

2001

# In the matter of the Guardianship of the Estate of Fushia Fern Cornia, Incompetent : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

Legal Brief, *In the matter of the Guardianship of the Estate of Fushia Fern Cornia, Incompetent*, No. 14139.00 (Utah Supreme Court, 2001).

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BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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IN THE MATTER OF THE GUARDIANSHIP  
OF THE ESTATE OF  
FUSHSIA FERN CORNIA,  
INCOMPETENT.

Case No. 14139

APPELLANT'S BRIEF

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

---

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FILED  
SEP 15 1976

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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IN THE MATTER OF THE GUARDIANSHIP  
OF THE ESTATE OF  
FUCHSIA FERN CORNIA,

INCOMPETENT.

Case No. 14139

APPELLANT'S BRIEF

---

STATEMENT OF KIND OF CASE

Jerry Cornia, the son of FUCHIA FERN CORNIA, filed a petition to have the said FUCHIA FERN CORNIA adjudged incompetent, and to have a guardian appointed for her estate, but not for her person.

DISPOSITION IN LOWER COURT

The Court adjudged Mrs. CORNIA to be incompetent, appointed the First Security Bank of Utah, Ogden Branch, Guardian of her estate, and ordered her sons and daughters to turn over to the Guardian various joint tenant time certificates of deposit a savings account and to reconvey real property.

RELIEF SOUGHT ON APPEAL

Appellant, FUCHIA FERN CORNIA, seeks to have the finding of her incompetency set aside and reversed.

STATEMENT OF FACTS

FUCHIA FERN CORNIA at the time of the hearing in this matter was a widow of 81 years of age. Her husband, OSRO LEWIS CORNIA, had died intestate on July 31, 1971, (T.69). At the time the petition was filed she had five living sons, CAL, DALE, DON, ROSS, and JERRY; two living daughters, GRACE McKINNON and BESSIE WADSWORTH. Two children, LOUISE and GENE, were deceased, each leaving two children (T.102).

The CORNIA family had been engaged in ranching in Rich County, Utah, until the death of Mr. Cornia. Mrs. Cornia had gone to Rich County from Davis County as a young girl to teach school, married Mr. Cornia and remained there raising a family and taking care of the home. She had never been engaged in business affairs.(T.106,108) Mr. Cornia died intestate and his son Don and daughter Bessie were appointed co-administrators. Bessie contended that she was requested by her mother to so act, but was of the opinion that she was never was appointed co-administrator (T.14,21). But she apparently was so appointed (T.15). Later, Mrs. Cornia petitioned to be appointed co-administrator in Bessie's place (T.72,73,76,77). Mrs. Cornia's share of her husband's estate consisted of approximately \$35,000.00 in cash, which she put in Time Certificates of Deposit, at the First National

Bank of Evanston, Wyoming, with herself and each of her living sons on certificates of \$5,000.00, and herself and each of her grandsons on certificates of \$2,500.00. There was also a certificate of deposit with the Bank of Lewiston, Utah, as joint tenant with Jerry Cornia for \$6,500.00. The effect of each certificate was the creation of a joint tenancy (T. 64,65). It being Mrs. Cornia's intention that when anything happened to her, that the certificate would go to the surviving joint tenant (T. 110). Mrs. Cornia also had a lot in Bountiful that had been given to her by her mother (T. 80) and a home in joint tenancy with her deceased husband in Woodruff, Utah (T. 145,124) and a savings and checking account at the First National Bank in Evanston, Wyoming (T. 60). On the third day of January, 1972, Mrs. Cornia executed a warranty deed to her Bountiful property to her sons, Jerry and Don (P. Exhibit 2) and five days later, on the 8th of January, 1972, executed a trust agreement with the same sons in regard to the same property (P. Exhibit 1) which she does not remember signing (T. 82). She also on the same day executed a Last Will and Testament (P. Exhibit 3) that provided a small bequest to her two daughters and left the bulk to her sons and grandsons. Mrs. Cornia, at the competency hearing, stated she does not recall signing the deed, trust agreement, and Will, giving as a reason that she couldn't hear or was embarrassed to ask for explanations because of her loss of hearing (T. 82,111,112,147). Also her vision was impaired (T.111). It was during this time that she was acting as

