

2001

In the matter of the Guardianship of the Estate of Fushia Fern Cornia, incompetent : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

In the Matter of the Guardianship)
of the Estate of)
FUCHSIA FERN CORNIA,) Case No. 14139
Incompetent.)

RESPONDENTS AND CROSS-APPELLANTS' BRIEF

APPEAL FROM JUDGMENT OF
FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY
HONORABLE VENOY CHRISTOFFERSEN, JUDGE

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FILED

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
ARGUMENT	5
CROSS APPEAL	31
RELIEF SOUGHT ON CROSS APPEAL	31
ARGUMENT	31
CONCLUSION	33

COURT DECISIONS CITED

In re HEATH, 102 Utah 1, 126 P. 2d 1058	29
In re LAMONT'S ESTATE, 95 Utah 219, 79 P. 2d 649, . 5, 6	
PAGANO vs WALKER, Utah, 1975,	30
In re SWAN'S ESTATE, 51 Utah 410, 170 P. 452,	6
WEST vs STANDARD FUEL, 81 Utah 300, 17 P. 2d 292	31

STATUTES CITED

UTAH CODE ANNOTATED, 1953, Section 75-13-20	5
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RESPONDENTS AND CROSS-APPELLANTS' BRIEF

STATEMENT OF FACTS

Fuchsia Fern Cornia, age 81, was widowed upon the death of her husband, Osro Lewis Cornia, on July 31, 1971. Bessie Wadsworth, a daughter, on August 12, 1971, signed a petition to have herself appointed administrator of her father's estate in Rich County (F. 1 & 2). (See Rich County Probate File by judicial notice hereinafter referred to as "F.____") On September 21, 1971, Acting Judge Corneby, after hearing in Randolph, Utah, signed an order appointing Bessie Wadsworth and her brother Don H. Cornia as co-administrators. On October 18, 1971, the said Fuchsia Fern Cornia, surviving widow, through her attorneys, filed a motion to vacate and set aside the order

appointing Bessie Wadsworth as co-administrator and also filed a Cross-Petition for Letters of Administration to be issued to herself and requested that her son Don H. Cornia act as co-administrator with her (F. 7 & 8). Cal Cornia, Don Cornia, Dale Cornia, Gene Cornia and Jerry Cornia joined in her petition (F. 15). Grace McKinnon, a daughter, filed an Answer to the Cross-Petition (F. 29-32) and Bessie Wadsworth filed an Answer and Reply to the Cross-Petition (F. 36 & 37). Thereafter hearings were had on the said motions and on November 21, 1971, Judge VeNoy Christoffersen entered his order vacating and setting aside the appointment of Bessie Wadsworth as co-administrator and appointing Fuchsia Cornia as administratrix and her son Don Cornia as co-administrator of the estate of Osro Lewis Cornia, Deceased (F. 66). Thereafter these persons qualified and acted as administrators and the estate was probated and distributed to the heirs at law.

During the time of the controversy surrounding the appointment of Bessie Wadsworth as administratrix, she came into possession of the check for \$5,100.00 for the sale of lambs and she refused to turn it over to the estate (T. 16). This and many other circumstances caused Mrs. Fuchsia Cornia to not trust Bessie (T. 78) and she couldn't get along with her (T. 79).

In January 1972, Mrs. Fuchsia Cornia made a Last Will and Testament (Pet. Exhibit 3) and Trust Agreement and Deed on the

Bountiful property (Pet. Exhibits 1 and 2). Mrs. Cornia continued to live at her residence at Woodruff, Utah, until November, 1972 (T. 149-27) when she then purchased a trailer home and moved into it next to her son Jerry Cornia at Weston, Idaho, and moved into the trailer in January 1973. Mrs. Cornia continued to live at Weston, Idaho, until August 8, 1974 (T. 131-10), at which time she left the trailer to visit her daughter in Arizona never again to return to her trailer.

Shortly after Mrs. Cornia went to visit the daughters, they took her to the First National Bank of Evanston, Wyoming, and withdrew her savings account in excess of \$9,000.00 (T. 117) and deposited the same in the name of her daughter Grace McKinnon, et al., in a bank at Holbrook, Arizona (T. 40-20). Real estate in Woodruff, Utah, was shortly thereafter conveyed to the daughters (T. 146-21).

On September 26, 1974, Attorney Handy, purportedly on behalf of Mrs. Cornia, sent letters of demand to her two sons, Don and Jerry Cornia, for return of properties consisting of certain savings certificates in joint tenancy and the trust property in Bountiful (Pet. Exhibits 5 and 6). When the sons refused to turn over the properties under these demands, suit was commenced against them in the name of Mrs. Cornia (T. 163), in the District Court of Rich County, Utah. Jerry Cornia, a son, on behalf of all sons in the family, filed a petition in

this matter contesting the competency of Mrs. Cornia (G. 1-5) (Guardianship file referred to as "G. ____") Thereafter Mrs. Cornia was not permitted to visit her sons or her granddaughters even at the funeral of her son Dale who died in January, 1975, at Evanston, Wyoming (T. 6 & 7). Mrs. Cornia thereafter was not willing to meet with members of her family unless her daughter Bessie was there, even at the taking of her deposition in this matter (T. 163).

