

1988

Mary Jean Freebairn v. J. Russell Scott and Le R Burton : Brief of Appellant

Utah Court of Appeals

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David J. Jordan; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Defendants/Respondents. Timothy C. Houpt; Barry Lawrence; Jones, Waldo, Holbrook & McDonough; Brian M. Barnard; Attorney\'s for Plaintiff/Appellant.

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UTAH COURT OF APPEALS
BRIEF

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88-570 CA

IN THE UTAH COURT OF APPEALS

MARY JEAN FREEBAIRN,	:	
	:	
Plaintiff and	:	
Appellant,	:	
	:	
vs.	:	Case No. 880570-CA
	:	(Priority No. 14b.)
J. RUSSELL SCOTT and	:	
Le R BURTON,	:	
	:	
Defendants	:	
and Respondents.	:	

BRIEF OF PLAINTIFF/APPELLANT
MARY JANE FREEBAIRN

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT FOR SALT
LAKE COUNTY, JUDGE ROKICH

David J. Jordan
VAN COTT, BAGLEY,
CORNWALL & MCCARTHY
50 South Main Street
Suite 1600
Salt Lake City, Utah

Attorneys for Defendants/
Respondents

Timothy C. Houpt
Barry Lawrence
JONES, WALDO, HOLBROOK
& McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

Brian M. Barnard
Utah Legal Clinic
214 East 500 South
Salt Lake City, Utah 84111-3204

Attorney's for Plaintiff/Appellant

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COURT OF APPEALS

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David J. Jordan
VAN COTT, BAGLEY,
CORNWALL & MCCARTHY
50 South Main Street
Suite 1600
Salt Lake City, Utah

Attorneys for Defendants/
Respondents

Timothy C. Hought
Barry Lawrence
JONES, WALDO, HOLBROOK
& McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

Brian M. Barnard
Utah Legal Clinic
214 East 500 South
Salt Lake City, Utah 84111-3204

Attorney's for Plaintiff/Appellant

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BRIEF OF PLAINTIFF/APPELLANT

JURISDICTION

Jurisdiction of this appeal is conferred by Utah Code Ann. § 78-2-2(3)(j) (Replacement Vol. 9 1987). The appeal was filed in the Supreme Court of the State of Utah and poured over by order of the Supreme Court on September 27, 1988.

NATURE OF THE PROCEEDINGS BELOW

This appeal arises out of an action by an adjudicated incompetent person, Mary Jane Freebairn, against her former guardian, J. Russell Scott, for an accounting and surcharge on account of a wrongful acquisition and subsequent resale by the guardian of property of the estate. Le R Burton gave a guardianship bond and was named as a defendant in that capacity. The claims were heard by The Honorable John A. Rokich, Third District Judge, commencing January 12, 1988. The court found for the defendants, and judgment was entered dismissing plaintiff's action.

ISSUES PRESENTED FOR REVIEW

1. Is a sale of real property void as a matter of law where (a) the seller was declared incompetent within a few weeks after executing an agreement to sell the property; (b) the buyer petitioned for appointment as the seller's guardian and was declared the seller's guardian before a deed

was given; (c) the deed was signed by the seller after she was declared incompetent; and (d) no judicial approval of the sale nor confirmation of the sale was sought by the guardian?

2. Did Mary Jane Freebairn have the mental capacity to enter into a contract to sell her property to Russell Scott and to execute a conveyance to him?

3. Did the sale unfairly benefit Mr. Scott as the dominant party to a confidential relationship?

4. Should a constructive trust be imposed upon the proceeds of Mr. Scott's sale of the land he traded for Miss Freebairn's property?

STATUTES REQUIRING INTERPRETATION

Provisions of Former Utah Probate Code:

§ 75-13-32. Duties of guardian of property. A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the court, but must, so far as it is in his power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the ward at the close of his guardianship in as good condition as he received it, natural wear and tear excepted. (Emphasis supplied).

§ 75-13-33. Power to sell, mortgage and lease. Every guardian must manage the estate of his ward, frugally and without waste, and apply the income and profits thereof, as far as necessary, for the comfortable and suitable maintenance and support of the ward and his family, if any; and if such income and profits are insufficient for that purpose, the guardian may sell, mortgage or lease the real estate, upon obtaining an order of the court therefor, as provided, and must

apply the proceeds thereof as far as may be necessary for the maintenance and support of the ward and his family, if any. (Emphasis supplied).

§ 75-13-41. Sales, mortgages and leases. When a sale of the property a ward is necessary to maintain him or his family, or to maintain and educate the ward when a minor, or to pay the debts and expenses of guardianship, or when it appears to the satisfaction of the court that it is for the best interests of the estate that the real or personal property, or some part thereof, be sold, mortgaged or leased, the guardian may mortgage or lease the same, upon an order of the court; and the guardian without an order of sale and without confirmation may sell such personal property of the ward as is in decedent estates to be sold without confirmation; and the guardian without an order of sale, but subject to confirmation of the court, may sell other personal property and the real property of the ward. The provisions of this title respecting the selling, mortgaging and leasing of the property of decedents and the powers, duties, rights and obligations thereby conferring and imposed shall, as far as applicable, govern the selling, mortgaging and leasing of property under guardianship (Emphasis supplied.)

§ 75-10-2. Sale to be reported to and confirmed by court. All sales must be reported under oath to, and confirmed by, the court before the title to the property sold passes, except as hereinafter otherwise provided.

§ 75-10-3. Sales - Report and confirmation. The executor or administrator may sell any property of the estate without order of the court, at either public or private sale and with or without notice as he may determine, but must make return of such sales in all cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such direction must be observed. In any case, no title passes unless the sale is confirmed by the court.

STATEMENT OF THE CASE

J. Russell Scott petitioned the Third District Court for Salt Lake County on February 27, 1971 for a declaration that Mary Jean Freebairn was incompetent and requested appointment as her guardian. The petition was granted on March 22, 1971. In April, 1983, Miss Freebairn brought an action to terminate Mr. Scott's guardianship of her, for an accounting of sums paid to and disbursed by Mr. Scott during the guardianship, and for a surcharge for damages arising out of the wrongful disposition of her property. Mr. Le R Burton was named as a defendant as a person who gave a bond to ensure Mr. Scott's performance as guardian. After a hearing in October, 1983, the court removed Mr. Scott as guardian and required him to prepare an accounting. The court found that Miss Freebairn remained incompetent, however, and ordered the appointment of new conservators, (The enactment of the new Probate Code changed the applicable nomenclature). The Department of Social Services was appointed conservator of her person and substitute conservators were appointed conservators of her estate.

The action for damages in the nature of a surcharge was set down for hearing. By order of October 28, 1987 the Honorable John A. Rokich approved Miss Freebairn's retention of counsel of record to represent the interest of her estate in

this matter. The claim against Mr. Scott was the subject of a hearing commencing January 12, 1988. On March 11, 1988, Judge Rokich issued a Memorandum Decision with Findings of Fact and Conclusions of Law, and a Final Judgment in favor of the defendant was entered April 29, 1988. This appeal by the plaintiff followed.

SUMMARY OF ARGUMENTS

1. The sale of Mary Jean Freebairn's property to Russell Scott is invalid as a matter of law for three reasons. First, Mr. Scott as Miss Freebairn's guardian, was not permitted to purchase property of his ward. Second, court approval of the sale was never obtained, and the lack of an order authorizing the sale invalidates it. Finally, once a guardian was appointed, Miss Freebairn lost the legal capacity to validly deed away her property, and thus the deed she gave to Mr. Scott was void.

2. Even if the transactions were not invalid as a matter of law, they fail because Miss Freebairn lacked the requisite mental capacity to contract or execute a deed. The trial court's finding to the contrary is clearly erroneous because the judicial finding of incompetency raised, at the very least, a presumption of lack of capacity which was not rebutted by the evidence.

3. If the transaction is not set aside for either of the foregoing reasons, it should be nullified since it resulted from a breach of a confidential relationship. It is indisputable that the plaintiff and defendant were parties to a confidential relationship. A presumption therefore arose that the transaction was unfair. This presumption was not rebutted because the evidence was overwhelming that the property was sold for less than its fair market value, that improper deductions were taken from the purchase price, and that Mr. Scott profited significantly by his acquisition of his incompetent ward's property. The very same property resold less than a year after the disputed transaction for more than twice what the plaintiff was paid.

4. As Miss Freebairn's guardian, Mr. Scott is deemed to have held her property in trust, and a constructive trust should be imposed upon the profit he earned when he traded her property for another parcel and then sold that parcel at a profit.