co-administrator of her husband's estate, and in her words, "signing papers by the bushels" and "stacks" (T.76) with the advice of her attornies and the co-administrator, her son Don Cornia. Some time after the death of her husband, Mrs. Cornia moved from her home in Woodruff to a trailer home in Weston, Idaho, that was located approximately 60 feet from her son Jerry's home. She was lonesome there (T. 30,57), and went to visit her daughter, Grace, in Arizona. She did not return to Weston, but remained in Ogden with her daughter, Bessie, and preferred to go to a "home" rather than return to her lonely existence, which offended her sons and caused them to believe she was being unduly influenced (T.133,154, 164). Before going to Arizona, she drew her savings account in the approximate sum of \$9,000.00 out of the bank in Evans-ton (T. 60,61) and placed the funds in a joint account with her daughter, Grace, in Holbrook, Arizona (T.60,46). She withdrew her savings account because she was not allowed to see her bank statements (T.59,16) and learned that a daughter-in-law had withdrawn funds from Mrs. Cornia's savings account (T.39,40,96) without Mrs. Cornia's consent. Following this, Mrs. Cornia requested that her sons turn over to her the joint tenant time certificates of deposit that they had in their possessions (T.48,119). This request, when refused, was follow up by a letter from her attorney (P. Exhibit 5 and 6). These requests, and the knowledge that Mrs. Cornia had withdrawn her funds from the bank precipitated this action (R.1, T.130,131).

The Court held that Mrs. Cornia was incompetent, appointed First Security Bank of Ogden, Guardian of her estate, but not her person; ordered the sons, Jerry and Don, to deliver to the Guardian the time certificates of deposit; conveyed the Bountiful property and the home of the Appellant to the Guardian; voided the trust agreement and Last Will and Testament. Bessie Wadsworth and Grace McKinnon, the daughters, were ordered to convey the vacant lot in Woodruff to the Guardian and withdraw the funds from the joint account in Arizona and deliver the proceeds to the Guardian (R.23,29).

#### ARGUMENT

##### POINT I.

THAT THE EVIDENCE DOES NOT SUPPORT A FINDING THAT APPELLANT IS INCOMPETENT.

What is meant by Incompetency? Our statute 75-13-20, Utah Code Annotated, 1953, says:

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."

An explanation of this statute is found in IN RE HEATH 126 P.2d,1058,1061 (Utah) as follows:

The section implies physical or mental defects which interfere with the rational functioning of the mind. If the mind functions rationally, put the individual acts in a way commonly designated as eccentric--that is, his act deviate from



the usual principally, because he is less susceptible to public opinion than are many of us--he is not incompetent. One may love gardening--\*\*\*\*\*and not be interested in anything else, even to the extent of losing his property at the hands of unscrupulous friends or relatives. He may be foolish in the eyes of many of us, but he is not incompetent. Competency is not measured by one's ability to accumulate and hold the material things of life. Were it so, there would be many of our ministerial brethren--not to mention some of our learned judicial associates--behind mental bars." "In other words, the evidence must show a lack of power to function--not an unwillingness to or lack of interest in functioning, be the latter to ever so reprehensible as personal characteristics."

At the conclusion of the evidence, and the motion of Appellant's counsel to deny the petition, the Court gave its reasons for appointing a Guardian for Mrs. Cornia. The reasons and the thinking of the Court is found on Page 200 of the Transcript, as follows:

"THE COURT: this is a very difficult type case, and I'm certainly sorry that the children of Mrs. Cornia have got into the position and relationship that they have. My interest, of course, is Mrs. Cornia, that she have what is rightfully hers and be used for her benefit. And as I indicated, part of the things or some of the things that concern me in responding to the motion of counsel for Mrs. Cornia, also that testimony of Mrs. Cornia on a prior occasion before this court being so different than the testimony that I heard today is of some real concern to me, as to how and why she forms opinions that she has testified to in a prior hearing and now in this hearing.

I think Mr. Wadsworth did state some answers that are significant: that he didn't think that she understood or knew that she had transferred property in Bountiful; that someone of artful and designing nature could get her property if she trusted them, and I'm not accusing anybody of being artful or designing or attempting to get her property; but I do feel that the past several transactions that she has made and what she has said concerning them leads me to believe that she

is in a position not of being what we would say an incompetent person, she's certainly not in that nature, 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 and that it may not be that she will be in a position at times to have the protection of interested children to protect her, and certainly any one of us can certainly be hoodwinked at any time by people who have the ability to get us to do things that we would not otherwise so, but I think she is much more vulnerable because of several reasons.

One, as the doctor explained, arterio--whatever the word was he used, and also because of her hearing problem, her reading problem, in order to know what she's reading and hearing and understanding what people are saying to her. I think these are all factors that fit into it also. And I think this was so back when she executed these agreements and signed certificates and placed her property at that time, and I say this because of the testimony given at a hearing prior to the execution of these documents and which she testified to facts and things much differently now and which she doesn't remember, and I think that she is correct when she said she didn't understand at the time what she was doing on the transfer of property."

It is my position that none of the reasons contained in the foregoing meets the requirements of the statute 75-13-20 U.C.A 1953, and also IN RE HEATH, supra.

