1978

Alice Kesler v. David 0. Kesler, Trustee of the Estate of Alice Kesler; David 0. Kesler, An Individual, and Helen Kesler, His Wife : Respondents' Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ALICE KESLER, Plaintiff-Appellant, vs. DAVID O. KESLER, Trustee of the Estate of Alice Kesler; DAVID O. KESLER, an individual, and HELEN KESLER, his wife, Defendants-Respondents.	)	No. 15520

RESPONDENTS' BRIEF

Appeal from the Judgment of the Fifth District

Court of Millard County, State of Utah

J. Harlan Burns, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALICE KESLER, Plaintiff-Appellant, vs. DAVID O. KESLER, Trustee of the Estate of Alice Kesler; DAVID O. KESLER, an individual, and HELEN KESLER, his wife, Defendants-Respondents.	)	No. 15520

BRIEF OF RESPONDENTS

STATEMENT OF THE KIND OF CASE

In this matter David Kesler, Defendant-Respondent, son of Alice Kesler, Plaintiff-Appellant, seeks a judgment from the above-entitled Court sustaining the trial court's holding that a document marked Exhibit No. P-3, entitled "Warranty Deed," is a valid gift to Respondent from Appellant and should not be declared invalid.

DISPOSITION IN LOWER COURT

The lower court held for Defendant-Respondent on all points.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment.

STATEMENT OF FACTS

On July 14, 1971, the Appellant, Alice Kesler, widow of Otto Kesler, executed an instrument creating a revocable inter vivos trust of certain property to benefit herself and members of her family and by quit claim deed conveyed the trust realty to her son, David O. Kesler, as trustee. The trust res consisted of real and personal property located in Beaver and Millard Counties, including four (4) parcels of realty situated in the Fillmore City Survey. It did not include 640 acres conveyed to Respondents in the Warranty Deed in question.

On September 20, 1971, at the request of Mrs. Alice Kesler, Eldon Eliason, Esq., drafted a Statement of Withdrawal pursuant to the provisions of the revocable trust whereby Mrs. Kesler requested that the four (4) Fillmore parcels[1] be withdrawn from her trust. Mrs. Kesler signed the Statement of Withdrawal, which was duly

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[1]Contrary to the assertion in Appellant's brief, the Statement of Withdrawal did not include the 640 acres in question in this action.

notarized by Mr. Eliason in his Delta office. In accord with the settlor's request, the trustee, David O. Kesler, the same day by quit claim deed reconveyed the four (4) parcels to his mother.

On October 5, 1971, Mrs. Kesler wrote her son, David, who by then had returned to his home in Montana. She expressed her desire that "all my Fillmore property (be) taken out of my trust," apparently not recalling her previous formal request to that effect. One week later she again wrote her son: "Dave, was I to write to Eliason and ask for my Fillmore property to be released from that trust or did you see to that when you were here."

On June 28, 1972, in an instrument acknowledged by the Millard County Clerk, Mrs. Kesler amended and modified her trust with regard to distribution of the trust property upon her death. Also that same day, Mrs. Kesler requested the recordation of the September 20, 1971, deed to herself from David as her trustee. On July 14, 1972, Mrs. Kesler executed a Last Will and Testament which was attested to by Dr. Dean C. Evans and Scott A. Speakman, both Fillmore residents. David O. Kesler was named as

executor and residuary legatee of the Will and remained the residuary distributee of the amended trust. In both her Will and the trust amendments, Mrs. Kesler limited the possible devise to two other sons, Joseph F. Kesler and Calvin T. Kesler, to $100.00 each under each distribution as she was then involved in a dispute with these two sons over possession of certain other realty located near Cove Fort, Utah. In August of 1972, this dispute between Mrs. Kesler and her sons, Joe and Calvin, was brought to this Court for resolution in an action filed by Mrs. Kesler and David in his capacity as trustee.