STATEMENT OF THE FACTS

1. Plaintiff Mary Jean Freebairn and defendant J. Russell Scott are first cousins. Their mothers were sisters. They both inherited real property from a common uncle, Samuel Russell in 1957. The property was undeveloped

land at the mouth of Little Cottonwood Canyon in Salt Lake County. Mr. Scott inherited approximately four hundred and fifty acres and Miss Freebairn, approximately sixty acres (Tr. 4-6).

2. Some time in the early sixties or previously, Miss Freebairn began exhibiting signs of a mental disease which has been variously described as paranoid schizophrenia or a paranoid delusional disorder (Tr. 334-335; 486).

3. Prior to January, 1971, Miss Freebairn made the following assertions to Mr. Scott, which illustrate her disorder:

A group of people she referred to as "the gang" or "the Cannon Committee" was "after her." (Tr. 55, 90). The group included former governor James D. Cannon and his wife, Elaine Cannon. (Tr. 61) She thought they were trying to "get her." (Tr. 55) She thought she was followed (Tr. 59) and spied upon. (Tr. 56) She believed that the editor of the Deseret News, Mr. William Smart, deliberately placed objectionable messages about her in the newspaper in the form of cartoons and other material with hidden meanings to defame her. (Tr. 56-57).

Miss Freebairn told Mr. Scott that her phone was bugged and that there was a television camera placed in her bathroom through which people observed her. (Tr. 58).

Miss Freebairn indicated that she believed that she was "watched over" by Stuart Udall who flew airplanes over her home for her protection. (Tr. 61-62). Mr. Scott was aware that Miss Freebairn had written the Department of Justice, the Federal Bureau of Investigation and Senator Frank Moss about these problems. (Tr. 60-61, 63)

4. Miss Freebairn corresponded with a number of people prior to January, 1971, about these matters, and some of her letters were received in evidence. (Exhibit 11, Tr. 60). They include LDS Church authorities, law enforcement agencies, Mr. Cannon and Mr. Udall. In one letter she explained that during a two-year period from 1966 to 1968 she was required, on account of interference by the "Cannon Committee" to change dressmakers, find a new physician, a new lawyer, a new insurance agent, a new bank, and a new hair dresser (Ex. 11, P. 0000124, Tr. 60). She also explained that in February 1967, the Newspaper Agency Corporation had placed an industrial spy on the staff of "Field and Stream Magazine" in New York in order to force her to resign a job she had held for one month. (Ex. 11, Page 0000128, Tr. 60). She stated that the Newspaper Agency Corporation learned in November, 1967 that she was about to hire a New York attorney to sue them but that the Newspaper used cartoons of a threatening nature to let her know that she

could expect "evil consequences" for doing so. (Exhibit 11, P.0000129, Tr. 60). Examples of her correspondence which were received into evidence are included as Appendix "A".

5. Mr. Scott was told some time prior to July 1969 that psychiatric treatment had been recommended for Miss Freebairn. (Tr. 64).

6. During the 1950's and early sixties, Miss Freebairn was intermittently a student at Columbia University in New York City, but never earned a degree, and was intermittently employed in the East and in Salt Lake City. (Tr. 262-267). Her last employment in Utah was in 1960 with the BYU Adult Education Center. She believes she was required to leave that job on account of negative reports to her employer from her enemies at the Deseret News, and recalls that her employer told her, "I don't think you're going to get beyond their reach." (Tr. 201).

7. Miss Freebairn's first business dealings with Mr. Scott occurred in June and October, 1964. She told him she was in debt and needed to borrow money. She executed an agreement in June to sell Mr. Scott ten acres of her property which adjoined Danish Road, with an option to repurchase. The sales price was \$3,000 an acre. In October she was in debt again and sold another five acres at the same price, with a similar option to repurchase. (Tr. 10-15). The option to

repurchase was extended until September, 1965 because Miss Freebairn believed that there were developers who wanted to build another Disneyland on her property. (Tr. 15-16, Tr. 181). No one on behalf of Walt Disney ever contacted Mr. Scott about building another Disneyland on her property or his. (Tr. 16).

8. In 1966, Mr. Scott formed the Scott Investment Corporation with himself as president, his wife as vice president and Mr. Le R Burton as secretary/treasurer. (Tr. 17). Mr. Burton was a realtor who represented Mr. Scott in various real estate transactions, and, in addition to serving as an officer in the Scott family corporation, had his own real estate office in an office building owned by Mr. Scott, where Mr. Scott's office was located. (Tr. 720-722).

9. Mr. Burton handled a sale of Miss Freebairn's property to a Mr. Wilstead in 1967, which included a promise by the seller to install a water line to the property. (Tr. 661-662). Burton, as Miss Freebairn's realtor, knew she was not personally able to install a water line but thought she would sell other property to raise the funds to do so. (Tr. 729).

10. When Miss Freebairn was unable to meet her obligation to install the water line, she went to her brother, Samuel Freebairn for help. (Tr. 214-215). They entered into a

verbal agreement whereby Samuel Freebairn and his wife Agnes Freebairn would purchase the bulk of his sister's remaining property, develop the property, and pay her \$3,000 per acre on a "lot release" basis, with a minimum annual payment of \$7,000. The agreement was later reduced to writing and the property was made subject to a trust agreement with Security Title Company. (Ex. 32P, Tr. 213, the trust agreement is attached hereto as Appendix "B"). Prior to the drafting of the written agreement, Russell Scott assisted Mr. Freebairn in installing the water line by loaning him money to purchase material and by performing some of the labor. The water line was installed on the property which became subject to the agreement with her brother, but moved water to the Wilstead property. (Tr. 376-377, 27-28).

11. The trust agreement between Miss Freebairn and her brother and sister-in-law was drafted by Herbert Halladay, an in-house attorney with Security Title Company, on the basis of information given to him by Samuel Freebairn in May, 1968. Among his notes from that meeting placed in his file is the statement: "Russell Scott financed water lines and Sam promised to pay him back." (Tr. 378). The written agreement itself, in the initial provision which recites the consideration given by the party, states:

AND WHEREAS approximately one year ago First Beneficiary (Miss Freebairn) verbally agreed to sell and Second Beneficiary (Mr. Freebairn, her brother) verbally agreed to purchase said premises and Second Beneficiary has heretofore caused said property to be platted and engineered and has installed some water lines which have materially assisted First Beneficiary by enabling First Beneficiary to ful-fill her commitments to provide water to Robert Wilstead and Clifford Green to whom she has heretofore sold a piece of adjoining property,

The agreement also provides that:

Second Beneficiary shall and hereby agrees to pay all costs and expenses of said subdividing including, but not limited to, surveying, platting, engineering, installation of water and sewer lines, culverting, grading and surfacing of streets and such other off-site improvements and utilities as may be required, the intent being that First Beneficiary shall be under no obligation or expense in connection therewith. Second Beneficiary further agrees to indemnify and save First Beneficiary harmless from any and all loss, cost or expense which First Beneficiary may suffer or sustain in connection with said subdividing and improvements including those heretofore installed and constructed. First Beneficiary is aware of the fact that Second Beneficiary has borrowed approximately \$15,000.00 from Russell Scott to finance the construction of said off-site improvements heretofore installed and Second Beneficiary hereby agrees to pay the same.

(Exhibit 32 P, Tr. 213).

from Agnes Freebairn her interest in those lots along with the assumption of the obligation to repay the balance of the money Samuel and Agnes had borrowed to develop the property. The agreement provided that in order to secure payment by the buyer, Miss Freebairn was to have no mortgage or remaining interest in the property. Payments of \$275 per month were to be made in the following manner:

All of the rights and benefits to seller arising as a part of this agreement are to be placed in a protective trust for the purpose of safeguarding the assets and welfare of the seller to the extent that the income she needs for personal welfare cannot be preyed upon by others. J. Russell Scott is to act personally as trustee for such trust and to receive all money and disburse it according to the instruction of the trust with general outline to be \$200 per month to seller including taxes and \$75.00 to current bills.

(Exhibit 12P, Tr. 748-750).

16. Mr. Scott testified that the \$8,000 credit on the purchase price consisted of \$6,000 which he charged Miss Freebairn for a portion of the water line loan made to Samuel Freebairn, and \$2,000 in other debts. (Tr. 79).

17. Prior to signing the agreement, Miss Freebairn had no advice from any attorney, or from anyone at Security Title. She testified that she was not prepared to discuss her

property and would sign the agreement only with the understanding that a lawyer would look at it later. She testified that she did not understand how the purchase price was calculated, and thought she should be paid more for her property. (Tr. 238-246).

18. Miss Freebairn testified that she left Mr. Burton's office without a copy of the agreement and later went to Mr. Duncan, whom she regarded as "Russell's lawyer" who told her she had already exchanged her property for an unsecured note. (Tr. 246).