It is impossible for any of us in reviewing this matter to know what the Court had in mind when he refers to the "testimony of Mrs. Cornia on a prior occasion before this Court being so different than the testimony that I heard today." We can only surmise that the Court is referring to some aspect of the probate proceedings in Mr. Cornia's estate where she was a co-administrator, and perhaps points specifically to the hearing in Brigham City when the daughter, Bessie, was removed as co-administrator and Mrs. Cornia was appointed in her place.

At the hearing referred to, Mrs. Cornia asked to be appointed in Bessie's place because it was alleged that Bessie was not cooperative in that she would not sign a check for \$5,055.00 payable to the Osro Cornia Estate (T.74). Bessie had testified she had not signed the check because her lawyer informed her she had not been appointed nor qualified co-administrator (T.16). Mr. Harris, counsel for the Petitioners, read a long series of questions and answers to her from the transcript of the hearing to remove Bessie in Brigham City, and Mrs. Cornia, when asked if she remembers so testifying, replied, generally in the negative (T.74 to 80).

In analyzing the questions from the removal hearing, how can it be said that there was anything said that indicated mental incompetency within the definition of 75-13-20 U.C.A., 1953. Obviously, nothing therein indicated such incompetency. We must then look to her responses to the re-reading of the testimony, which were generally that she did not recall making such statements. It must here be pointed out that the hearing referred to in Brigham City, in November, 1972, and also the competency hearing in Cache County, in February, 1975, involved an elderly lady who testified that in regard to proceedings in 1972, she was hard of hearing. She testified in regard to 1972 events as follows:

"I couldn't hear, so a lot of times I said, well, I feel embarrassed because I couldn't hear. A lot of times I would tell you I heard when I didn't hear when you were reading it." (T. 82) See also (T.111).

The above quotation was in regard to the meeting where she executed her Last Will and Testament in January of 1972. But the same condition continued through November, 1972, the time of the removal hearing at Brigham City. Before she had obtained a hearing aid (T.192) and obviously effected her answers at the competency hearing in February, 1975, as her hearing had been bad since 1971 (T.196). The transcript is replete with instances when Mrs. Cornia could not hear, and attempts were made to adjust her hearing aid and improve her hearing (T.58,67,70,71,73,74,100).

It goes without saying that all of us are presumed to be competent until proven to be otherwise. To require an 81 year old person to recall specifically what she had testified to 2½ years before, under oath, in Court, under stress condidions, would be to require of her more than we would require of ourselves or a person of average health. We would then ask the impossible when we add to this the fact that Mrs. Cornia was at the Brigham City hearing laboring under a severe hearing loss without a hearing aid and at the competency hearing, even with a hearing aid, and sometimes inspite of it, was having a difficult time hearing and understanding.

Quoting again from IN RE HEATH, supra, we find the following observation on page 1061.

"Such confusion as appears in his answers apparently arises either from defective hearing or ignorance of facts or law, but those answers do not show a mind laboring under difficulty in functioning."

The Court next refers to the answers of Mr. Wadsworth, Mrs. Cornia's son-in-law, where he states that she didn't think she understood or knew she had transferred her property in Bountiful and that someone of artful and designing nature could get her property if she trusted them. The question and answer in regard to this are as follows from (T.194):

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

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.

Q: Who makes her decisions for her?

A: Mrs. Cornia does.

Mr. Wadsworth at (T.194) testified as follows:

Q: Do you have an opinion as to whether or not Mrs. Cornia can manage her own affairs?

A: Yes, Sir.

Q: Do you have any questions about that?

A: No, Sir. She's 81 years old, but I think with glasses with her hearing aid, I think she's quite competent.

(T.195) Q: Well, do you think that if you or Grace or Bessie tried to get her property from her she'd give it to you.

A: No, Sir, not unless she wanted us to have it, not unless she had some reason for it.

Q: Has she ever discussed with you what property she has?

A: Yes, Sir.

Q: Does she know what property she has?

A: Yes.

Q: What's she told you?

A: This is the only place we have learned it. She's told us she has the property in Bountiful, she has the house, she thought she had the house in Woodruff, she had the trailer house, her certificates to the boys and the grandchildren, and I think that's it.

Q: Well, has she ever mention the savings account?

A: Well, she knows she has that.

Q: Does she know who her children and grandchildren are?

A: Yes.

In regard to the Court statement that Mr. Wadsworth didn't think that Mrs. Cornia understood or knew she had transferred the property in Bountiful, it must be remembered that this occurred at a time when Mrs. Cornia was involved in probate of her husband's estate, was not acquainted with this procedure nor law. She had stated before that her lawyers and sons had brought stacks of papers to her to sign, and they wouldn't have done it if it hadn't been right. (T.108) We have no inference from her then counsel, Mr. B.H. Harris and Mr. M.C. Harris, that she was not competent to execute the deed to the Bountiful property, the trust agreement, and her Last Will and Testament, and in answer to the query as to why she did not remember these events in February of 1972, we must look again to her hearing problem and the great number of papers that were presented to her for signing in regard to her husband's estate. Does this then mean that artful and designing persons can take advantage

of her at the present time? I think the answer to that is found in all the testimony of the witnesses. None of whom stated that she was incapable of handling her own affairs whether the witnesses were for the Proponents or on behalf of Mrs. Cornia, as will be brought out later in this brief.