During a hearing in this matter Dr. J. C. Hayward, who had previously examined Mrs. Cornia, testified as to Mrs. Cornia's increasing senile changes related to her ability to remember and concentrate and follow instructions (T. 87). Thereafter Judge Christoffersen entered an order finding Mrs. Cornia incompetent and appointed the First Security Bank of Ogden, Utah, as the guardian of her estate, and ordered all properties heretofore conveyed to be turned over to the guardian (G. 29-31). Mrs. Cornia filed a Notice of Appeal from this order (G. 32) and Respondents filed a Notice of Cross Appeal from that portion of the Court's order that declared the Trust Agreement, dated the 8th day of January, 1972, and the Last Will and Testament, dated January 8, 1972, of Fuchsia Fern Cornia null and void, because of her incapacity in 1972, upon the grounds that these matters were not within the issues of these proceedings (G. 35-36). At this time all properties are now in custody of the guardian, First Security Bank at Ogden, Utah.

ARGUMENT

There is ample evidence supporting the finding that the Appellant is incompetent.

The Utah Statute, Section 75-13-20, defines incompetency as follows:

"The words 'incompetent,' 'mentally incompetent' and 'incapable,' as used in this title, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons."

The Utah Supreme Court in the case *In re Lamont's Estate*, 95 Utah 219, Utah, 1939 P 2d 649, at page 651 holds as follows:

" . . . One likely to be easily deceived or imposed upon by artful and designing persons for the reasons stated, and thus lose his property, is entitled to the protection of the guardianship of the court over his property."

In the *Lamont* case above, at page 650, a summary of the testimony of Mary Lamont (the incompetent) is as follows:

" . . . She stated that her memory was bad, That she was eighty years old, but too young to make a will. Although she had deeded all the land to Andrew, she said she did not want him to have all of it. Certain matters relating to her property that happened the day before she did not remember. She signed a document asking for the appointment of a guardian, yet did not remember it, or, if she did, she did not understand it, and then said she did not want a guardian appointed. She did not seem to realize she had conveyed away all her property, yet thought if it would deprive her of making a will it was wrong."

The Supreme Court then held at page 652:

"(8) As indicated, the record discloses that there is material and substantial evidence to sustain the findings of the court. That there may be evidence from which other findings might have been made, takes us outside of considering the sufficiency of the evidence to sustain the findings made. In cases of this kind, we may not ignore or disregard the findings made and the decision arrived at within the fair interpretation of the evidence before the court. In re Swan's Estate, 51 Utah 410, 170 P. 452; In re Jones' Estate, 59 Utah 99, 202 P. 206; In re Dong Ling Hing's Estate, 78 Utah 324, 2 P. 2d 902; In re Hanson's Estate, 87 Utah 580, 52 P. 2d 1103."

51 Utah 410,

The Utah case of In re Swan's Estate, 170 P. 452, was a will contest case, but the Utah Supreme Court set forth the rules governing the review of the evidence by the court where the lower court had made its findings and announced these rules at page 456, as follows:

" . . . it is vigorously contended from the beginning to the end of appellant's argument that there is no substantial evidence in this case to justify the findings or to support the judgment . . . In view of this fact the court deems it expedient to review more closely, and, to some extent, in greater detail, the evidence in support of the findings alleged to be erroneous. In doing so it is manifestly not the duty or the province of the court to go farther than to show that there is substantial evidence to uphold the findings, for, to go farther and undertake to compare and weigh the evidence would be to do the very thing which the Constitution and the former decisions of this court forbid."

The Court then continues at page 457 as follows:

" . . . If, in a case as plain as the case at bar, we disregarded the limits imposed by the Constitution and the hitherto unbroken line of

precedents established by the court, and assume to compare and weigh the evidence with a view of determining whether the trial court erred or not on a pure question of fact, it will amount to little less than a flagrant violation of the Constitution on the part of the court, and will tend to impair, if not absolutely destroy, the faith and confidence of the people of the commonwealth in the virtue and integrity of their judicial tribunals As before stated, if there is any substantial evidence to support the finding, our duty becomes fixed and absolute, no matter how much or what kind of evidence there may be on the other side. . . . "

The Court continues at page 458:

"We hold tenaciously to the opinion that in law cases, in considering the sufficiency of the evidence to sustain the findings of the trial court, we are limited to the consideration merely as to whether or not there is substantial evidence to sustain the findings. If there is, we have no power to reverse the judgment. . . ."

What does the evidence in this case show?

As indicated above, Mrs. Cornia was appointed co-administratrix of her husband's estate (F. 66) and acted with her son Don during the administration. This appointment was made after she had requested the court to remove her daughter Bessie as co-administrator (F. 7 & 8).

At the trial of this matter, which was held on or about February 3, 1975, Mrs. Cornia was asked the following questions (T. 76-17):

"Q Do you know who else was appointed to act as administrator of your husband's estate?
A Don.

"Q And do you know whether Bessie was appointed?
A Well, I thought she was, but I don't know.
Q Do you know what happened as far as her appointment was concerned?
A No, I don't.
Q Do you remember that there was a hearing in Brigham City on November 22 of 1972?
A That was the only one except the one in Randolph that I was to.
Q And you attended the hearing on November 22 of 1972 in Brigham?
A Yes, over at Brigham City.
Q And this was a hearing, wasn't it, upon your cross-petition to have yourself and Don appointed and Bessie removed as administrator?
A I don't know what it was for.
Q Ma'am, could I read to you excerpts of your testimony you gave in court that day over in Brigham City? I'll ask you if this was under questions that I asked you on direct examination: 'Would you state your name, please?'
A Mrs. Osro Cornia.'
A Yes, that's right.
Q And that's what you testified. Do you remember that now?
A Yes, I remember that.
Q All right. 'Q Since your daughter has been appointed have you had conversation with Bessie concerning the farming operations and the farm business? Have you talked to her on the telephone?
'A Oh, she called me one night on the telephone.
'Q Do you know when that was approximately?
'A Oh, I can't tell you exactly.
'Q Can you tell the court what was said by her at that time?
'A Well, she said that if I didn't want her as administrator, she says, "I won't." She hadn't mentioned it to the boys, and she says, "I won't speak to one of them again." And I understood her, "You either," but I wouldn't be sure, but she hasn't since. I haven't seen nothing of her since. I've been alone at home there and taking care of the home as best I could, but she hasn't been out no more.' Do you remember testifying like that in Brigham City?
A No.