19. Miss Freebairn testified that she had hoped that Stuart Udall would keep her from having to go through with the deal since he had enough money to fly planes over her house every hour, but that she was unable to reach him. She said she was sick about it. (Tr. 247-248).

20. On February 27, 1971, J. Russell Scott executed under oath a Petition for Appointment of Guardian which is attached hereto as Appendix "E." La Mar Duncan appeared on the petition as attorney for the petitioner, Mr. Scott. The petition alleges, inter alia, that Mary Jean Freebairn is incompetent and

is now living alone and is incapable,
without the assistance of some other person,
to properly manage and care for her
property, and by reason thereof, would be

likely to be deceived or imposed upon by artful or designing persons . . . that it is necessary that some fit and proper person be appointed the guardian of said incompetent, to care and properly manage the properties and estate of said incompetent.

See, Appendix D. The petition identifies as her assets the sum of \$100.00, her residence, and real property described as "raw undeveloped ground suitable for subdividing into home sites . . . of the approximate value of \$57,000.00 with an annual rental value of approximately \$600.00". No mention is made of the existence of a sales contract between Mr. Scott the petitioner, and Miss Freebairn, the alleged incompetent.

Mr. Scott read the petition before signing it. Mr. Scott took no action to determine the value of the land which is described in the petition other than to assign it the value of his purchase contract. (Tr. 100-101). Mr. Scott admitted that there was no change in Miss Freebairn's mental competency between January 13 and the earnest money agreement was signed and February 27, the date he made these allegations. (Tr. 117).

21. On March 1, 1971, a closing was scheduled and held. However, no deed was given by Miss Freebairn to the Scott Corporation because it was recognized that the property was subject to a trust agreement with Security Title Company which needed to be terminated. (Tr. 109). On that day

Miss Freebairn telephoned Herb Halladay, the Security Title Company attorney, who made the following notes about their conversation:

Duncan wants Mary Jean F. to establish a guardian for her. Alleges William Smart at Deseret News is guilty of a conspiracy ag. her. Russell Scott now tired of helping her and only has done so in the past because he wants her land. They offered her \$500.00 per month income. She said \$250.00 for her and \$250.00 for her nieces and nephews college educ. Cut value of contract about \$20,000--forcing her to pay for water pipe. William Smart involved in her life--very complicated--the xeroxing she has done would reveal the whole story. Sending people to her house at all hours to entrap her. She complained to Bruce McConkie and visit stopped.

(Exhibit 41P, Tr. 398-391) (Appendix E).

22. On March 2, 1971 Scott's petition for appointment as Miss Freebairn's guardian was filed with the Third District Court. The petition was granted by order of the Third District Court on March 22, 1971. (Tr. 111)

23. On March 23, 1971, Miss Freebairn herself executed a deed conveying the property which had been subject to the earnest money agreement to the Scott Investment Corporation. On the following day, March 24, 1971, J. Russell Scott signed a deed on behalf of the Scott Investment Corporation conveying the deed from the corporation to himself personally. (Tr. 113, Tr. 118).

24. In January, 1972, Miss Freebairn's property was sold by Mr. Scott as part of a four-way exchange which had been negotiated at least a month beforehand. Mr. Jerry Young was the purchaser of Miss Freebairn's property and paid \$6,000 an acre for it, more than twice the amount which Mr. Scott paid Miss Freebairn for the property less than a year before. (Tr. 123-128).

25. As a result of the four-way trade, Mr. Scott received title to real property located under an office building which he had purchased previously. He had previously held a long-term lease of the same ground. In addition to the property he acquired from Miss Freebairn the year before, Mr. Scott traded five acres of land which he had obtained from Miss Freebairn as a part of the loan transactions in 1964. In November, 1974, Mr. Scott sold both the office building and the land under it in one package. The building and ground sold together for \$777,909.68. According to his own records and his accounting to the Internal Revenue Service, 27% of the combined sales price represented the purchase price of the ground, or \$208,955.00. (Tr. 128-136). Mr. Scott paid Miss Freebairn \$89,564.57 in monthly payments of \$250.00, the last payment of which was made in 1981, for her property, which included the credits for sums he claimed had been owing to her previously. According to Mr. Scott's records, he miscalculated the interest

owing and overpaid Miss Freebairn by \$7,967.63. In addition, during the period of his guardianship, Mr. Scott made various payments to Miss Freebairn which he identified as loans or gifts. (Tr. 781-784).

26. On November 16, 1982 Mr. Scott signed a Verified Answer to a complaint in a collection action against Miss Freebairn filed in the Third District Court. (Ex. 30P, Tr. 186-187). In it he swore that he had read the document and that its contents were true. He stated in paragraph 3, as follows:

Further answering and by way of affirmative answer, heretofore, on the 22nd day of March, 1971, the above-entitled court in probate number 57693, adjudicated the defendant an incompetent, because of certain mental disorders; that defendant is therefore unable to enter into any contract whatsoever. Any attempts on the part of the plaintiff are null and void.

(Tr. 188) (emphasis added). A copy of Mr. Scott's Verified Answer is attached hereto as Appendix "F".

27. When this action was filed against Mr. Scott and Mr. Burton in May, 1983, Mr. La Mar Duncan appeared and filed an answer on their behalf, again representing Mr. Scott in a position adverse to that of Miss Freebairn. (See Case File, Document No. 0024, attached hereto as Appendix "G".)

28. Plaintiffs' expert real estate appraiser testified that the real property which Mr. Scott obtained from Miss Freebairn had a market value of \$5,000.00 per acre at the time of the transaction in January, 1971. He relied upon the "comparable sales" or "market data" approach. (Tr. 445).

29. Relying upon the same approach (and excluding the trust agreement between Miss Freebairn and her brother) defendants' expert witness testified that the same real estate was valued at \$3,100.00 per acre at the time of the transaction. Using other methods which plaintiff contends were objectionable, defendants' expert claimed a sales price of \$2,600.00 was consistent with the property's value. (Tr. 597-600).

ARGUMENT

POINT I

THE SALE OF MISS FREEBAIRN'S PROPERTY TO MR. SCOTT IS INVALID, AS A MATTER OF LAW.

A. A GUARDIAN IS NOT PERMITTED TO PURCHASE HIS WARD'S PROPERTY.

It is generally held that

where a guardian purchases the property of his ward, directly or indirectly, the ward may have the sale set aside without a showing of actual fraud or injury, . . . [and that] any investigation into the fairness or unfairness of the

transaction . . . or good faith of the guardian in consummating the sale is immaterial.

39. C.J.S. "Guardian & Ward", § 99 (1976); see also In Re Estate of Howard's, 133 Cal. App. 2d 535, 284 P.2d 966 (Cal. App. 1955); In the Matter of Guardianship of Eisenberg, 42 Wash. App. 761, 719 P.2d 187 (Wash. App. 1986).

This rule is a variant of the general rule of trusts that

a trustee with power to sell trust property is under a duty not to sell to himself either by private sale or at auction whether or not the trustee makes a profit thereby . . . [and that] it is immaterial that the trustee acts in good faith . . . and that he pays a fair consideration.

Restatement (2d) of Trusts, § 170 (1957).

This is the law of Utah as well, as articulated by the Utah Supreme Court in Farley v. Farley, 19 Utah 2d 301, 431 P.2d 133. (1967):

One who is a trustee cannot purchase or deal with the subject of the trust nor place himself in an attitude antagonistic to the trust . . . This rule is unyielding and a trustee may not, under any circumstances, be allowed to have any dealings in the trust property with himself or acquire any interest therein.

Id., 431 P.2d at 137-138.

Although an earnest money agreement was signed a few weeks before Mr. Scott executed the petition to establish his guardianship, the order of guardianship was effective the day before Mrs. Freebairn executed a deed to Mr. Scott for the property. The purchase price was not paid in one sum but in monthly installments which continued for over ten years. Because the transaction in the present case involves such a conveyance by a ward to a guardian, the transaction as between Mr. Scott and Miss Freebairn is void.

B. THE DEED FROM MISS FREEBAIRN TO
MR. SCOTT IS VOID FOR LACK OF
JUDICIAL AUTHORIZATION.

Even if a conveyance by a ward to a guardian were not absolutely prohibited, no deed by the ward to the guardian, or subsequent deed by the guardian to a third party, can be valid in the absence of court approval.

Pertinent provisions of Utah's former Probate Code, in effect at the time of the disputed transaction, have been set forth previously. In summary, former Utah Code Ann. § 75-13-32, which described the duties of a guardian, states that a guardian must not " . . . make any sale of such property [i.e., property of the ward] without the order of the court." Utah Code Ann. § 75-13-32 (repealed and replaced 1975).