The past transactions that the Court refers to could only refer to the warranty deed to the Bountiful property, the trust agreement, the Last Will and Testament, the time certificates, and the withdrawal of her funds from the First National Bank of Evanston. I have attempted to deal with the deed, trust agreement, and Will, in the preceding paragraph.

In regard to the time certificates, you may search the testimony of Don Cornia and his wife with a fine toothed comb and at no time do they contend that she was not mentally competent when the time certificates of deposit were made out in joint tenancy with herself and her various sons and grandsons. It is Mrs. Cornia's testimony and the testimony of her son-in-law, Bob Wadsworth, and daughters, Grace McKinnon and Bessie Wadsworth, that Mrs. Cornia well remembers this transaction, when it took place, the reasons for creating joint tenancies, and at the competency hearing and prior thereto, was well aware of this transaction and that she was the owner of these time certificates of deposit. It would appear that under the circumstances, under which these joint tenancy were created, that this was good planning of a forward thinking, competent individual, who under the circumstances at that time had done fairly competent estate planning. (T.110,118,119,62,63)

When the Court refers to past transaction, if he is referring to the withdrawal of the funds from the savings account, this would indicate the actions of a person well able to manage her own affairs. Consider the facts: That her bank statements had gone to her son, Jerry, and she had not been allowed to see them. (T.116) She went to Evanston to talk to the president of the bank, was there told that her account contained around \$12,000.00, but was later informed that there had been two or three \$500.00 withdrawals in the past six weeks or so, and other withdrawals that reduced the balance to about \$9800.00. These withdrawals had been made by her daughter-in-law, the wife of Don Cornia, without the authorization of Mrs. Cornia. (T.39) Mrs. Cornia then did what an alert, mentally competent individual would do. She withdrew all of her money from the Evanston bank and put it in a joint tenant savings account with her daughter, Grace, in Holbrook, Arizona. (T.52, 117) These were the actions of an alert, mentally competent individual who could make her own decisions and handle her own affairs. The remaining reason for the Court finding as he did is found as follows:

"One, as the doctor explained, arterio--whatever the word was he used, and also because of her hearing problem, her reading problem, in order to know what she's reading and hearing and understanding what people are saying to her. I think these are all factors that fit into it also."

Dr. Hayward testified that when he examined Mrs. Cornia in May of 1974, one of her problems was definite signs of Cerebral Arteriosclerosis, and also related that she had a problem with her hearing and with her vision. (T.87) In



answer to Mr. Harris' question, related to competency, the testimony was as follows:

Q: Doctor, from your examination of Mrs. Cornia and the experience that you had with her on these two occasions, did you form an opinion as to whether or not she, though may be not insane, but by reason of old age, disease, or weakness of mind from any cause, would be unable to properly manage or take care of herself or her property or by reason thereof, would be likely to be deceived or imposed upon by artful and designing persons?

A: Could I qualify that a little?

Q: Yes, you may.

A: Well, I didn't consider these things in the light of her managing her property because I didn't know she had any property. And I don't think this question came up as I recall it. But, as far as her being able to handle her personal affairs and take care of herself, I had grave reservations, yes. I felt that she was getting to a point, when I saw her last, that probably she shouldn't try to take care of herself.

(T.90)

Dr. Hayward further testified as follows:

Q: And so you form no opinion at that time as to whether or not she could take care of her property?

A: No, I'm sure that didn't come into the picture.

Q: And your main concern was that because she was an elderly lady, that she should have some help with her physical needs?

Would that be--

A: Definitely. (T.93)

Dr. Hayward's answers fall far short of carrying the weight that would be sufficient to overcome a presumption of competency. This concern seemed to be only that an elderly lady should have someone to help her with her physical needs. His "grave reservations" certainly are not sufficiently conclusive as to imply that she had physical or mental defects which interfered with the rational functioning of the mind, or that she had a lack of power to function as was required by the HEATH CASE. True, she had difficulty with her hearing and vision as the doctor stated, but these disabilities do not show a mind laboring under difficulty in functioning.

In the case of IN RE HEATH (126 P.2d,1058) (Utah) previously cited, Joseph A. Heath alleged incompetent, was past 72 years of age and "he is ignorant, he lacks interest in business details, he has implicit confidence in his brother and other relatives, in whose hands he has placed his affairs; he resents these incompetency proceedings, and he much prefers shifting responsibility to the shoulders of others than to worry with them himself." The Court in that matter reversed a finding of the trial court of incompetency of Heath.