. . . .
'Q Now, Mrs. Cornia, can you tell us, please, if there's any way in which your daughter

- Bessie has not cooperated with you?
- 'A None of us.
- 'Q Well, with you in particular.
- 'A Yes, me in particular. I've never seen her since the night she called. I have never seen her. She's never been out, but she doesn't understand the ranch and they were all surprised that she would even think of being on there, because she doesn't know a thing about the operation of the ranch.'
- Did you testify like that in court?
- A Well, I don't know. But why would she need to know about the operation of the ranch to be administrator?
- Q Well, that's beside the point. My only question is, did you testify like that at this hearing? Do you remember whether you did or not?
- A Yes, I probably did.
- Q I see. Okay, 'Q What do you know of any specific way in which she has not cooperated?
- 'A Well, I can't get along with her.' Now what do you mean that you couldn't get along with Bessie?
- A Well, I don't know. I guess I maybe hadn't tried.
- Q I see, And then you say, 'I can't get along with her, so she doesn't cooperate. I wouldn't say.
- 'Q Have you ever had any problems getting along with Bessie in the past up until prior to the time of the petition?
- 'A Yes. I have had a little trouble with Bessie, but that was a family affair. And that was before my husband died.
- 'Q Any more than any of the other children?
- 'A Well, a little more so, yes.
- 'Q Would you object to being appointed as co-administrator with the two of them?
- 'A With Don, but not with Bessie. I couldn't get along with Bessie, but I would like to have Don appointed with me.'
- Now do you remember testifying like that in Brigham City?
- A No."

The above testimony is contrary to the testimony given by Mrs. Cornia in her deposition on January 16, 1975, at Mr. Handy's Office when she testified that she wanted Bessie

to serve and that Bessie would be honest (T. 71-28). It is interesting to note that at the time of her deposition she testified completely differently than at the trial in 1972 when she had been living with Bessie for the past six months (T. 54-28).

On October 2, 1971, Mrs. Cornia signed the petition to have herself appointed as administrator (F. 7 & 8). When asked about this at the trial Mrs. Cornia states that she never acted (T. 73-5) and that she was not aware she was appointed as administrator (T. 76-16).

When asked by petitioner's counsel at the trial on February 3, 1975, if she had me make her will for her, she answered "I think I did" (T. 80-25). Then, when asked if she had the trust agreement (Pet. Exhibit 1) prepared for her she replied "I don't think so .." (T. 81-1). Mrs. Cornia then volunteered the following in answer to a question concerning her signature affixed to the trust agreement as shown in the Transcript at page 81-9 as follows:

"A I still am. And I can handle--I figure that I can handle, if I'm told and things are explained to me, I think I can handle it. All my--I can handle all my affairs. All I'd like is what's mine back, and I would like that."
(Emphasis added)

When asked if she signed the trust agreement she testified as follows (T. 82-14):

"Q And it was signed on the eighth of January, 1972, in my office; do you remember that?

A They kept bringing so many papers that I don't know. I guess that was it.

Q No, you were in my office here in Logan, my law office in Logan, when you signed that. Do you remember that?

A No, I don't remember signing that.

Q Do you remember the conference room that you went up some stairs and there's a big table up there that we all sat around the table and talked about this?

A Yes, up there--

Q Do you remember that?

A I couldn't hear, so a lot of times I said, 'Well, I feel embarrassed because I couldn't hear,' and a lot of times I would tell you I heard when I didn't hear, when you were reading it.

Q Can you tell us what we discussed there that day?

A No, I don't know what you discussed.

Q What questions did I ask you; can you remember?

A I don't remember.

Q Didn't I ask you as to why you wanted to cut the girls out of participating in this trust?

A Oh, yes, I remember you asking that.

Q And what did you answer?

A I said the boys didn't want them and I guess that was all right. Anyway, I had enough property I figured I could give the girls something besides, I could sell something and give it to the girls.

Q Did you tell me that at that^{time} in that meeting?

A I think so."

When asked what property the trust agreement dealt with, she testified as follows (T. 83-28):

"Q Now this trust agreement that was signed by you in my office on that day, can you tell the court what property it dealt with?

A No, I can't.

Q You can't tell what property it dealt with?

A But I didn't intend to give my boys or anyone that property in Bountiful, because my mother

wanted me to have it and she never once mentioned the boys having it. She was an older lady when she died, and she didn't intend for the boys to have that property. I was to have it. My family all knew that. Or I thought they did. But after their dad died they went right to trying to take it, these two boys.

Q Okay, Mrs. Cornia, I'll show you an exhibit marked petitioner's exhibit two and ask if that is your signature on that exhibit.

A Well, I guess it's mine, yes.

Q Can you read what it says up here then at the top?

A Warranty Deed. Yes.