In February or early March of 1973, Mrs. Kesler, desiring that Joe and Calvin be unable to "get their hands on her property" and that David be compensated for helping and sustaining her, requested that her counsel, Mr. Eliason, draft a warranty deed conveying to David part of her interest in the Fillmore parcels and an additional section of realty west of Cove Fort. Mr. Eliason, seeing a potential conflict of interest, declined Mrs. Kesler's request and advised her to secure independent legal advice. He did not recommend any particular attorney. On March 9, 1973, David, at his mother's request, drove Mrs. Kesler to Salt Lake City

to the office of Mr. Fred Finlinson, Sr., Esq. Mrs. Kesler had previously become acquainted with Mr. Finlinson when he was present at an accounting made by Mr. Ellsworth Brunson in her action against Joe and Calvin.

Mrs. Kesler asked Mr. Finlinson to draft a deed conveying the property in question to herself and David as joint tenants.[2] Finlinson thoroughly explained to her the effect of joint tenancies and then drafted the requested warranty deed, which Mrs. Kesler signed and Mr. Finlinson notarized. David recorded the deed three (3) days later. This property included no trust property whatsoever. Six hundred and forty acres had never been in the trust res and the remainder, the Fillmore property, had been withdrawn from the trust res a year and a half previously.

At the taking of his deposition and at trial, David testified that his mother had intended to convey to him an undivided present interest in the property as a gift for several reasons. These reasons, among others, were (1) for assistance in the lawsuit against Joe and Calvin, (2) to prevent Joe or Calvin from obtaining the

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[2]Mr. Finlinson testified at trial that Mrs. Kesler originally only wanted a deed from herself to David but that it was on his advice that the instrument was made in joint tenancy.

property, and (3) out of natural love and affection of a mother for her son, especially since David and his wife, Helen, had not "had things as easy" as Mrs. Kesler's other descendants.[3] In addition, David testified that he immediately recorded the deed in question at his mother's specific request because "(s)he was worried that something would happen". He also testified that his mother was familiar with the operation of joint tenancies and that this form of property ownership was chosen so that David would be sole owner at Mrs. Kesler's death, and that both the Fillmore property and the other 640 acres were discussed between them and mutually intended by them to be the gift. David further testified that he had no desire to challenge his mother's present possession of and income from the properties in question; rather, his testimony was to the effect that he was in this action merely defending his right of survivorship in the properties.

At trial, Mr. Finlinson testified that he had advised Mrs. Kesler with respect to joint tenancies and

[3] In a letter to "Dave, Helen and baby" dated October 12, 1973, Mrs. Kesler wrote: "We went to all that expense of building the museum (at Cove Fort) and Mary and LeGrande and the boys and their wives got the whole benefit. Never have you had a break with the others but earned it the hard way. Helen too as your father and I did."

that he had notarized the deed in question which Mrs. Kesler executed in his presence. Mr. Eliason testified that he prepared the Statement of Withdrawal from the trust and the September 20, 1971, quit claim deed in accordance with Mrs. Kesler's instructions and that the documents were executed before him at his office in Delta.

On the other hand, Mrs. Kesler testified, at the taking of her deposition and at trial, that she had never been in Mr. Eliason's office, that she had signed nothing in Mr. Finlinson's office, that she was familiar with the operation of joint tenancies, that she intended that David have her Fillmore property at her death, and that she regarded her memory as good. She also testified that she signed what she thought was a Will which was to be recorded only at her death.[4]

The trial court held for David Kesler on all points, including the character of the instrument (a warranty deed in joint tenancy) and that it had been validly executed and delivered as a gift to David.

[4]Evidently, Mrs. Kesler was familiar with the highly questionable Utah practice of a "deadman's deed", whereby a grantor delivers a deed to the grantee but requests that it not be recorded until the grantor's death. As a method of avoiding probate and inheritance taxes, such a practice is clearly against public policy and should not be encouraged.

ARGUMENT

It is elementary that a case on appeal to the Supreme Court is decided on issues of law. The trial court, in the present case, after considering all the evidence presented, has determined the facts, applied the applicable law, and has clearly held on every point for Respondent.