No such allegations of eccentricity, disinterest, and irresponsibility have or could be attributed to Mrs. Cornia. If Joseph A. Heath, under those circumstances, could not be considered incompetent, then could Mrs. Cornia, under the circumstances of this case?

In the matter of IN RE VALENTINE'S GUARDIANSHIP (294 P.2d,696) (Utah), the alleged incompetent, Mrs. Valentine, had given an option to purchase three hundred thousand (300,000) shares of stock at one dollar (\$1.00) per share. The stock was valued at five hundred thousand dollars. She also sold fifty thousand (50,000) shares of stock for twenty-five thousand dollars (\$25,000.00), which she had purchased one year previously for one hundred thousand dollars (\$100,000.00). The trial court denied the appointment of guardian, the Supreme Court affirmed the trial court and stated as follows:

"The right of every individual to handle his own affairs, even at the expense of dissipating his fortune, is a right jealously guarded, and one which will not be taken away except in extreme cases. No such case is presented here. The facts alleged do not indicate an inability to properly manage property. An uncooperative attitude or mistake as to business principles or legal rules is not sufficient to warrant the appointment of a guardian."

Certainly Mrs. Cornia's conduct at no time reaches the extravagance or irresponsibility of Mrs. Valentine.

In the matter of IN RE GUARDIANSHIP OF BOGAN (441, P.2d,972, Okla), the alleged incompetent was approaching 80 years of age, had married a man 35 years her junior, had an excessive amount in a checking account of forty-five thousand dollars (\$45,000.00), had expressed an intention to assist her new husband in a movie project, which would cost forty thousand dollars (\$40,000.00), could not identify a blank deposit slip on the bank in which she had the forty-five thousand dollar checking account; that she had a twelve hundred dollar plumbing bill, and that she was susceptible to flattery and had given a young

man a diamond ring worth fifteen hundred dollars (\$1500.00.) The guardianship proceedings in regard to Mrs. Bogan was based upon a statute identical in its wording to the Utah Statute. The Supreme Court of Oklahoma in affirming the District Court in finding that Mrs. Bogan was not incompetent and did not need to have a guardian appointed for her, observed as follows:

"Much of the evidence produced and relied upon the Petitioner to establish the incapacity or inability of Mrs. Bogan to manage her property, unassisted, strongly indicates that he has attributed undue and unrealistic significance to the work "unassisted." That requirement does not relate to menial tasks. It does not require non-use of expert or professional aid in management.\*\*\*\*

There is no competent and uncontroverted evidence in the record of this case that Mrs. Bogan has mismanaged her property, or that she has been the victim of any artful and designing person. Only the failure of Mrs. Bogan's memory, while a witness, would tend to justify, even remotely, a determination of her incompetency or inability properly to manage her property, and the facts of her actual management confirm the trial court's judgment and her counsel's explanation of her memory lapses as a witness."

In comparison to the alleged conduct of Mrs. Bogan and Mrs. Valentine, Mrs. Cornia's conduct has been that of an ordinary prudent woman of 81 years, able to properly manage her own affairs, with some assistance on menial tasks, such as writing checks.

It appears that the Court had some doubts himself when he said, "but I do feel that the past several transactions that she has made, and what she has said concerning them, leads me to believe that she is in a position not of being what we would say an incompetent person. She's certainly not in that

nature, 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 and that it may not be that she will be in a position at times to have the protection of interested children to protect her." (Emphasis Ours) We would agree with the Court that she is not an incompetent person, and submit that we are not concerned here with what the situation might be in the future, but what it is at the present time, and all of the evidence preponderates against the finding of incompetency.

An examination of the testimony of the witnesses on behalf of the Proponents is in order at this time.

The first witness offered was Janet Fox, and granddaughter of Mrs. Cornia. The purpose of her testimony seemed to be solely for the purpose to show that she was offended; that she wasn't allowed to visit with her grandmother at or after her father's funeral in Evanston, (T.6) and that Bessie had prevented such a visit. The explanation seems to be that Mrs. Cornia was not feeling well on that day and there was a misunderstanding as to how long Mrs. Fox would be in town, but that Mrs. Wadsworth intended to take Mrs. Cornia back to Evanston from Ogden for a visit with her granddaughter and great-grandchildren. There is no remote hint in all of the testimony of Mrs. Fox that Mrs. Cornia was incompetent by any stretch of the imagination. In response to the question of Mr. Harris, as to whether or not Mrs. Fox had observed any marked change in her grandmother, she stated that her grandmother seemed to have

trouble keeping her dentures in her mouth and stated further, "she knew us. She knew everyone of us, if that's anything."