Q Do you know what deed this was for?

A No, but if it was for that ground in Farmington, why, I didn't know what I was signing, because I didn't intend to give that away. That was mine, left by my mother, and she was gone and I valued it."

Then, when asked if any members of the family had shown her a copy of this trust agreement since it was signed in 1972 or have you seen a copy since it was signed, Mrs. Cornia said "No" (T. 85-2). The Transcript continues (T. 85-3):

"Q Do you remember in May of last year, (1974) as late as May in last year, up at Don's place, that you discussed this with Don and his family?

A No."

Billie Cornia, wife of Don Cornia, a son, testified concerning this situation as follows (T. 175-1):

"Q Do you recall an instance last May when your mother was visiting with you up at Randolph?

A Yes.

Q Was the matter of the trust agreement discussed in any way?

A Yes.

Q What was done in that regard?

A She was wondering about it, so we got it out

and Don read it through to her, and then we sat her down and made her read it through, and when she got through, we said, 'Do you understand it?'

Q What did she say"

A She said, 'Yes.'

Q And this was in May of '74?

A (Nods head in the affirmative.)

Q And this was the trust agreement that we offered into evidence here in court?

A Yes, sir, on the Bountiful property."

Throughout Appellant's brief counsel has attempted to place great importance on the hard hearing and poor eyesight of Mrs. Cornia attempting to justify her acts and conduct in the past. Throughout her lengthy examination on the witness stand the court should note the witness had little difficulty in hearing and answering the questions.

Mrs. Cornia was then asked the following about her bank statements (T. 58-12):

"Q Had you been taking care of your accounts, your bookkeeping, up until that time?

A Yes, I can take care of it.

Q No, the question was, had you been doing it at that time, taking care of the books yourself?

A Well, I'll tell you, I didn't--that's what got me worried. I didn't get no bank statements. I didn't see a bank statement."

and again (line 32):

"Q Now can you tell me, Mrs. Cornia what period of time did you not have access to your bank statements?

A Well, I haven't seen the bank statements. I'd ask Jerry about different things and he always told me he would bring them over, but he didn't bring them over. I didn't see them.

"Q And can you tell us how long a period this was that you didn't have access--

A I can't remember how long. I never saw any until I got to Ogden."

Mrs. Cornia did not attempt to keep track of her bank matters and she had continual access to her bank statements as shown by the following testimony of her son Jerry Cornia (T. 167-10):

"Q Jerry, one question I think that we should ask. The bank statements, did they come to your mother at Weston?

A Right.

Q And whatever happened to the bank statements when they'd come there to Weston?

A I always took them to Mother and she'd say, 'You take care of them. You take care of them.'

Q Did you leave them with your mother?

A I usually left them there for a period of time and then I just had a shelf I kept them on, and that's where they were.

Q Did you note whether she was keeping track of the checks she would write in her check-books?

A No.

Q Did you know whether she kept track of them or you don't know whether she did or not?

A I don't think she kept track.

Q Would she examine the bank statements when they would come? Did you ever see her examine them?

A No.

Q Would they be left out in the trailer house?

A Well, I'd just take her mail and say, 'Here is your mail, Mother, and there's a bank statement.' So we didn't lose them, because we had to have them for tax purposes.

Q You indicated you were concerned with her about her financial affairs. When did this first manifest itself, would you say?

A Well, I've been concerned ever since Mother's lived over by me, because I kind of helped her with anything she needed."

"Q Did she do anything that caused you to feel that she needed help as far as with her financial matters?
A She'd say, 'You take care of it, you take care of it.' The bank statements would come, she'd say, 'you take care of it.'
Q Did she ever ask you for the bank statements?
A No. They were always there.
Q Did you ever refuse to give her the bank statements?
A No.
Q Who would write the checks that would be issued off of the bank?
A Well, Mother always signed them and we usually just paid the business, whatever come due, you know. Lights and utilities and so on.
Q But she would just sign a blank check and then ask you to fill them out to whoever was supposed to be paid; is that right?
A That's correct.
Q How long has this been going on?
A Well, ever since she came over to my place. November of '72.
Q Has any of her money gone to pay your bills?
A No.
Q Or your wife's bills?
A No way.
Q Has any gone to pay Don's bills that you know of?
A No."

Mrs. Cornia lived in Weston near Jerry from November, 1972, to August, 1974 (T. 131). When Mrs. Cornia was living in Woodruff she had the bank statements. Billie Cornia, wife of Don, testified as follows (T. 173-3):

"Q Did the bank statements during this period of time go to her at Woodruff?
A Yes, sir.
Q And would you gather them up at the end of the year for the purpose of income tax?
A Yes, sir.
Q And you'd get them from whom?
A From Grandma."

"Q Was your grandma taking care of her financial affairs during that period of time?

A Well, her bank statements would go there, but she'd call me up sometimes at four o'clock in the morning and say, 'Come and help me pay this light bill.' I ran back and forth I don't know how many times in that 14 months."

From the above evidence, it is obvious that Mrs. Cornia's memory has escaped her which indicates she cannot recall her past activities. Mrs. Cornia has not been able, unassisted, to handle her financial affairs for many months last past.

The above evidence shows that Mrs. Cornia cannot remember transferring the Bountiful lot even though her signature on the trust agreement and Warranty Deed is undisputed. Mrs. Cornia denies transferring the property or even knowing to whom it was transferred, even though she read and stated she understood the trust agreement as late as May 1974.