Appellant has failed to carry her burden in proving the points below in the trial court. On appeal, Appellant has several additional burdens to overcome. First, she must establish that the District Court erred in its characterization of the instrument in question as a deed and not as a will, even though the trial court found the deed to be a valid warranty deed, clearly labeled as such, signed as such by Appellant, and correctly delivered to and recorded by Respondent. In addition, Appellant, in Point II through VIII of her Appellant brief, merely repeats the same line of muddled inference, clearly distinguishable case support, misplaced burdens, and attempts at emotional manipulation which it placed before the trial court.

POINT I

THE TRIAL COURT CORRECTLY ESTABLISHED THAT PLAINTIFF-APPELLANT FAILED TO CARRY THE BURDEN OF PROOF IN ATTACKING THE JOINT TENANCY DEED IN QUESTION AS A WILL AND NOT A DEED.

It is well-established law, in Utah and elsewhere, that a joint tenancy deed is to be taken at face value, and not otherwise, unless contested by another party, who then has a heavy burden of proof to show that the deed does not mean what it says it means:

> [It is a] universally accepted principle that joint tenancy documents, be they bonds, bank or savings accounts, deeds, negotiable instruments or the like, mean what they say, and are invulnerable to any other meaning until attacked by someone. The latter (the attacking party) . . . carries the burden of proving otherwise. Such proof must be by clear and convincing evidence. Spader v. Newbold, 29 Utah 2d 433.

See also Hardy v. Hendrickson, 27 Utah 2d 251, 495 P.2d 28 (1972); Beehive State Bank v. Rosquist, 21 Utah 2d 17, 439 P.2d 468 (1968).

Appellants not only failed to prove that the warranty deed was not a deed, but also failed to prove that the warranty deed was a will which failed. The intent of Appellant in executing the deed to Respondent has been clearly established by the trier of fact as being to execute and deliver a warranty deed.

Appellant maintains that the intent of grantor

was not to pass a present interest, but rather an interest, which somehow vested after grantor's death. Appellant failed to point out, however, that

> [t]he controlling intent is that which is expressed in the instrument, rather than any belief or secret intention of the party or parties which may have existed at the time of execution. It has been pointed out, however, that the rule and the intention of the maker governs in determining the nature of such instruments is to be invoked only when the recitals of the instrument are obscure, equivocal and uncertain. 23 Am.Jur.2d Deeds §177, at 222-23 (1965) (Emphasis added).

See also Thom v. Thom, 171 Kan. 651, 237 P.2d 250 (1951) (in construction of deeds the intention of grantor as gathered from an examination of the instrument in its entirety is controlling"). Appellant's reliance on First Security Bank v. Burgi, 122 Utah 445, 251 P.2d 297 (1952), is misplaced here. The issue in Burgi was whether the deed had been effectively delivered to the grantee. Evidence in Burgi was conflicting since the deed remained in grantor's valut until his death, so evidence re intent was considered. In the present case there is no question of delivery of the deed physically to grantee. And even where the instrument on its face

is equivocal--certainly not the case at bar--the fraud of modern decisions has been to uphold the instrument as a deed and not as a testamentary instrument.

The deed here is not obscure, equivocal, or uncertain as to the time of its operative effect. It clearly states "WARRANTY DEED" on the top, and was signed as such, before witnesses, by Appellant.

The only other possible explanation of Respondent's intent was that she executed and delivered a so-called "deadman's deed." A "deadman's deed" is a deed delivered to grantee by grantor, with the request that grantee not record the deed until grantor's death. Such "deeds" are a method of avoiding inheritance taxes and probate, and are clearly against public policy in Utah. The trial court wisely and correctly rejected the possibility that Appellant's deed to Respondent was a "deadman's deed." The court chose to judge the deed for what it is and should be--an instrument conveying as a gift a present interest in real property to Respondent.

Property ownership in joint tenancy is a legitimate will substitute and generally an effective probate-avoidance device. Appellant's actions and expressed

desires are totally consistent with joint tenancy ownership. As the joint owner in possession, it is only natural that she would collect income from the property, pay the taxes, and generally manage the property. Appellant as possessory co-owner, in deed, may even be liable to Respondent had she failed to pay taxes or preserve the property.