Sections 75-13-33, and 75-13-41 reiterated the power of a guardian to sell a ward's property only with prior court approval or upon "confirmation" of the sale. Utah Code Ann.

§§ 75-13-33, 75-13-41 (repealed and replaced 1975).

Section 75-13-41 incorporated by reference to the provisions of the Probate Code relating to decedents' estate for a definition of approval by confirmation. Utah Code Ann. § 75-13-41 (repealed and replaced 1975).

The confirmation provisions required that a verified petition be filed by an executor stating the reasons why a sale was in the interest of the estate, and, if the sale were by private rather than public auction, proof that the property had been appraised within a year and that the purchase price was at least 90% of its appraised value. Utah Code Ann. §§ 75-10-12, 75-10-16 (repealed and replaced 1975). If the court found that the sale was not in the interest of the estate, it could vacate the sale and order acceptance of a different offer. Utah Code Ann. § 75-10-15 (repealed and replaced 1975). Most importantly, it is clear that title to real property did not pass unless the required return was made to the court and unless an order of confirmation was issued:

§ 75-10-3. Sales - Report and Confirmation. The executor or administrator may sell any property of the estate without order of the court, at either public or

private sale and without notice as he may determine, but must make return of such sales in all cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such direction must be observed. In any case, no title passes unless the sale is confirmed by the court.

Utah Code Ann. § 75-10-3 (repealed and replaced 1975) (emphasis added).

The Utah Supreme Court held under the old code that, except as provided by statute, " . . .the general guardian is not authorized to sell the property of the ward or to make a contract concerning the sale of the same." In Re Hansen's Guardianship, 67 Utah 256, 247 P. 481 at 484 (1926). As the Supreme Court of Kansas noted about a statute similar to ours in In Re Younkin's Estate, 158 Kan. 431, 147 P.2d 726 (1944):

. . . the guardian of the estate may sell any real estate of an incompetent whenever it shall be determined by the court that such sale is for the best interests of the ward and his estate. It is therefore clear a guardian's sale always remains subject to the consent and approval of the probate court. In the final analysis the sale is therefore passed upon and in reality is a sale by the court, the deed being executed by the guardian of the ward, his legally appointed representative.

Id., 147 P.2d at 729 (emphasis added).

When Mr. Scott petitioned for a declaration that Miss Freebairn was incompetent and sought appointment as her guardian, he did not disclose the existence of an agreement between himself and Miss Freebairn concerning sale of the property. Furthermore, he did not seek court approval for the sale prior to Miss Freebairn's execution of the deed. In the entire twelve and a half years of his guardianship of Miss Freebairn, during ten of which he was doling out monthly payments pursuant to their contract, he never sought court approval of the transaction and never obtained an order of confirmation.

The sale from Miss Freebairn to Mr. Scott was not authorized or confirmed by the court and, therefore, was never valid.

C. MISS FREEBAIRN LACKED LEGAL
CAPACITY TO CONVEY TITLE TO ANYONE
AFTER A GUARDIAN WAS APPOINTED.

In most jurisdictions, a person who has been found mentally incompetent and who has had a guardian appointed, is rendered legally incapable of executing a valid conveyance of his property, and deeds given by him are thus void. See, Gibson v. Westoby, 115 Cal. App. 2d 273, 251 P.2d 1003 (Cal. App. 1953); see also, Citizens State Bank and Trust Co. of Hiawatha v. Nolte, 226 Kan. 443, 601 P.2d 1110 (1979); Horton v. Lothschultz, 43 Wash. 2d 132, 260 P.2d 777 (1953). Other

jurisdictions regard such deeds as merely voidable and protect good faith purchasers who were ignorant of the guardianship. Under either rule, the deed from Miss Freebairn to Mr. Scott, executed the day after the order of guardianship was signed, is invalid.

The Utah Supreme Court has never directly addressed the question of whether there are any circumstances under which a deed given by a person adjudged incompetent can be valid or whether such a deed is void or merely voidable. The question as it relates to the contractual capacity of an incompetent was considered in the case of a person who had been declared incompetent under a federal Veterans' Guardianship Act. The Utah Supreme Court noted in Home Town Finance Corporation v. Frank, 13 Utah 2d 26, 368 P.2d 72 (1962), that the requirements for appointment of a guardian under the federal act were more lenient than those of our own statute and noted that Utah statutes "probably required an adjudication that an adult person is incompetent to manage his business affairs." Id. 368 P.2d at 75. That case concerned the enforceability of an agreement by the ward to pledge his car as security for a loan. The guardian, a bank, had only been given control of the ward's bank account. It was conceded by the lender that he could not reach sums actually placed in trust with the guardian. However, the court held that under the federal act,

appointment of a guardian created a rebuttable presumption of incapacity to contract, and that upon proof that the ward was actually competent at the time he pledged his car, the agreement could be enforced. Id. 368 P.2d at 76.

The contractual capacity question was also considered by the Court of Appeals for the Tenth Circuit applying Utah law in Brisacher v. Tracy Collins Trust Company, 277 F.2d 519 (10th Cir. 1960). Because the trial court found that the ward had ratified his contract after his capacity had been judicially restored, the Court of Appeals did not reach the question of whether in the absence of subsequent ratification the contract would have been enforceable. While recognizing that capacity to contract and competency under the Utah Probate Code may have involved different standards, the court observed that

It is of course fundamental that a ward is not free to deal with his property when under the shelter of a valid and existing guardianship. Such indeed is the very purpose of the guardianship and were the rule otherwise the guardian could neither execute his trust nor could third persons rely upon the authority of the guardian. The rule appears conclusive where the rights of those who deal with the guardian are concerned and where conflict exists between guardian and ward.

Id. 277 F.2d at 521.

In the Matter of Estate of Anderson, 671 P.2d 165 (Utah 1983), an incompetent person, after appointment of a guardian, executed a deed from herself, to herself and her guardian as joint tenants. The invalidity of the deed was so clear that the parties stipulated that it was null and void, and the Supreme court affirmed this consent decree on that subject. Id., 671 P.2d at 169.

Where the deeds of an incompetent are regarded as void, they are like forged deeds which pass no title even to bona fide purchasers for value. See e.g., Gibson v. Westoby (cited supra); Olson v. United States, 437 F.2d 981 (9th Cir. 1971), cert. den'd 404 U.S. 939, 30 L.Ed.2d 253 (1971). Even if such a deed is voidable as to bona fide purchasers, it is absolutely void when given in favor of the very person who petitioned for establishment of the guardianship.

POINT II

MISS FREEBAIRN LACKED MENTAL CAPACITY TO CONTRACT AND CONVEY HER PROPERTY

The trial court found that Miss Freebairn possessed the capacity to contract at the time of the disputed transaction. This finding is clearly erroneous and should be reversed.

As noted, the plaintiff appellant contends that a judicial finding of incompetency should render contracts and deeds given by the incompetent invalid as a matter of law. At the very least, however, it is clear that the finding of incompetency raises a presumption of lack of contractual capacity which must be overcome by the party who seeks to enforce the contract or deed. See Home Town Finance Corporations v. Frank, cited supra. In this case, Mr. Scott admitted that there was no change in Miss Freebairn's capacity between January 13, the date she signed the earnest money agreement, and February 27, the date he signed the petition alleging she was incompetent. And, as noted, the finding of incompetency had already been made by the time she signed a deed. It was therefore Mr. Scott's burden in the trial court to overcome the presumption that Miss Freebairn lacked the capacity to sell him her property.

The legal test of capacity to contract or to make a deed are essentially the same. The Utah Supreme Court stated in Anderson v. Thomas, 108 Utah 252, 159 P.2d 142 (1945) that,

In ordinary contracts the test is, Were the mental facilities so deficient or impaired that there was not sufficient power to comprehend the subject of the contract, its nature and its probable consequences, and to act with discretion in relation thereto, or with relation to the ordinary affairs of life?

159 P.2d at 146 (emphasis added).

This court held in the recent case of Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App. 1988) that,

The test whether a grantor has sufficient mental capacity to make a deed is whether the mental faculties were so deficient or impaired that there was not sufficient power to comprehend the subject of the deed, its nature and its probable consequences and to act with discretion in relation thereto.

Id., 756 P.2d at 100 (emphasis added).

This definition of capacity is essentially the same as that given in Section 15 of the Restatement (2d) of the Law of Contracts:

§ 15 Mental Illness or Defect

(1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect:

(a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or

(b) he is unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of his condition.

Restatement (2d) of Contracts, § 15 (1979).

When a question as to the competency of a contracting party has been raised, a two part inquiry must be made. The first concerns the ability of the party to "understand in a reasonable manner" the terms of the contract and the consequences of entering into it. The second inquiry concerns the ability of the party to act reasonably in relation to the contract.