It is important to note the change in Mrs. Cornia since she left Weston, Idaho, to visit her daughter in Arizona. The girls came and got her and didn't even tell her son Jerry she was leaving (T. 153-18). Mrs. Cornia stated she left not intending to return, yet she didn't make any arrangements with Jerry to have the trailer house winterized or the utilities turned off (T. 153-25). She never took her clothes, but later on someone returned to the trailer and got her clothes without notifying her son Jerry who lived next door (T. 155-11). After she was with the girls the sons were unable to visit with her

without Bessie being present (T. 157-7). When Billie Cornia, a daughter-in-law, was asked by Mr. Handy if she thought Bessie would take care of her she replied (T. 180-23):

"A Oh, I think she'll take care of her, but I don't think we'll be able to see her."

Even though Mrs. Cornia had been receiving all the interest on the savings certificates (T. 181-3), she thought she was broke (T. 174-6). Billie's testimony is quite significant showing Mrs. Cornia's mental capacity or understanding of her financial affairs (T. 173-32):

"Q Did she tell you why she didn't want the girls to participate?

A She just felt like they'd caused all of this trouble and she was just that bitter.

Q Now following that, Billie, did you visit with Mrs. Cornia when she was down in Bountiful in the last few months, since she's left Jerry's home?

A Yes. We found out they'd withdrawn the money from the bank, and then she called Don the next week and said, 'Bring my certificates, I'm broke.' And then he said, 'What happened to your 10,000?' she said, 'I don't know, but I'm broke.' Then we found out, I believe -- I'm not sure; I think it was Leah and Jerry talked to Aunt Polly and she said she was coming for the weekend. We had to go get our fruit, so we just dropped in on her at Aunt Polly's and it was quite unexpected.

Q She was there?

A She was there.

Q Did you have occasion to talk with her?

A Yes.

Q Did the question of the funds come up in your discussion?

A Yes.

Q What was said?

A Well, I just couldn't believe, you know-- that was her money, her very own. That didn't

"come from Grandpa. She saved that for years and years. And she just guarded it with her life, and I couldn't believe that--

Q Now was this in a savings account?

A This was her savings account; her personal account. And I just couldn't believe that three weeks and bang! they've got it. And I said, you know, 'What did you do with it?' Well, she just shrugged and says, 'I don't know. Maybe Mr. Bradbury knows.'

Q Did she indicate anything further to you about her financial affairs in that time you were there?

A She says, 'I guess if I haven't got any money I'll have to sell something.' And I said, 'Well, what would you sell?' And she says, 'Well, I guess I'll sell my furniture.'

Mrs. Cornia told Mr. Bradbury, the banker in Evanston, how she wanted the savings certificates made out (T. 176-4) and at no time did any money from Mrs. Cornia go to pay any of Don's bills (T. 172-32).

The boys became concerned about their mother being influenced by the girls when they learned that the savings account in Evanston had been withdrawn. At the time when Don and his wife Billie found Mrs. Cornia at her Aunt Polly's in Bountiful they were able to talk to her outside the presence of the girls and the testimony of Billie is significant as to Mrs. Cornia's ability to handle her affairs (T. 181-26):

"Q Not the mental capacity, but the ability of your mother to handle her personal affairs.

A Well, since she's been over at Weston I don't really know, but the day I talked to her in Bountiful I thought she seemed really vague."

"Q When you say 'vague', what do you mean by that?

A Well, you know. I'd ask her a question and she'd shrug her shoulders. 'What? I don't know.' You know."

and upon cross examination by Mr. Handy the witness testifies as follows (T. 176-29):

"Q All right. Now in regard to this Evanston bank account, you said, 'I can't believe in three weeks bango! they've got it.'

A Yeah."

Then again when the witness was asked by Mr. Handy if she had any evidence that Mrs. Cornia was being imposed upon or influenced by Bessie, the witness testified (T. 178-9):

"A Because of the way she's acting, for one thing.

Q The way she's acting here in Court?

A No, not here in court. The way she's acted. The way she acted that day in Bountiful when I tried to talk to her.

Q Now when she was in Bountiful, was she staying at Bessie's at that time?

A Yes.

Q Was Bessie with her at that time?

A No.

Q Who took her to Bountiful?

A I suppose they did.

Q Were they there?

A No.

Q They weren't there influencing her when you were talking to her, were they?

A No, but she was so vague, just like she was in a different world.

Q Did she have her hearing aid at that time?

A No, but she didn't before. I've never talked to her since she's had her hearing aid.

Q You have no evidence that Mrs. Cornia here cannot, does not have the mental capacity to take care of herself and her affairs, have you?

A Well, I know she didn't before.

Q Well, you helped her out, didn't you?

A Yes."

"Q You helped her out with menial things like signing the checks, or writing the checks and mailing them out and paying the bills for her; you helped her out with things like that?

A Uh-huh. Figuring out what she had.

Q But when you were talking about it, she took care of herself around the house and that? You helped her out with menial things?

A Well, just about everything.

Q Well, you were helping her out, weren't you?

A Yes.

Q But you weren't concerned at that time about her mental competency, were you? Were you?

A Well, she had to have help with almost everything she did.

Q But she was able to take care of her financial affairs and this sort of thing?

A With help, yes.

Q And you weren't concerned at that time that anybody was going to take her property away from her, were you?

A Well, no, not as long as--you know, until it started disappearing.

Q You never became concerned until you heard the money was taken out of the bank in Evanston; that's right, isn't it?

A No, until then I knew where it was.