Furthermore, joint tenancy ownership is consistent with Appellant's proven wish that the Respondent have the property at her (Appellant's) death. In the event Appellant predeceased Respondent, then by operation of law Respondent becomes sole owner of the property in fee simple.

Finally, it is clear that had Appellant intended this document to be a will she knew how to execute one. She had executed a will in July, 1972, in which the formalities were met and in which she provided for her testamentary disposition of property.

In short, it is clear that the deed in question is a warranty deed, as the trial court found. A warranty deed is not a will, and it is not a "deadman's deed." It is exactly what the four corners and surrounding evidence as proved say it is--a presently operative deed in joint tenancy.

POINT II

THE TRIAL COURT CORRECTLY DETERMINED THAT THE JOINT TENANCY WARRANTY DEED WAS NOT INVALID FOR ALLEGED INEFFECTIVE DELIVERY.

The general rule, cited by Appellant, is that "a deed does not become effective until it is delivered." Gilbert v. McSpadden, 91 S.W.2d 889, 899-90 (Tex. Civ. App. 1936). Exactly what constitutes an effective delivery varies according to the fact situation. Certainly intent of the grantor to deliver a present interest of real property to the grantee is a required element. Appellant's confusion in the case at hand centers around that nebulous and evasive area of "what really was the grantor's intent." As established in Point I, supra, Appellant failed to meet the burden of proof requirements establishing that Appellant's intent was something other than that clearly evident from the "four corners" of the warranty deed in question.

The warranty deed instrument was clearly signed by the grantor, and was in the possession of the Respondent. The presumption can only be, in this case, that the grantor tendered possession of the deed to grantee with intent of vesting in the grantee title to the property described in the deed:

> (a) presumption of delivery of a deed arises from its possession by the grantee or one claiming under him. In other words, possession of a deed of property by the grantee therein named . . . is prima facie evidence of its delivery, and of the grantor's intent then to vest in the grantee title to the property therein described. 23 Am.Jur.2d Deeds §115, at 163-64 (1965).

Presumption of a validly delivered deed is also raised upon recordation of the deed:

> It is generally held by nearly all the authorities on the subject that the recording of a regularly executed and acknowleged deed by either the grantor or the grantee raises a rebuttable or disputable presumption of delivery. In other words, a prima facie case is made by such showing. Id. §120, at 168-69.

This heavy burden on the Appellant-grantor is well-established in Utah:

> A deed duly executed and acknowleged and shown to be in the possession of the grantee is self-proving both as to execution and delivery, and that the recording of a deed is likewise evidence of delivery . . . And not only is the burden of proving nondelivery upon the plaintiffs, but the inference of delivery arising from possession of the deed by the grantee and from the recording thereof is entitled to great and controlling weight and can only be overcome by clear

and convincing evidence. Chamberlain v. Larsen, 83 Utah 420, 434, 436, 29 P.2d 355, 361, 362 (1934).

Later Utah cases are equally clear. See Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807 (1966) (deed from father through stawman to himself and four children as joint tenants upheld); Allen v. Allen, 115 Utah 303, 204 P.2d 458 (1949).

In the present case, Appellant conceded even at the trail court, that physical custody of the deed passed from the grantor to grantee, that the grantee retained irrevocable possession of the deed, and that the deed was properly recorded. The inference of delivery was rightfully entitled to great weight at trial court. The trial court correctly found that Appellant failed to overcome this inference by "clear and convincing evidence." Appellant also failed to prove nondelivery by any positive evidence whatsoever.

Appellant's attempts, once again, to overcome the presumption of valid delivery by claiming lack of "intent" by grantor to convey a present interest to the grantee. However, Appellant's assertions are without merit in four ways.