As the commentators to the Restatement of Contracts have noted,

Even though understanding is complete, he
may lack the ability to control his acts in
the way that the normal individual can and
does control them . . .

Restatement (2d) of Contracts, § 15, Comment 6 (1979). In other words, a person may be the victim of a mental disease or defect which does not impair his cognitive ability to understand the meaning of an agreement he signs, but which impairs his ability to make a rational decision about whether to sign it at all.

There was no dispute in the trial court that Miss Freebairn suffered from a significant mental illness at the time of the disputed transaction. This was apparent from her correspondence, from the observations of others, and from her own testimony at trial.

Plaintiff and defendant each called expert witnesses to give testimony about Miss Freebairn's capacity to enter into the agreement to sell her property. Dr. Steven Golding, a forensic psychologist and professor of psychology at the University of Utah, testified on behalf of the plaintiff. He concluded that Miss Freebairn suffered from a pervasive disease he described as paranoid schizophrenia. (Tr. 290-295).

Dr. Golding explained his view of the effect of this disease on Miss Freebairn's ability to act rationally in relation to this transaction, as follows:

Q So, what is your opinion about how the mental disorder she suffered from affected her ability to rationally understand the contract and to act with discretion in relation to the decision?

A The easiest way to explain that is to elaborate upon these motions [sic] of panic and compulsion, and it's present in her -- it's present in her letters and it is present in her deposition.

As Miss Freebairn told me, there are times in her life when she feels relatively less persuaded and hounded by this conspiracy and times when she feels relatively more hounded under the direct threat of what might happen, for whatever reason. And I suppose it would be a combination of her real-life circumstances, that is her financial fragility and her delusional system that she was in, and around the time beginning in around 1970, actually from the letters, becoming more increasingly panicked about two issues. One is that they were really out to get her this

time, and they, meaning this "fabulized: delusional group of people, and two that her protector, Stewart Udall, wasn't coming through. That's the only way I can describe it, namely that she felt like she had very few people she could rely upon. The major person she hoped, as she says in her deposition, none of them would have happened if Stewart Udall would have come forth, come forth and stopped hiding for whatever reason he was hiding from her, probably didn't want to be bothered. If he would only come forth and help she would not be in such a desperate situation.

And I think it is from a psychological point of view just absolutely clear -- and she herself uses the word 'compel.' She was compelled by an internal but rational -- [sic] that is to say delusional -- belief that she must do something to render herself more viable. She expressed fear that at the time the surveillance and counter surveillance -- I know it's an elaborate, obviously crazy system, but that Stewart Udall's willingness to covertly provide this cover surveillance and protection which was in some sense staving off the surveillance and harassment by their conspiracy, that she was basically convinced that he was -- since he would not come forth as she unceasingly would ask him to and hoping that he would and so forth, that she had little choice but to sell off what she did not want to sell off. And I don't think she did it with the kind -- obviously, in my opinion at least, did it with the kind of consideration or discretion or care or whatever that under other circumstances she perhaps might be capable of doing. I mean it was in a panic, and the panic was caused by the delusional system and by her mental disorder, and I think that is abundantly clear from the psychological perspective.

Q Do you think she was able to understand in a rational way the consequences of what she was doing when she signed that agreement?

A I think she factually understood that she was selling this property, but if we now have to clarify what we mean by "rational," and perhaps that's the crunch issue here, what constitutes a rational or reasonable as opposed to factual kind of understanding, I think it is clear from a psychological perspective that she did not anticipate the requirements of that kind of transaction in the sense that while someone can certainly do something stupid, and I guess the law permits them to be stupid or even irrational or impulsive, I don't think she had a lot of choice in that matter.

. . . so, my professional opinion is that she did not have the rational anticipation of the nature of the transaction, although she certainly understood that she was selling land. I don't know if I can go much further.

Q Aside from understanding that she was selling land, do you have an opinion about whether she was able to make a rational choice about whether it was in her interest to sell her land or not in the way that someone without this disorder would have been able to make a rational choice about whether or not to sell their land?

A I have already used the words in some sense confusion and fear and panic, and to draw out the implications of that, I don't think that an individual, in my clinical experience, an individual who is in a very real sense in the throes of an assault on their existence is very capable of making many choices at all except to defend themselves in the only way that they know how.

When a different kind of paranoid schizophrenic individual does some kind of thinking out in public and/or assaults a public person, they're not going to do it in some sense out of choice; they're doing it because these people are flying the helicopters that are getting ready to bomb their house, to use an analogy. So, the meaning of the word "rational" implies that there is a freedom of choice that one is not under the influence of that kind of internal or external coercion, and that in this case the coercion, if there is coercion, is primarily internal and delusional. So, in my opinion it was not a rational choice. In particular the nature of her letters and the nature of her description of her mental state at the time leads me to conclude that her preference, her druthers obviously would have been never to sell that land unless it was absolutely necessary and as a way of holding onto her heritage and so forth and perhaps being able to turn it over to some of her relatives when she died.

Clearly that was a knowledge -- that's unrealistic, given her financial circumstances, but at that particular moment in time I think that the only option or choice that she saw as available -- and I don't know because I have no records made available to me, nor I haven't been at the trial -- I don't know what the evidence has been, what conversations took place at that moment in time in terms of individuals whomever they might be suggesting to her ways out of her current financial predicament, but she wasn't looking out at the world and surveying it with anything that I would call a free-and-rational intellect.

Q And that would include this contract?

A Yes.

(Tr. 304-310).

In sum, while Dr. Golding concluded that while Miss Freebairn may have possessed the mental capacity to have a factual understanding of the transaction, she lacked the capacity to make a rational decision about whether or not to enter into the transaction at all.

The defendant called as a witness Dr. John Malouf, a psychologist who had previously testified about Miss Freebairn's competency in 1983 when the court concluded that she remained in need of a guardian. Prior to taking the witness stand, he had not considered evidence of her capacity to contract in 1971, though he did cursorily review some of the contemporaneous correspondence during a recess. (Tr. 493).

In any event, on the critical issue, Dr. Malouf's testimony did not differ dramatically from Dr. Golding's. Dr. Malouf agreed that Miss Freebairn suffered from a "very elaborate delusional process" which he characterized as a "paranoid delusion disorder" rather than paranoid schizophrenia (Tr. 497). He admitted that a person who suffered from this condition, even though she was intelligent, might, while under the influence of the delusional system, be unable to make a rational judgment about a particular transaction:

Q Wouldn't you also agree with me, doctor, that in the case of someone who had either of those two disorders, and let's assume that we're talking about a person who has the delusional disorder and not schizophrenia, isn't it true that a person who suffers from the delusional disorder who may be a very intelligent person may yet, under certain circumstances, when influenced by the delusion be unable to make a rational judgment about a particular transaction?

A Yeah, that's possible.

Q So, such a person in a business transaction, let's say, hypothetically might be able to read and understand the contents of a document, but for whatever reason that person, under the effects of the delusional system, at the point that person's ability to rationally decide what to do in the business transaction could be impaired?

A Yes.

Q And a rational judgment could be totally absent depending on how that delusional system affected that particular circumstance; isn't that true?

A Yes.

(Tr. 514-515).

 However, his fundamental opinion about Miss Freebairn's contractual capacity did not reach the critical question of her ability to make a rational decision about the transaction in question:

Q [Mr. Jordan:] Thank you. Now, I will put to you a question that I asked before that I think we have now laid the foundation for.

Based upon your review of the materials that Exhibit 11 and all the other testing and interviewing that you did of Miss Freebairn, all the information that you have been able to gather about her and your diagnosis, what is your professional opinion as to her ability in the 1970, 1971 time period to transact business intelligently?

A Intelligently -- Now, again, to speak of --

Q Transaction, business. Let me just --

A I think she would have knowledge. She would have had adequate knowledge to know if she was selling something, what she was selling, what she was receiving for it, those sorts of specifics.

[Mr. Jordan:] All right. That's all I have.

(Tr. 497).

The defendant, who had the burden of proving Miss Freebairn's capacity to contract, never rebutted Dr. Golding's testimony that Miss Freebairn was unable to act with discretion in relation to the transaction in question.

Even though the defendant did offer the testimony of defendant Le R Burton that at the time of the execution of the agreement Miss Freebairn seemed to understand the transaction, Mr. Burton was the secretary of the corporation which was

buying the property, the drafter of the agreement, and the broker who earned a commission by selling the property. Mrs. Agnes Freebairn testified that she was also present and observed that Miss Freebairn completely understood the transaction. However, at her deposition taken just two months before her trial testimony, Agnes Freebairn had no recollection of being present at the signing of the document at all. (Tr. 544-546). Furthermore, Agnes Freebairn benefitted tremendously from the transaction by being relieved of both the burden of developing property she was incapable of developing, and the obligation of paying off a development loan for which her own home served as collateral. (Tr. 529, 541-542).