Q And you don't know anything about it since, about the circumstances under which it was taken out, did you?

A Uh-uh.

Q And you really don't know what happened to it after that, do you?

A No.

Q But you have every reason now to believe it was put in a bank in Holbrook, Arizona, in Mrs. Cornia's name, don't you?

A No, because I don't believe them.

Q You don't believe them?

A No.

Q Regardless of what they say, you don't believe them?

A For one thing, when I went to the bank and I talked to Mr. Faddis (At the bank in Evanston when money withdrawn)-- this was the other man, but they had raised enough rumpus that day that he knew all about it, and he said to me, 'I don't know where the certificates are, but I

"know one thing: if those girls get their hands on them they'll be gone.'

Q I'll let you say that even though it's hearsay, but why did he say that? Do you know that?

A I suppose from seeing them at the bank."

Jerry Cornia's testimony indicates that Bessie was dominating Mrs. Cornia when he testified that at the deposition of Mrs. Cornia that as soon as he would attempt to ask a question of his mother that Bessie would answer it (T. 156-25). Mr. Handy asked a question (T. 160-17):

"Q Now you also say your sisters are scheming to get this. Tell how they're scheming to get it.

A First of all they took the money and secondly they've taken the two lots in Woodruff; and if they can get any more they'll take it.

Q All right. When you wrote this they did not have the two lots in Woodruff, did they?

A No, but I've heard they were getting them."

and again (T. 163-11):

"Q All right, now is there anything else that leads you to believe that your sisters are influencing your mother to turn her property over to them?

A Absolutely.

Q Tell me.

A They won't allow me to talk to her.

Q Grace won't allow you to talk to her?

A. If she was here, no.

Q And you say Bessie won't allow you to talk to her?

A Nope.

Q You were given an opportunity of talking to her in my office, weren't you?

A Right.

Q And you immediately began shouting at her and questioning her about the lawsuit she filed against you, didn't you?

"A I asked three questions to my mother and Bessie answered all three of them. And I was talking to Mother.

Q And you had your voice down real low and well modulated, didn't you?

A I did when I asked the first two questions, and I didn't get the answer.

Q Was one of the questions, 'How are you, Mother?'

A I asked her that when she walked in the door.

Q Was one of the questions, 'How are you getting along?'

A I asked her that when she walked in the door.

Q Was one of the questions 'What can I do for you?'

A I never had time to ask her what I could do for her.

Q Do you know that it's Bessie that won't let your mother visit with you, or is it that your mother doesn't want to visit with you under the circumstances now?

A I'd assume it's Bessie, the way she hangs onto her, because if I could get Mother away she'd talk to me.

Q Well, you're assuming it's Bessie, but you don't know that, do you?

A Well, somebody has got a hold of my arm, I assume that's the one that's holding me."

and again, concerning Mrs. Cornia and her handling of money matters (T. 166-25):

"Q It wasn't that you thought at any time that your mother was incompetent, was it?

A Yes, over her money matters, yes.

Q But why did you get concerned?

A I'd been concerned a long time.

Q But you never got concerned until I asked you to turn these things over to your mother, did you?

A I didn't know Mother wasn't coming back until then."

On redirect Mr. Cornia was asked the following (T. 169-11):

"Q Before your mother left, Jerry, to go with the girls in August, did you have any difficulty in communicating or talking with your mother?

A No, none at all. None.

Q Do you know whether she had any hesitancy to talk to you?

A No, none. Talked to me all the time."

Further examples of Mrs. Cornia being influenced is when the granddaughter of Mrs. Cornia, at the funeral of her son Dale in January 1975, tried to visit with Mrs. Cornia at the funeral and was unable to do so. Mrs. Fox, a granddaughter, testified as follows (T. 6-25):

"Q And after the funeral did you try to talk to your Grandmother?

A Well, can I go back a little bit?

Q Please.

A When they came in I said to grandma, 'We want you to come up to the house after the services so we can get pictures with our kids with you.' because this is the only grandma that my little girl has. And Bessie leaned over and she said, 'Grandma's absolutely not, Grandma's sick, she's not going to the cemetery even.' So this was fine. I was very upset over it, but the funeral was already started. So during the service Bessie tapped me on the shoulder and asked me how long I was going to be in Evanston, and I said, 'One week,' which would have been a week today. We've waited for a week for Grandma to come up and see our kids, and they never have come."

and again (T. 7-21):

"A The day of the service they said she was sick. Bessie said Grandma was sick and they were heading right back to Ogden. The day before,

"which was Sunday, Grandma and Bob came up to view my dad in the afternoon, Sunday afternoon.

Q This would be at the mortuary?

A Yes.

Q Did you have occasion to talk to your grandmother and to Bob at that time?

A Yes. The mortician called us and said Grandma was over to the mortuary, so we got in the car and we went over. We each got to kiss Grandma and we talked to her, 'How are you, how have you been?' We talked about my dad's death. Then we asked if Grandma could come over to the house for a little while, and Bob said no, they had to go pay for some flowers downtown at the florist. And so my older sister Joan said, 'Well, can't she come over while you go down and pay for the flowers?' And Bob said, 'No, we've got to get back to Ogden.'"

Even Bessie admits that her mother would not talk with others without her when she testified (T. 19-29):

'Q And do you recall that your mother would refuse to talk to anyone else unless you were present? Do you recall that?