First, Appellant cites no Utah cases to support

her assertion that grantor's intent to make a present transfer is even necessary to establish when there is an actual transfer of the instrument to grantee. It appears that all Utah cases where grantor's intent was an issue with respect to delivery (and hence validity) of a deed involved fact situations where there was no transfer of custody of the deed to the grantee. See Mower v. Mower, 64 Utah 260, 228 P. 911 (1924) (deed found in grantor's possession at death); Reed v. Knudson, 80 Utah 428, 15 P.2d 347 (1932) (evidence of intent important as to whether person to whom deed was delivered was agent of grantee or of grantor); Stanley v. Stanley, 97 Utah 520, 94 P.2d 465 (1939) (conflicting testimony as to whether there had been a manual delivery); Losee v. Jones, 120 Utah 385, 235 P.2d 132 (1951) (evidence of intent showed irrevocable delivery of deeds by grantor to third party). In the same vein, the cases cited by Appellant to support her assertion are distinguishable on their facts. In Gilbert v. McSpadden, 91 S.W.2d 889 (Tex. Civ. App. 1936), the deeds were found in the grantor's baggage (his grip!); at his death, in Martiney v. Archuleta, 64 N.M. 196, 326 P.2d 1082 (1958), the questioned deed was never in the possession of the grantees, and in Henneberry v. Henneberry, 330 P.2d 250

(1958), the court found that the mutual intent of the parties at the time of manual delivery was that document not take effect until the grantor's death.

Second, assuming arguendo that under Utah law grantor's intent is a necessary element of effective delivery even when there is a transfer of the deed to the grantee's custody, Appellant still has failed to carry her burden of providing by clear and convincing evidence that her intention in executing the deed and delivering it to grantee was not to convey a present property interest. This the trial court clearly established, in accordance with Henneberry, supra, at 253:

> Fundamentally, the question of intent is one of fact to be determined by the trier of facts on all the evidence.

The trial court was able to consider the testimony of all witnesses, particularly the Appellant, and observe the demeanor, behavior, and inconsistencies during that testimony.

In addition, it is clearly established in July of 1972, less than one year prior to the execution and delivery of this deed that Appellant executed a valid will in

which she left, among other things, the residue of her estate to Respondent. The will was not revoked or modified prior to execution and delivery of the deed in question. Clearly, the July 1972 will is where any testamentary gift or future interest would be provided for--including any residue. In making a present gift, as the trial court found, Appellant intended delivery to convey present title of a present interest.

There is much other evidence which this Court may choose to review to support this point. The great preponderance of the evidence establishes, however, that Appellant did intend, at the time the deed was executed and delivered, to convey to Respondent a present interest in joint ownership of the property as joint tenants.

POINT III

DEED NOT INVALID FOR ALLEGED FRAUD, UNDUE INFLUENCE, OR MISTAKE.

Appellant correctly asserts that a deed may be voided for fraud or undue influence of the grantee upon the grantor. Since undue influence is often used synonymously with fraud or as a species of constructive fraud (See Annot., 28 A.L.R. 787 (1924); Annot., 92 A.L.R. 790 (1935)), both subjects will be treated here. Because

of the common issues involved, mistake will also be considered under voidability of a deed.

A. Failure to Prove Fraud.

Appellant failed to prove* the nine basic elements of fraud, which are:

> It may be stated generally that the elements of actual fraud consist of: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; (9) his consequent and proximate injury.

Stuck v. Delta Land & Water, 63 Utah 495, 505, 227 P. 791, 795 (1924), CITED IN Kinnear v. Prows, 81 Utah 135, 16 P. 2d 1094 (1932); Oberg v. Sanders, 111 Utah 507, 184 P.2d 229 (1947); Pace v. Parrish, 122 Utah 141, 247 P.2d 873 (1952).

The general law is in harmony with Utah law with regard to the burden of proof resting on the one alleging

*Furthermore, Appellant even failed to plead fraud (or mistake) with particularity, contrary to Rule 9(c) of the Utah Rules of Civil Procedure.

fraud:

> [t]he party who alleges fraud as the basis of a cause of action or defense has the burden of establishing it by the requisite of quantum of proof in order to prevail in this action. 37 Am.Jur.2d, Fraud and Deceit §437, at 596 (1968).

Appellant failed to prove these elements of trial court, where Respondent (by far) exceeded his burden in not only establishing the absence of fraud, but did so by introducing far more evidence than his small burden required to establish firmly and clearly the absence of fraud in this transaction.