If the testimony of the expert witnesses did not fully resolve the question of Miss Freebairn's mental capacity, the notes of the conversations between Herbert Halladay, the Security Title attorney, and Miss Freebairn on March 1, 1971 do. She telephoned him on the day the closing of the sale was scheduled. The earnest money agreement had been signed six weeks beforehand. Mr. Scott had already executed the petition for guardianship, but did not present it to the court for filing until the day after the closing. Mr. Halladay's notes, made at the time of their conversation, state, as follows:

Duncan wants Mary Jean F. to establish a guardian for her. Alleges William Smart at Deseret News is guilty of a conspiracy ag. her. Russell Scott now tired of helping her and only has done so in the past because he wants her land. They offered her \$500.00 per month income. She said \$250.00 for her and \$250.00 for her nieces and nephews college educ. cut value of contract about \$20,000--forcing her to pay for water pipe. William Smart involved in her life--very complicated--the xeroxing she has done would reveal the whole story. Sending people to her house at all hours to entrap her. She complained to Bruce McConkie and visits stopped.

(Exhibit 41P, Tr. 398-391) (See Appendix "E").

This memorandum of the phone conversation between Mr. Halladay and Miss Freebairn is the best contemporary evidence of Miss Freebairn's mental state, and it comes from an impartial witness. It establishes several critical points:

First, Miss Freebairn, as of March 1, did not appear to believe that she had already entered into a binding contract; she describes the transaction as though it were still being negotiated. Second, she did not have an accurate factual understanding of the agreement; she refers to monthly payments of \$500.00 with \$250.00 to be used for her nieces' and nephews' education. The earnest money agreement provides for payments of \$275.00 a month for her benefit and includes no reference to payments to her nieces and nephews. Third, she expresses her

sense of being compelled to accept terms proposed by others, i.e., "forcing her to pay for waterpipe." Finally, and perhaps most significantly, she intertwines her description of the pending transaction with references to the conspiracy against her, "William Smart involved in her life . . . sending people at all hours to her home to entrap her . . ." These references substantiate Dr. Golding's testimony that the delusional system deprived her of an ability to make a voluntary and rational decision about the sale of her property.

As if this were not enough, Mr. Scott has already admitted in a verified pleading that Miss Freebairn lacked the capacity to enter into an enforceable contract (Tr. 188). It is well-established that a party may not seek relief by alleging certain facts to be true, and then take a different position about the same facts in a subsequent proceeding. See, Condas v. Condas, 618 P.2d 491 at 495-496 (Utah 1980).

Mr. Scott stated under oath that on account of the mental disorders which led to the guardianship, Miss Freebairn was incapable of entering into a contract and that any attempt to do so was null and void. He should be estopped from taking a contrary position in the case at bar.

The evidence that Miss Freebairn lacked the mental capacity to contract or convey her property is overwhelming. The finding of the Third District Court in 1971 that she was

incompetent raised a presumption that she lacked contractual capacity which was not overcome. The trial court's finding to the contrary is clearly erroneous and should be reversed.

POINT III

THE SALE OF MISS FREEBAIRN'S PROPERTY
SHOULD BE SET ASIDE BECAUSE IT UNFAIRLY
BENEFITTED THE DOMINANT PARTY TO A
CONFIDENTIAL RELATIONSHIP

An agreement to convey real property made by a party with mental capacity to contract is still voidable if it was entered into between parties to a confidential relationship and unfairly benefitted the party in the superior position. Furthermore, once it has been established that a confidential relationship exists, the transaction is presumed to be unfair.

As the Utah Supreme Court stated in Bradbury v. Rasmussen, 16 Utah 2d 378, 401 P.2d 710 (1965):

If a confidential relationship is shown to exist, and a gift or conveyance is made to a party in a superior position, a presumption arises that the transaction was unfair; this presumption has the force of evidence and will itself support a finding if not overcome by countervailing evidence. The burden is upon the superior party to convince the court by a preponderance (not clear and convincing) of the evidence that the transaction was fair.

Id. 401 P.2d at 713. See also Berrett v. Stevens, 690 P.2d 553 (Utah 1984); Johnson v. Johnson, 9 Utah 2d 40, 337 P.2d 420 (1959).

It has been noted that there are some relationships which the law presumes to be confidential, such as, parent-child, attorney-client and trustee-cestui. Blodgett v. Martsch, 590 P.d 298 at 302 (Utah 1978). Otherwise, the question is one of fact:

The doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. Mere confidence in one person to another is not sufficient enough to constitute such a relationship.. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other.

Bradbury 401 P.2d at 713. In Blodgett v. Martsch, the Utah Supreme Court stated that

If the circumstances are such that the defendant could exercise extraordinary influence over the plaintiff and the defendant was or should have been aware that the plaintiff reposed trust and confidence in the defendant and reasonably relied on defendant's guidance, then the parties are

said to be in 'confidential relationship' and the plaintiff's burden is considerably diminished. 'A course of dealing between persons so situated is watched with extreme jealousy and solicitude, and if there is found the slightest tract of undue influence or unfair advantage, redress will be given to the injured party."

Blodgett, 590 P.2d at 302. (Emphasis added).

The trial court made no specific finding that Miss Freebairn and Mr. Scott were parties to a confidential relationship, but found that the transaction was "fair and without fraud or undue influence." (See, Memorandum Decision of Trial Court, attached hereto as Appendix "H".)

There can actually be no question that the plaintiff and defendant were parties to a confidential relationship. The earnest money agreement itself refers to their contemplation that Mr. Scott would act as "trustee" for Miss Freebairn. Shortly beforehand, Miss Freebairn gave Mr. Scott a mortgage to her home which he described as being for her own "protection." (Tr. 53-54). And, Mr. Scott testified that the reason it was not necessary for the land being sold to serve as security for his promise to pay for it was that Miss Freebairn "trusted" him enough. (Tr. 83). Of course, once the guardianship was established, the two were by definition parties to a confidential relationship.

A presumption arose, therefore, that the transaction in question unfairly benefitted Mr. Scott, and it was his burden to prove to the contrary. It is plain that he failed to carry that burden.

The unfairness of the transaction is evident in several ways. First, there is no justification for a deduction from the purchase price of six thousand dollars which the agreement states "was previously invested in the subject property." Samuel and Agnes Freebairn quite clearly agreed, as between themselves and Miss Freebairn, to pay for the water line which was installed on the property under development and which allowed water to be delivered to the Wilstead property. Miss Freebairn's property was still subject to that trust agreement in January 1971. Agnes Freebairn owed that obligation, and yet rather than obtain payment from her, Mr. Scott charged it as a credit against the purchase price of the property.

Second, Mr. Scott did not establish that the purchase price itself was fair. Plaintiff's appraiser testified that the property was worth \$5,000.00 an acre at the time of the sale. Mr. Scott paid approximately \$2,600.00 per acre if he is permitted the credit for the water line, or less than \$2,400.00 per acre if that credit is not permitted. Using the market data approach, (and excluding the 1968 transaction between Miss

Freebairn and her brother) Mr. Scott's own appraiser, Mr. Van Drimmelen, after indulging in every presumption in his favor, testified that the market value of the property was \$3,100.00 per acre. (Tr. 597-600).

Despite this conclusion, the defendant's appraiser testified that he thought a purchase price of \$2,600.00 per acre was "within the range" of the fair market appraisal of the property. (Tr. 614). To reach this conclusion, however, he relied upon irrelevant and inadmissible factors. First, he assumed that the cost of developing the property was the sum that Samuel Freebairn borrowed, and projected the price per lot which would have to be generated to make a profit on lot sales. This testimony was received over plaintiff's objections, (Tr. 608-609), and in contravention of the rule that where market data is available, evidence of the profitability to an individual of a particular use of property is inadmissible.

The Utah Supreme Court has held that in the ordinary case, proof of "market value" should be used to determine the value of property and that only where market data is lacking should other methods be employed. Southern Pacific Co. v. Arthur, 10 Utah 2d 306, 352 P.2d 693 at 695 (1960). It has also been stated that, "[a]s a rule, evidence of the profits of

a business conducted on land is inadmissible as evidence of the market value of the land." 22 Am. Jur. 2d Damages, § 955 (1988).

Not only was the appraisal method improper, but the defendant's appraiser was simply asked to assume that Samuel Freebairn's loan represented the development cost of the land without any evidence that that sum was, in fact, the reasonable cost of developing it. (Tr. 609). The trial court did, however, indicate that he would not rely heavily on this evidence. (Tr. 208).