Don Cornia, a son, testified as follows:

Q: And did you see any mark changes in her physical capacity during that time?

A: Well, she seems quite healthy, her physical condition.

Q: When she went up to Weston, she seemed like--

A: Yea, she did.

Q: Could she handle her affairs at that time?

A: Well, I think she probably could. (T.132,133)

\*\*\*\*\*

Q: Now, in the last nine months or so, have you notice any marked change in your mother and her physical capacities?

A: Oh, physically she's pretty well, I think.

Q: Have you noticed any change in her since she's left and gone down and lived in Ogden from what you've been able to observe here in Court?

A: Yea, I'd say she's changed.

Q: In what way?

A: Well, she'd always visit with me before, now she won't. (T.133)

\*\*\*\*\*

Q: So, actually Mr. Cornia, you can't point to anything that Grace or Bessie have done to impose upon your mother and take her property from her can you?

A: Well, they've got her to haul that money out of the bank where its always been. (T.142)

Mr. Cornia became concerned when his mother withdrew the savings from the account in Evanston and transferred it to Arizona in joint tenancy with her daughter, but it is apparent from his testimony that he did not understand why this was done and nowhere in the testimony of Mr. Cornia is there an expression or a contention that his mother could not properly manage her property or take care of herself.

The entire context of the testimony of Jerry Cornia is that he was offended because his mother, after she went to Arizona to visit her daughter, Grace, did not return to the trailer home in Weston, Idaho, but remained in Ogden with her daughter, Bessie. (T.154) His testimony in regard to his mother's ability to manage her affairs is as follows:

Q: All right. Now, there was never any question in your mind when your mother was in Weston with you that she could manage her own affairs was there?

A: Pardon? Repeat that will you?

Q: Yes, I will. Excuse me. There never was any question in your mind when your mother lived in Weston, that she could manage her affairs alright, was there?

A: Oh, some. Some, yes.

Q: But you weren't concerned were you?

A: No.

Q: Never did anything about it did you?

A: If she asked me I'd done anything she ask me to do about it.

Q: And you only became concerned when she didn't return from Arizona; is that right?

A: Well, yes, I did.

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Q: So, you don't know that since that time she hasn't been able to properly take care of herself or manage her property, do you?

A: Since what time?

Q: Since she came back from Arizona.

A: I didn't know when she came back.

Q: Well, since whenever it was.

A: I don't know, I haven't been able to see her.

Q: All right. Then you have nothing you can tell this Court here; that since your mother came back from Arizona, she can't properly take care of herself or manage her property. (T.165)

A search of the testimony of Mr. Jerry Cornia indicates only that he was hurt when his mother did not return to Weston. (T.166) And that he became concerned when his mother withdrew her savings account from the bank in Evanston, although he knew nothing about the circumstances surrounding this withdrawal. (T. 166)

In regard to the sole issue in this matter, Billy Lou Cornia, the wife of Don Cornia, testified as follows:

Q: Can you see a change in the mental capacity of you mother-in-law now as opposed to what it was when you knew her back in Woodruff?

A: Mr. Handy: I object to the form of the question, your Honor. I think mental capacity--I don't think that's a proper question.

THE COURT: Sustained.

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's shrug her shoulders "what? I don't know." You know. (T.181)

Q: Was there any discussion about the Bountiful lot at any time while you were in Bountiful?

A: Oh, she said, "I always thought that was mine," and I said, "It is."

Certainly the opinion of the above witness cannot be considered to have much weight in regard to the question of competency, as it relates to Mrs. Cornia's ability to properly manage and take care of herself or her property.

Lea, the wife of Jerry Cornia, gave no testimony whatsoever on direct examination in regard to mental capacity. On cross-examination, she testified as follows:

Q: Then while Mrs. Cornia was living with you up there in Weston, you had no reason to be concerned about whether or not she actually has the mental capacity to handle her affairs, do you?

A: We brought her over there and took care of her for two year because we thought she did need help. She lived two and a half blocks from town in Woodruff, and it was awful lonesome. That's why we took her over there, was to help her.

Q: You took her over there because it was lonesome for her in

Woodruff?

A: Right.

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Q: I'm sure you did, but that wasn't the question. The question was that you had no reason to think she couldn't take care of her affairs.

A: Well, she wanted us to do it.

Q: You had no reason to think she couldn't do it.

A: She never has. Billy did it when she was in Woodruff, and she asked me when she came over there.

Q: Did you fill out the checks and signed them and that sort of thing?

A: Yes.

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Q: All right. So, you haven't been able to see her, so you really have no way of knowing what her mental capacity is?

A: All I know is the day I took her doctor, what the doctor told me about her mental capacity.