Finally, it should be pointed out here that at trial, Appellant herself took the rather confusing position by insisting, under oath, that she signed nothing in Attorney Finlinson's office, but that whatever she did sign was a will! This denial of signature was contradicted not only by Attorney Finlinson's seal and signature on the deed, but also contradicted Attorney Finlinson's testimony and Respondent's testimony as well.

Another interesting question arises with regard to Respondent allegedly folding a yellow paper over the instrument to "trick" the mother he stood by and sacrificed for. Appellant claims she could not see the deed because

of the paper. She also claims she cannot see at all, without her glasses, and at trial took great pains to indicate this "problem" by taking several minutes to search for and put on glasses each time asked to read something. If she can't see, as counsel suggests, then she really did not miss anything even if the deed were "obscured." However, the trial court observed this little comedy and probably saw through it in finding for as well as holding for Respondents.

Separate evidence clearly establishes, moreover, that the warranty deed in question was signed, witnesses, and notarized in Fred Finlinson's law office. What, then, was this "folded paper" with reference to? If it did indeed exist, it obviously did not obscure the deed in question.

It would appear, in short, that any testimony which contradicts Appellant's somewhat jaundiced perception of the facts is to be denied any integrity and credibility whatsoever, if Appellant is to be believed. The trial court did not, of course, give credence to these irresponsible allegations and inferences of fraud.

B. Failure to Prove Undue Influence.

The burden on Appellant to prove undue influence is more than clear and convincing. The evidence must also be "cogent." See Richmond v. Ballard, 7 Utah 2d 341, 325 P.2d 839 (1958), CITED IN Bradbury v. Rasmussen, 50 Wash. 2d 142, 309 P.2d 1050 (1957).

Once again, Appellant has failed in trial court to prove that burden. If anything, at trial the Appellant's very strong will and inability to be influenced by anyone were very evident to the trier of fact.

Appellant appears uncertain, even evasive, in attempting to define undue influence. She cites two out-of-state cases as well as American Jurisprudence in a vague and muddled way, without reference to the more commonly understood definitions which amount to substituting the will of one person for that of another.

One court has held that undue influence

> [t]o vitiate a conveyance must destroy the grantor's free agency at the time the conveyance is executed and must, in effect, substitute the will of another for that of the grantor . . . [n]ot all influences will avoid a deed. Influences which arise out of the affection, confidence and gratitude of a parent to a child and inspire a gift are natural and lawful influences and will not render such a gift voidable. It is only

> when influences have been such as to confuse the judgment and control the will of the grantor that they become undue influences. Antle v. Hartman, 193 Okla. 524,524, 525-26, 145 P.2d 756, 756-57 (1944). (Emphasis added).

Appellant maintained her free agency at all times in her dealings in question. The attempted appearance of Appellant as a befuddled old lady who can never quite find her glasses, and never really understands what's going on, was easily seen through in court. Appellant, if influenced at all, was found to be influenced by Respondents' thankless tasks in constantly interrupting his own life to look after his mother. That a gift of real property, in joint tenancy deed, was given to Respondent in gratitude is not surprising, but rather is a natural and lawful consequence of natural and lawful concern and anxiety of a son for his elderly mother.

One court, in an amazingly similar fact situation as the case at bar, has broken down the elements of undue influence with secure specificity:

> It has been held that whatever may be the particular form of undue influence asserted in all cases, three factors are involved:

(1) A person who can be influenced.

(2) The fact of improper influence exerted.

(3) Submission to the overmastering effect of such unlawful conduct.

Johnson v. Johnson, 85 N.W.2d 211, 221 (N.D. 1957) (deed of all grantor's farm lands to himself and one of his sons as joint tenants held valid).

Early in trial proceedings, Appellant conceded she is competent. As the facts, testimony, and Appellant's demeanor and bearing developed at trial, it became obvious to all, including the fact finder, that Appellant is definitely not "a person who can be influenced."

Likewise, the trial court held as a matter of fact that the "fact of improper influence exerted" simply was not present.

Similarly, Point 3 of Johnson, supra, was found to be non-existent, since no unlawful conduct was established, and in any event Appellant did not submit to the "overmastering effect" of "such unlawful conduct."