Furthermore, the appraiser considered a written appraisal done by another appraiser, Mr. Werner Kiepe, of the same land in 1968 who indicated in his report that he relied upon a "comparable sales" approach but failed to include in his report the market data he relied upon. When Mr. Kiepe was called to the stand, he had no recollection of what market data formed the basis of his opinion, (Tr. 557-559). Plaintiff objected to the admissibility of his appraisal since he could not be cross examined about its foundation. (Tr. 552-558). Eventually the court excluded the written report, but allowed the defendant's expert to note Mr. Kiepe's opinion that the property had a value of \$2500 per acre in 1968, exclusive of improvements made by Samuel Freebairn. The fact that neither Mr. Kiepe nor defendant's expert could articulate the facts and

data which underlay Mr. Kiepe's opinion, made it improper for the expert or the court to rely upon that opinion. Utah R. Evid. 705.

Finally, defendant's appraiser lowered his view of the fair value of the property when he included in his calculation the transaction between Mrs. Freebairn and her brother, a transaction which was peculiarly structured, which included consideration such as the agreement to pay for the water line which was not a part of the stated price per acre, and which was not an arm's length transaction. (Tr. 558-559).

A conclusion that \$2,600 was the fair market value of the property in 1971 is suspect to begin with in view of the fact that Mr. Scott himself paid Miss Freebairn \$3,000 an acre for adjoining property in 1964. But the most telling evidence about the market value of the property is that less than one year later, Mr. Jerry Young, a seasoned real estate developer, paid \$6,000 an acre for the very same land! (Tr. 409). Mr. Young said that \$6,000 an acre was a fair price for the land in January 1972. (Tr. 427), and as a result of their four-way trade, Mr. Scott acquired the land under his office building, which he resold at a great profit to himself less than two years later. (Tr. 128-131).

It defies common sense to contend that land which was worth \$2600 an acre in January, 1971, without any additional improvements, was worth \$6,000 an acre in January 1972. It is true that other developers built sewer lines on adjoining property between those dates which improved sewer access to the subject property but there was no evidence that this occurrence was not reasonably expected in January 1971.

The transaction was unfair because Mr. Scott paid less than the fair market value for the property and because he deducted sums from the purchase price which he had no right to deduct. The plaintiff lacked the benefit of any independent advice about the value of the property or the wisdom of entering into the transaction. And, by simply holding the property and selling it in combination with a few acres he had previously obtained from Mrs. Freebairn, Mr. Scott was able to reap an enormous profit.

Mr. Scott failed to carry his burden of proving that he did not unfairly benefit from this transaction. It should be set aside for this reason, if not for others previously discussed.

POINT IV

A CONSTRUCTIVE TRUST SHOULD BE IMPOSED
UPON THE PROCEEDS OF MR. SCOTT'S SALE
OF THE LAND HE TRADED FOR MISS FREEBAIRN'S
PROPERTY

A constructive trust is an equitable remedy which arises by operation of law to prevent unjust enrichment, when, among other situations, a person "unjustly profit[s] through fraud or the violation of a duty imposed under a fiduciary or confidential relationship." Carnesecca v. Carnesecca, 572 P.2d 708 at 710 (Utah 1977); see also, Ashton v. Ashton, 733 P.2d 147 at 150 (Utah 1987); Hawkins v. Perry, 123 Utah 16, 253 P.2d 372 at 375 (1953). One such fiduciary relationship is that between a guardian and a ward. Utah Code Ann. § 22-1-1 (1953). In fact, it has been said that "in no relation, except perhaps that of parent and child or husband and wife, are the elements of confidence on one side and active good faith on the other more essential than in the relation of guardian and ward." 39 Am. Jur. 2d, Guardian and Ward, § 208 (1968).

A guardian/ward relationship is, by definition, a trustee/beneficiary relationship for which trust law, specifically provided by the imposition of a constructive trust when a trustee wrongfully acquires trust property and exchanges it for other property:

Where the trustee by the wrongful disposition of trust property acquires other property, the beneficiary is entitled at his option either to enforce a constructive trust of the property so acquired or to enforce an equitable lien upon it to secure his claim against the trustee for damages

for breach of trust, as long as the product of the trust property is held by the trustee and can be traced.

Restatement (2d) of Trusts, § 202(1) (1957). Additionally, Comment (a) to this section states,

Where the trustee by the wrongful disposition of trust property acquires other property which is or becomes more valuable than trust property used in acquiring it, the beneficiary is entitled to reach the property so acquired and thus secure the profit which arises from the transaction.

Restatement (2d) of Trusts, § 202(1), Comment a (1957).

Even in cases not involving trust relationships, Utah courts have imposed constructive trusts broadly.

Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding legal title, and where there is no express or implied, written or verbal, declaration of the trust.

Parks v. Zions First National Bank, 673 P.2d 590 at 599 (Utah 1983) (citing, Powery, J., Equity Jurisprudence, § 1044 (1941)) (emphasis added). Thus, under Utah law, a constructive trust should be imposed liberally, in many situations to ensure equity and prevent unjust enrichment.

In the event that trust property has been re-conveyed, the constructive trust beneficiary should be awarded the proceeds of subsequent transfers, which can be accomplished by tracing the property through an unlimited number of transactions or changes in form if necessary. In Re Independent Clearing House Co., 41 Bankr. 985 at 1000 (Bankr. D. Utah 1984) (aff'd in part and rev'd in part and on other grounds, In Re Universal Clearing House Co., 62 Bankr. 118 (D. Utah 1986); In Re Independent Clearing House Co., 77 Bankr. 843 (D. Utah 1987)).

Furthermore, it is well-settled that when the trust property, or its subsequent proceeds, appreciate in value, the profit should be included as proceeds and awarded to the beneficiary. 76 Am. Jur. 2d, Trusts, § 254, (1975). In a treatise entitled "Remedies", it is provided that a plaintiff may obtain "a considerable profit," and cited an example which mirrors the facts of our case:

. . . if the defendant secured Blackacre by fraud at a time when it was worth \$10,000, and then traded it for Whiteacre which was worth \$15,000, a constructive trust in the plaintiff's favor on Whiteacre would net him property worth considerably more than the property he lost.

Dobbs, Remedies, p. 242 (West Publ. 1973). In fact, the United States Supreme Court held in 1844 that "the rule in equity is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go to the [trust]." Oliver v. Piatt, 44 U.S. (3 Howard) 333, 61 L.Ed. 622 (1844).

Whether the transaction in question is set aside as being void as a matter of law, or because the grantor lacked the requisite mental capacity, or because it resulted from the breach of a confidential relationship, the remedy is the same. Mr. Scott is deemed to have held Miss Freebairn's property in constructive trust for her benefit from March 1971 until January 1972. When he traded her land for another parcel in January 1972, he is deemed to have obtained that parcel in constructive trust for her as well. Additionally, when he sold the second parcel in November 1974, he is deemed, by law, to have received the proceeds for her benefit.

Thus the imposition of a constructive trust upon those proceeds case is the proper remedy in this case.

CONCLUSION

The law has long recognized that some people suffer from mental diseases which deprive them of the ability to look out for themselves in business dealings. Legal guardianship is one protection afforded to such a person. A guardian's job is to exercise on behalf of the ward, the independent and informed

business judgment which the ward is found incapable of exercising for himself. It would defeat the very purpose of guardianship if the guardian were permitted to take control of a ward's property and then exercise his business acumen in relation to the property to reap a profit for himself rather than for the ward.

Another protection for the mentally handicapped is the rule that the law will not enforce an agreement unless each party is able to make a rational decision about whether or not to enter into the agreement. Finally, the law protects those who, on account of a special relationship, are less likely than others to be able to bargain on equal footing and strike a fair deal for themselves. Notably, none of these protections is contingent upon the intention or motive of the other party.

Mr. J. Russell Scott has earned a handsome profit for himself by acquiring land from Miss Freebairn at a time when she suffered from a serious mental disease and when he was under a duty to act as her protector. The benefit he obtained by holding the property until an opportunity arose for an advantageous sale, and doing the same with the parcel he exchanged for it, should be returned to Miss Freebairn who was forced for years to live on \$250.00 a month while he enjoyed the profit earned from dealing with her property.

DATED this 26th day of January, 1989.