Q: But I was talking about since she came back from Arizona.

A: No, I haven't talked to her since she came back from Arizona.

Q: So, you really can't give the Court an opinion as to her mental capacity, can you?

A: (Shakes head in the negative.)

Q: Obviously, if you haven't talked to her.

A: I mean I'm not a doctor. I can't say what her mental capacity is. (T.184,185,186)

Bessie Wadsworth was called as a witness by the Pro-

ponent, and testified as follows:

Q: And are you saying that at the time she filed a cross petition, she was not competent?

A: No, and I'm not saying she's not competent. She's competent and was then. (T.18)

The above witnesses were called on behalf of Proponents, and individually or collectively their testimonies preponderate in favor of a determination of competency, and not sufficient to overcome the presumption of competency, and nothing that they have said supports a contention that Appellant has physical or mental defects which interfere with the rational functioning of the mind.

The witnesses on behalf of the Appellant, in regard to the issue of competency, testified as follows:

Frances Greer, residing in Holbrook, Arizona, was a neighbor of Mrs. Cornia's daughter, Grace McKinnon and had occasion to visit with Mrs. Cornia approximately fifteen or twenty times since August of 1973. In regard to said visits, she testified as follows:

Q: When you would visit, did her answers to your questions seem to be responsive?

A: Yes.

Q: Did she seem to have any difficulty in understanding what you were talking about?

A: No, Sir.

Q: Did she ever seem vague or disoriented or confused?

A: She didn't to me; in fact, I thought for a woman as old as she

was--and I didn't know until today, she was 81--but I thought she was pretty sharp.

Q: Did you ever have any reason to question whether or not she was mentally competent?

A: No, Sir. (T.31,32)

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Q: All right. Do you have an opinion as to whether or not Mrs. Cornia could unassisted properly manage and take care of herself or her property?

A: Well, I mean I'm sure she may need some--well, as far as her mental, being able to think, I'm sure she can think for herself. She may have to have, physically, cars to take her places or things like that, if that's what you mean. (T.33)

Grace McKinnon, daughter of Appellant, Mrs. Cornia, testified as to her mother discovering that Bountiful lot was in Don and Jerry's name (T.38), and the reasons for Mrs. Cornia withdrawing her savings from the bank in Evanston and depositing them in the bank in Arizona with Mrs. McKinnon as a joint tenant; and that the decision was solely Mrs. Cornia's. (T.39,40) She testified that her mother was in good health, (T.41) and testified as follows in regard to her mother's ability to care for herself and her property:

Q: Who makes your mother's decisions for her?

A: She makes her own decisions, very much so, she makes her own decisions.

Q: Do you think she can take care of herself?

A: Yes, Sir, I do.

Q: Do you think she can manage her own property?

A: Yes, Sir, I do.

Q: Does she know what property she has or had?

A: She knew what property she had. I'm not sure she knew all the sections my dad had.

Q: You mean the ranch land?

A: Yes.

Q: Did she ever discuss with you what property she had acquired as a result of your father's estate?

A: Well, no. We really didn't discuss the property that she had. She knew she had the property with her home on in Woodruff, and I think the lot across and also this lot that she knew she had in Bountiful that was given to her by her parents.

Q: And obviously, she was well aware that she had an account at the First National Bank in Evanston; is that right?

A: Yes.

Q: Then are you saying that at the time she went to the First Nation Bank to inquire about her savings account she also inquired about the time savings certificates?

A: Yes, Sir, we did.

Q: Are you saying that she was aware that she had them at that time?

A: Yes, she was aware she had them. (T.50)

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Q: Do you feel at this time your mother knows what property she has?

A: Yes, Sir. What she should have she knows.

Q: And you feel that she can take care of it all right?

A: Yes, sir.

Q: Without any help from anybody else?

A: It's hers.

Q: Other than what you've indicated, writing checks?

A: Yes, sir, I'm sure she can.

Q: And you're well aware she does not want a guardian appointed for her, aren't you? (T.51)

Robert Wadsworth, son-in-law, who married into the family in 1946, and with whom Mrs. Cornia had been living since August, 1974, up until the time of the hearing, testified as follows:

Q: What's your observation been of Mrs. Cornia's physical condition since say her husband died and at the present time?

A: Well, she's very, very, strong physically, I think, for a woman 81 years old. I think she's mentally alert, but I think she needs her hearing aid, and when she has her hearing aid, I think she's quite responsive, quite alert. (T.192)

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Q: Do you have an opinion as to whether or not Mrs. Cornia can manage her own affairs?

A: Yes, sir.

MR. HARRIS: I object.

THE COURT: Well, he changed it and put the same words you did and I let you go, so I'll allow it.

A: Yes, sir, I think she is.

Q: Do you have any question about that?