Since neither fraud nor undue influence were established, nor can now be established, there is no reason to reverse the trial court and cancel a clear and valid warranty deed.

Appellant cites two lengthy citations from American Jurisprudence to suggest that undue influence is present due to a "confidential relationship" between mother and son. Appellant, however, assumes that a confidential or fiduciary relationship exists between Appellant and Respondent in the present case. While Appellant correctly asserts that a presumption of undue influence may exist in some cases where a proven confidential or fiduciary relationship exists between grantor and grantee as to the subject matter of the transaction in question. However, the burden of proving the existence of a confidential or fiduciary relationship remains on the grantor. See Klaber v. Unity School of Christianity, 330 Mo. 854, 51 S.W.2d 30 (1932). The burden is evident: "Where the relationship does not exist as a matter of law, must be proved by clear and convincing evidence." Stone v. Stone, 407 Ill. 66, 77, 94 N.E.2d 855, 861 (1950). Appellant asserted and failed to prove, in the trial court, that such a relationship existed between the parties in this action with respect to the property in question--namely, the property deeded to Respondent by the Appellant.

Appellant attempted to prove that Respondent owed fiduciary duties to his mother in his capacity as trustee of

her revocable trust. It is axiomatic that a trustee's duties to a beneficiary do not extend to dealings in property not part of the trust res. See Bogert & Bogert, Handbook of the Law of Trusts, §96, at 352 (5th ed. 1973); First National Bank & Trust Co. v. Gold, 217 Wis. 522, 259 N.W. 260 (1935); Stone v. Stone, supra. In the present case, the property conveyed in the challenged deed was not part of the trust at the time the deed was executed. Appellant had withdrawn the Fillmore properties from the trust a year and a half previous to the execution of the deed in question, and the 640 acres of grazing ground near Cove Fort had never been included in the trust res. Thus Respondent owed Appellant no duties with regard to the property in question. Appellant's assertion to the contrary is as spurious and misplaced on appeal as it was when the trial court ruled against her.

Furthermore, Appellant argues that the relationship between her and her son is per se confidential merely because a parent-child relationship exists. Utah law clearly rejects the per se rule:

> [t]he mere relationship of parent and child does not constitute evidence of such confidential relationship as to

> create a presumption of fraud or undue influence. Bradbury v. Rasmussen, supra, citing Froyd v. Barnhurst, 83 Utah 271, 28 P.2d 135 (1934).

See also Furlong v. Tilley, 51 Utah 617, 172 P. 676 (1918), Hatch v. Hatch, 46 Utah 218, 948 P. 433 (1914).

Once again the burden of proof is on the Appellant--in this case to prove the existence of a confidential relationship by clear and convincing evidence. Once, again the Appellant clearly failed to carry the burden of proof, both at trial court and in argument on appeal.

For the sake of argument only, however, let us assume that a confidential or fiduciary relationship existed with respect to the property in question. Appellant must still show that undue influence in fact did exist. The grantee need not prove by "clear and convincing" evidence, but only "by a preponderance of the evidence that the transaction was fair." Bradbury v. Rasmussen, supra at 713 n. 4. This burden Respondent has shown at trial.

Appellant by stipulation is mentally competent, a fact which distinguishes this case from those in which deeds have been cancelled because of undue influence.

See Parris v. Benedict, 28 Wash.2d 817, 184 P.2d 63 (1947) where the court noted that out of eleven previous cancellation of deed cases involving claims of undue influence in Washington, in every case decreeing cancellation the court found the grantor to be mentally incompetent or nearly so. Conversely, in every case where the challenged deed was upheld, the grantor was found clear of mind, or at least not mentally incompetent. In cases where grantors have less mental capacity than Appellant, who admittedly is fully competent, courts have refused to invalidate challenged conveyances. See, e.g., Richmond v. Ballard, supra, (deed from 86-year old man to housekeeper upheld); Johnson v. Johnson, supra, (deed upheld from father to son and himself as joint tenants); Binder v. Binder, 50 Wash. 20, 142, 309 P.2d 1050 (1967) (deed from mother to son upheld); Thomas v. Johnson, 183 Ore. 405, 193 P.2d 534 (1948) (deed reserving a life estate from mother to adopted daughter upheld); O'Neill v. Dennis, 109 Cal. App. 2d 210, 240 P.2d 376 (1952) (deed upheld from 80-year old woman to casual friend).