A Yes, She didn't want to talk to them unless I was there."

and again when the boys had contacted their mother to take her to dinner, Bessie testifies (T. 22-31):

"A They wanted to take her to dinner, and so I discussed at great lengths with her about going to dinner with them, and she didn't want to go. She says, 'I don't want to go with them unless you can go too.' And I says, 'Well, I'm sure they don't want me to go to dinner, but if they want they could come here.' And she says, 'Okay, they can come to the house if you'll stay here.' She did not want to see them unless I was there."

Bob Wadsworth, husband of Bessie, made a significant statement when the following question was asked (T. 194-20):

"Q Do you think that artful and designing persons could get her property away from her?"

and he answered:

"A If she trusted them enough possibly, but not--I think not. I think she's pretty competent. Pretty capable of determining which way she wants to go in anything she attempts."

Under the Utah Statute the question is not whether she is "pretty competent" but whether she is likely to be imposed upon, and Mr. Wadsworth says she could be if she trusted them enough.

Let us now examine the evidence to demonstrate the confusion in the mind of Mrs. Cornia concerning her property and other matters. Mrs. Cornia now claims she can take care of her affairs (T. 81-9) when Billie Cornia (T. 179) and others have been doing it for her in the past. Leah Cornia, wife of Jerry, testified as follows (T. 185-1):

"A She never has. Billie did it when she was in Woodruff and she asked me when she came over there."

Billie Cornia, the wife of Don, a son, was put on the checking account by Mrs. Cornia shortly after her husband Osro passed away in 1971 (T. 127-7), and Mrs. Cornia is the one who suggested putting Billie on her checking and savings accounts

at the First National Bank in Evanston (T. 137-31). Mrs. Cornia testified that only hers and her husband's names were on the savings account (T. 60-8).

Petitioner's Exhibits 1 and 2 show that Mrs. Cornia transferred to Jerry and Don the lot in Bountiful in trust on or about January 8, 1972. The Trust Agreement provides that all monies from the Bountiful property shall be used for the benefit of Mrs. Cornia during the term of her natural life and upon her death for the payment of her funeral expenses, and if anything remains thereafter, to be distributed to her children pursuant to her express directions. Mrs. Cornia told Mr. Bradbury at the bank in Evanston how she wanted the Savings Certificates made out (T. 64-18 - 20). Mrs. Cornia testified at the trial that she had lived eight months in Weston (T. 55-4) (when she had lived there from November 1972 to August 1974) and lived in Woodruff for two years (T. 55-30). Mrs. Cornia testified that the savings account was in her name alone (T. 60-15), and she thought she was the only one on her checking account (T. 96-7). She further testified that the \$9,000.00 savings account that was withdrawn from the Evanston Bank was in her name alone in Arizona (T. 62-13) and that no one else but she could draw it out of the Arizona Bank (T. 62-17): and Grace, her daughter, testified that her consent would be needed to draw out the Arizona money (T. 52-9).

Mrs. Cornia, when asked about what happened to the money that was obtained in the sale of her husband's estate testified as follows (T. 108-27):

"Q Well, your husband's estate was probated. Did anybody get any money or property out of this?

A Well, they sold the property, all the ranch ground. They sold it to Louis Cornia, and that was Carter's boy. But that's all that I know of.

Q And they got some money from the sale. What happened to the money?

A Well, I guess they divided among the--the way they're supposed to, with the girls--or with the--they didn't give--the girls didn't get any, but the boys all got some."

Please note that the two girls got their share (See file of Osro Cornia, Deceased, of which Court took judicial notice, at pages 191 and 218 for girls' share).

Mr. Wadsworth says Mrs. Cornia told us she had the lot in Bountiful (T. 195-10) and she never told us she had transferred the lot in trust (T. 198-4), and he didn't think she, Mrs. Cornia, was aware she had transferred it (T. 198-10). Bessie testified that her mother never told her she had transferred the lot in Bountiful (T. 27-19), and when Bessie was pressed by counsel on this she stated (T. 27-23):

"A Well, she didn't hear at all, and she just didn't realize everything she was signing, which most of us sign things and don't realize."

How would Bessie know her mother didn't hear or didn't realize everything she was signing when Bessie wasn't even at the

place or even know of the transaction. I don't believe most of us, as Bessie states, sign deeds and trust agreements not realizing what we are signing.

All of the above evidence clearly demonstrates that Mrs. Cornia was suffering from mental defects which interfere with the rational functioning of her mind.

Dr. J. Clare Hayward, who had examined Mrs. Cornia on different occasions between February 13, 1973, and May 16, 1974, (T. 85-30) noted increasing senile changes and that related to her ability to remember and concentrate and follow instructions (T. 87-28); and he stated that Mrs. Cornia was more likely to be imposed upon by an individual if they wanted to impose their will upon her as compared to a person of normal faculties (T. 91-8). Dr. Hayward, on cross examination, indicated that when a person has this type of arteriosclerosis that there is continued degeneration rather than an improvement (T. 91-17). When Dr. Hayward was questioned concerning the hearing problem he stated that he thought he could tell when she understood him and answered him (T. 92-9); and on redirect Dr. Hayward stated in his opinion that Mrs. Cornia's condition was more than the normal type of senility you would expect in a person of her age (T. 93-14).

The above evidence as to Mrs. Cornia's mind does not arise from defective hearing. On the contrary, it shows a mind

laboring under difficulty in functioning even though she would like to justify her responses and excuse her confusion by saying "I didn't hear" or "I didn't understand". How easy would it be for a person in this situation to be imposed upon by artful and designing persons.