A: No, sir. She's 81 years old, but I think with glasses, with her hearing aid, I think she's quite competent.

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Q: Who makes her decisions for her?

A: Mrs. Cornia does. (T.194)

Mrs. Cornia herself testified at great length, being first called as a witness for the Proponents, and later testifying on her own behalf. She is extensively examined and cross examined for seventy-two (72) pages of the transcript. From the time of her birth to the time of the hearing (T.190,191) in regard to the property that she had disposed of, (T.109,111,118) the members of her family, (T.102,103) in regard to the probate of her husband's estate and transactions involving the purchasing of the time certificates or deposit and the reasons therefore, (T.64,65,66,120) the withdrawal of her funds from the Evanston bank and the reasons therefore, (T.58,59,61,117) date of her husband's death, (T.55) dates and places where she lived, (T.56,57) the execution of the deed, (T.84) Will, (T.94) and trust agreement, (T.94) and at no time did any of the witnesses contradict her or show that her memory was faulty.

It is true that Mrs. Cornia, at the hearing in February, 1975, did not recall executing the warranty deed to the Bountiful property, the trust agreement five days later in regard to the same transaction, and the Last Will and Testament, dated January 8, 1972. Her explanation for this is that she was extremely hard of hearing, and was embarrassed because of this and did not ask questions. She had impaired vision, as her doctor

and other witnesses testified to, (T.87,88) and had signed a great many papers in regard to her husband's estate and did not question them. (T.111,94)

Also, respondents will make much of the fact that when they became alarmed upon knowing that the money had been withdrawn from the savings account in the First National Bank in Evanston, Billy Lou, the wife of Don Cornia, asked Mrs. Cornia what happened to the money. Billy Lou Cornia testified that Mrs. Cornia merely shrugged her shoulders. Mrs. Cornia said in response to the inquiry, "It wasn't any of their affair. It was my money. It was in a safe place." (T.99) It must be remembered that the interrogator here was Billy Lou Cornia who had withdrawn several sums of money from the account without the knowledge or permission of Mrs. Cornia.

What then is the sum and substance of the present case. Counsel for Appellant and Respondents put the alleged incompetent through a very searching, persistent, and severe examination and cross examination on matters pertaining to her life, her family's life, unfamiliar matters regarding law and the probate of her husband's estate, what she had acquired from her husband's estate, the purchase of the time certificates of deposit, and the setting up of the joint tenancies and regard to them, the property she owned, withdrawal of funds from her savings account and the reasons therefore, where she had lived and traveled to after her husband's death, the execution of legal documents. What was the result of this examination? Here is the picture painted of the alleged incompetent:



She is 81 years of age, has had a normal education for a person of her time and period in history; did the work of a mother and housewife on the ranch; after her husband's death, was lonely; sought the company of her daughters and even wanted to live in a "home" where she could associate with older people and talk to them; didn't remember signing certain legal documents; did an adequate job of estate planning in regard to the proceeds from her husband's estate in buying the time certificates of deposit in joint tenancy with her sons and grandsons; upon not having access to her bank statements became concerned about what was happening to her savings account; upon learning that it was dwindling and that several withdrawals of \$500.00 a piece had been made from the account by Billy Lou Cornia, a daughter-in-law, without Mrs. Cornia's consent; withdrew the money from that account and placed it in a bank in Arizona in her name and her daughter's name; perhaps did not understand some of the things she did in regard to the probate of her husband's estate and the executing of the warranty deed to the Bountiful property, the trust deed in regard to the same, and the executing of her Will because of being hard of hearing and having impaired vision. At her age and with her physical disabilities, she needed someone to drive her to different places, assist her in filling out her income tax returns, writing checks to pay her bills.

None of the above, taken from any viewpoint, establishes that Mrs. Cornia had physical or mental defects which interfered with the rational functioning of her mind, and the evidence

presented by the Proponents did not overcome the presumption of competency.

Mental competency is presumed and in order to establish mental incompetency, fraud or undue influence, the evidence must be clear, cogent, and convincing. (Binder vs. Binder 309 P.2d,1050, Washington) Although this is a Washington case cited, it supports the general law and the reasoning of the Court in the case of IN RE VALENTINE'S GUARDIANSHIP. (294 P.2d,696, Utah)

#### CONCLUSION

It is commendable that the Court was concerned about Mrs. Cornia and that she should have the property that was hers, for her use and benefit. However, this concern of the Court nor the evidence produced in the hearing is sufficient to warrant the burdening this lady with the stigma of being "Incompetent." She is rightfully resentful of the finding of the Court and in spite of her age, impaired hearing and vision, should have the onus and stigma of incompetency removed from her and the judgment of the District Court of Cache County reversed.

Respectfully submitted,

GEORGE B. HANDY

Attorney for Appellant