All this the trial court carefully considered and held for Respondent. With the even heavier burden on appeal to overcome, Appellant should not, as a matter of law, be permitted to prevent a valid gift of a warranty deed to be

invalidated. Appellant's emotional rhetoric, slander of all attorneys involved (except her own) for obvious reasons, and misplaced innvendo to the contrary.

The Supreme Court of Utah should not for a moment be swayed by Appellant's attempts side-step the real issues by emotional advocacy. Appellant, as was obvious in trial court, is hardly the innocent, misguided person who sweetly and naively placed all trust and all her security in her dastardly son who, abetted by a battery of shifty, incompetent legal counsel, tricked her into signing a document with WARRANTY DEED spelled out clearly at the top, properly notarized, and duly recorded.

C. Failure to Prove and Absence of Mistake.

Appellant merely cites an irrelevant section of American Jurisprudence to argue mistake in this case. As with her other alleged defenses, the burden of proof here rests with Appellant. Appellant must prove the type of mistake of law or fact that warrants equitable cancellation of the deed. See 54 Am.Jur.2d Mistake, Accident, or Surprise, §26.

At trial Appellant failed to prove either mutual or unilateral mistake, or the materiality thereof. Appellant

here does not even identify whether the "mistake" alleged was one of law or fact. Appellant cites no Utah or other primary authority to support her position, whatever that position may be. The trial court did not cancel the transaction in question, on grounds of mistake or for any other reason. It is not clear why or how "mistake" was an issue at trial, and it is even less clear why cancellation on grounds of mistake is truly at issue now, on appeal.

POINT IV

BALANCING OF EQUITIES

A. Laches.

Appellant, seeking an equitable remedy, is required to prosecute her claim in a reasonable time. This Appellant failed to do. Delay of two or three years in bringing the action, as is the case here, has been held sufficient for the doctrine of laches to apply. See Leeper v. Beltrami, 53 Cal.2d 195, 347 P.2d 12, 1 Cal. Rptr. 12 (1959). And the general rule requires promptness.

A suit for recission (cancellation) must be brought promptly after the plaintiff has knowledge of the facts constituting the grounds for recission. Certainly three years is not prompt. The Utah statute of limitations

is three years with respect to actions for fraud or mistake. Utah Code Ann., §78-12-36. Three years and one day have elapsed between the alleged fraud and the filing of the complaint. One day is sufficient to bar the claim by law. Appellant's unreasonable and unexplained delay is certainly a factor to be considered in balancing the equities.

B. Burden of Proof.

The burden is on the Appellant for what is essentially a bill in equity. She has failed to show that this court's equitable jurisdiction is correctly invoked, a fortiori with sufficient weight to tilt the balance of equities in her favor to merit cancellation. Even without Appellant's burden of proof, the balance of equities favors Respondents, especially so on appeal.

C. Appellant's Emotional Appeals.

Appellant's emotional appeals fool no one, and are obviously irrelevant under the facts of this case. This is especially so with respect to the security of the elderly. Even if Appellant did not possess other private resources, she would be secure because Respondents have no intention of evicting Appellant or even of challenging Appellant's possession of or income from the property in question.

Respondents have no counterclaim praying for partition of the property and ejectment of the Appellant.

CONCLUSION

It is well established that Appellant executed a deed and not a will. The deed was validly executed and delivered. Appellant's intent was clear, and was proved at trial. She was subject to no fraud, undue influence, or mistake. The property in question was not in the trust res she had established. There was no trustee-in-trust or implicit fiduciary duty of Respondent to Appellant under the facts given. Appellant delayed filing this action for an unreasonable time. The trial court did not abuse its discretion, and carefully weighed the facts and law. The decision for Respondents was on the merits, and was a proper decision. The trial court should be sustained on all points.