When Judge Christoffersen used the term that Mrs. Cornia was not incompetent he was using it in the lay sense which sometimes carries some offensive stigma, but it is clear that in the legal sense of the use of the term, he felt that she needed the protection that a guardian could give her, as the Court's statement says:

" . . . but I think from a legal standpoint of being able to control her own transactions that for these reasons that I've stated I feel that she cannot . . ." (T. 200 and 201)

It is apparent that all of the cases cited by Appellant in her brief are not in point with the facts of this case. In re Heath's Estate, 102 Utah 1, 126 P. 2d 1058, as cited by Appellant, the alleged incompetent counted dishes while he washed them, his house was not very clean, certain of his relatives ridiculed him, he was one of the best gardeners in the state, but he didn't have any interest in financial matters.

In this case now before the Court the mother had ill feelings toward her two daughters and these feelings were dramatically made to appear by her testimony at the hearing in 1972, where she succeeded in having Bessie removed as co-admin-

istrator of her husband's estate. Her husband's estate was settled and she lived with her sons for approximately three years until August, 1974, when the girls came and took her to visit a daughter in Arizona. Within a few days thereafter her savings account was closed at her bank where it had been for 35 years (T. 158-21) and the money taken to Arizona. Thereafter Mrs. Cornia was not permitted or would not allow members of her family to visit with her. Immediate demand was made upon the sons to return the joint tenancy savings certificates to her, even to the extent of her commencing suit against her sons even though she had been getting all of the earnings and income from the said properties (T. 127-19) and (T. 95-32). All of the above indicate that Mrs. Cornia was not exercising her own will but that of others.

In the recent case decided by the Utah Supreme Court, on August 12, 1975, of Pagano vs Walker, No. 13864, Justice Crockett, speaking from the majority, stated the law in this state as follows:

"..... In equity cases such as this is, this court may review the facts. (Citing cases) However, it has long been established and reiterated by this court in numerous cases that due to the advantaged position of the trial court we will review its findings and judgments with considerable indulgence, and will not disagree with and upset them unless the evidence clearly preponderates against them, or the court has mistaken or misapplied the law applicable thereto." Citing Allen vs Allen, 109 Utah 99, 165 P. 2d 872; MacDonald vs MacDonald, 120 Utah 573, 236 P. 2d 1066.

In reviewing the evidence as above set forth, it is clear that there is abundant evidence to support the court's findings, and that the court was not mistaken or did not misapply the law in finding that Mrs. Cornia was legally incompetent.

CROSS APPEAL

Respondents cross appeal from the Court finding that the Trust Agreement and Last Will and Testament dated January 8, 1972, were declared null and void.

RELIEF SOUGHT ON CROSS APPEAL

The matter of the execution and delivery of the trust agreement dated January 8, 1972, and the Last Will and Testament of the same date were not within the issues and pleadings of the matters before the court, and this Court should order that paragraph eight of the Findings of Fact and Conclusions of Law be vacated and set aside.

ARGUMENT

In the case of West vs Standard Fuel Co., 81 Utah 300, 17 P. 2d 292, at page 293 the Utah Supreme Court states:

"It is the well settled law in this jurisdiction that it is the duty of the trial court to find upon all of the material issues raised by the pleadings, and that it is prejudicial error for the trial court to fail to find upon issues raised by the pleadings and the evidence."
(Citing cases)

It would seem to be elementary, therefore, that for the Court to make findings upon issues that were not set out in the pleadings is error.

In this case the pleadings raised the question of competency within the nine months (see File page 2) and particularly within the past two months. The Answer of Mrs. Cornia, as set forth in her Objection to Petition for the Appointment of Guardian (File 9 and 10) is in the form of a general denial. Nothing in the petition for the appointment of the guardian and in the objections makes any reference to the Will or the Trust Agreement made by her two and one-half years before. Without the question of her competency being in issue at the time of the execution of the instruments, the Court action in declaring the Will and Trust Agreement void was ultra vires. On the question of competency in January 1972, the evidence was that Mrs. Cornia was competent. Mrs. Cornia testified that she signed the will after wanting counsel to make the will for her (T. 94-7). Mrs. Cornia testified that her understanding was better then (speaking of 1972) than it is now (T. 108-20). Jerry Cornia testified that Mrs. Cornia got along pretty well during probate proceedings of her husband's estate and had no particular problems with hearing or eyesight during that period (T. 149-18); and he remembers bringing mother down to have her will made as she didn't want to

have her estate left like dad's had been and have to go through everything like we did in dad's estate (T. 151-27). Mother told the way she wanted it (T. 152-2).

In this case the trial court erred in setting aside the Will and the Trust Agreement.

CONCLUSION

Mrs. Cornia now has the protection of the legally appointed guardian to manage her property and provide for her needs. The problems between the children are not in issue in this matter. The trial court was concerned about her best interests and tried to remove as far as possible any so-called stigma of an incompetent when he tried to distinguish between the term and that of the legal standpoint that she cannot take care of her affairs. The record is replete with competent evidence supporting the findings that though not insane, she is, by reason of old age, disease, weakness of mind or from any other cause, unable, unassisted to properly manage and take care of herself or her property, and by reason thereof would be likely to be deceived or imposed upon by artful and designing persons. The Court should not concern itself as to differences in the testimony of the many witnesses, but only determine if there is evidence sufficient to show incompetency.

The Judgment of the trial court should be affirmed as to the finding of incompetency, and reversed as to declaring void of the Last Will and Testament and Trust Agreement dated January 8, 1972.

Respectfully submitted,

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