JONES, WALDO, HOLBROOK & McDONOUGH

By Timothy C. Haupt
Timothy C. Haupt
Barry G. Lawrence

CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of January, 1989, I caused to be hand-delivered, a true and correct copy of the foregoing Brief of Plaintiff/Appellant Mary Jane Freebairn, to the following:

David J. Jordan
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Attorneys for Defendants/Respondents
50 South Main Street
Suite 1600
Salt Lake City, Utah

Haupt

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ADDENDUM

APPENDICIES

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APPENDIX A: SELECTED LETTER OF FREEBAIRN

March 25, 1970

Questions to be asked of William Smart,
Executive Editor of the Deseret News:

1. You are accused of perpetrating and carrying out, personally, and with the assistance of many of the employees of the Deseret News, as well as other individuals, a criminal conspiracy against Miss Mary Jean Freebairn. Will you comment about this please.
2. You are accused of obtaining Miss Freebairn 's mail from the Salt Lake Post Office
 - (1) for the illegal purposes of burlesqueing it in cartoons in the Deseret News;
 - (2) of copying it; (3) of circulating it to unauthorized persons.

Will you answer the following questions with respect to this, please:

- (A) From whom have you obtained such authority.?
- (B) Why have you copied and circulated her mail?
- (C) To whom has it been circulated?
(Supply a complete list of individuals who have received her mail, and render an explanation of the intent for which it was given to them.) 0000042

3. You are accused of having installed
in Miss Freebairn's home electronic devices
which enable you to audit her conversations,
as well as to have installed electronic devices
on the telephones of members of her family.
Please explain (1) the authority
by which you were able to place such equipment
in her home; (2) who supplied the equipment?
4. You are accused of having used the electronic
device in Miss Freebairn's home to put forward
improper suggestions to her. Will you comment
about your having tormented her with such equipment
for five years.
5. You are accused of having placed television
equipment in Miss Freebairn's home,
with which you have entertained a group of lewd
men on closed circuit television. Will you please
inform the Church as to the authority
by which this was done and the names of persons
whose homes are serviced by such television lines.

0000043

6. You are accused of using the television and electronic equipment in Miss Freebairn's home in order to follow her and annoy her, and you have used Deseret News employees to do this on the following occasions: February 25, May 17, May 21st, June 26th, July 9th, August 13th, December 8, 1969, February 15, and March 17, 1970. Please comment.
7. You are accused of sending people to Miss Freebairn's home to harrass and annoy her, and this has occurred in the past, as well as recently on March 15th, and March 22, 1970
8. You are accused of having sent men to Miss Freebairn's home for immoral purposes on August 30, 1969, February 2, 1970, and March 25th, 1970, after which occasions you have published cartoons which were both offensive to and injurious to the reputation of Miss Freebairn.
9. Miss Freebairn has requested that you and everyone involved in the conspiracy against her be excommunicated. Will you comment about this, please.

0000024

August 6, 1970

FRANK E. MOSS,
UNITED STATES SENATOR
THE FEDERAL BUILDING
SALT LAKE CITY, UTAH

DEAR SENATOR MOSS:

When I brought
the ATTACHED MATERIAL
TO YOUR OFFICE, LATE
IN THE AFTERNOON
of July 27th, ONE
OF YOUR SECRETARIES
SAID THAT YOU
HAD LEFT THAT MORNING
FOR WASHINGTON, D.C.

0000033

I HAD PREPARED
A COPY OF IT
FOR MR. UDALL,
AND I LEFT THAT FOR
HIM AT THE SALT LAKE
POST OFFICE, BUT
I CARRIED MY LETTER
TO YOU BACK TO MY
HOME, BECAUSE I KNEW
THAT THE NEWSPAPER
AGENCY CORPORATION
WOULD MAKE EVERY
EFFORT TO GET HOLD
OF IT.

THAT VERY EVENING,

When I returned
to my home
after watching
my sister's children,
I heard someone
in my house,
and I fled out the door
and reported the matter
to the police

My brother-in-law
returned to my house
with me and checked
it from top to bottom,
but he did not find
anyone there.

LATER THAT EVENING,
AFTER 10 P.M., I HEARD
SOMEONE TURN THE WATER
ON OUTSIDE,
AND BECAUSE I DIDN'T
KNOW WHY IT SHOULD
HAVE BEEN TURNED ON,
I DECIDED THAT I WOULD
NOT GO OUT AND
TURN IT OFF.

THE NEXT MORNING,
I WENT TO THE BACK
YARD TO INSPECT
THE HOSE.

I WAS SURPRISED
TO SEE THAT IT HAD
BEEN COILED UP TIGHT
AND PLACED DIRECTLY
BE NEATH MY BATHROOM
WINDOW. THEN
THE FIRST 8 FEET
OF IT HAD BEEN
STRETCHED BACK
TO THE FAUCET,
AND WITH THE WATER
RUNNING IN A SWIFT
STREAM, IT WAS LEFT
IN A MANNER
THAT COULD NOT HAVE
FAILED TO CATCH

my attention.

Besides this,
children's toys
were arranged
to express Symbolisms
which were obscene.

The first thing
I did upon seeing
these strange
circumstances was
to call my attorney
so that he could
see them, too.

He said
that while a court

WOULD CONSIDER
SUCH EVIDENCE TO BE
"CIRCUMSTANTIAL,"
HE AGREED THAT
SOMEONE HAD TRIED
TO LORE ME OUTSIDE
THE NIGHT BEFORE,
BY TURNING ON
THE HOSE.

THE SHRUBBERY
IN A BORDER NEAR
THE HOSE HAD BEEN
BROKEN AND CRUSHED
BY SOMEONE'S HAVING
SAT IN IT,
FOR A LONG TIME.

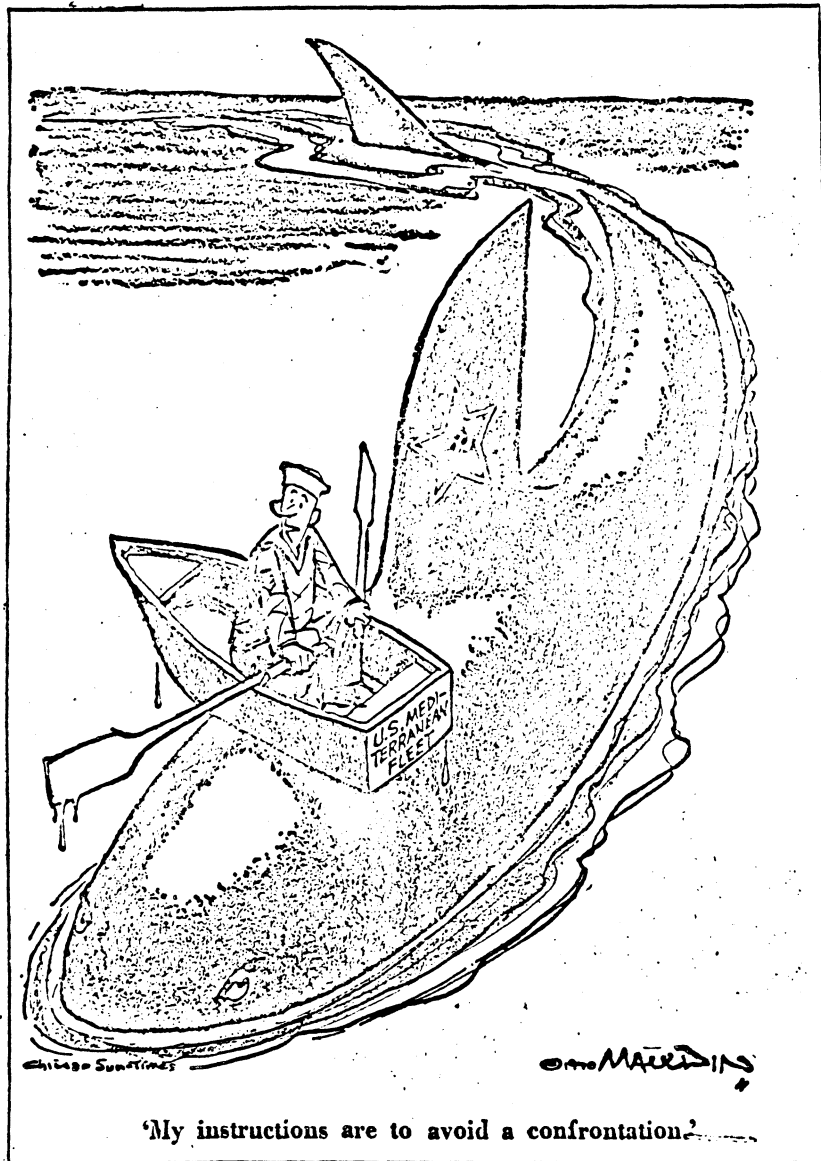
AND THAT WAS
UNDOUBTEDLY WHERE
THE WOULD-BE
MURDERER HAD CROUCHED
TO WAIT FOR ME
TO COME OUT
OF MY HOUSE.

Your Secretary
COULD NO DOUBT
CONFIRM THE FACT
THAT THE NEWSPAPER
AGENCY CORPORATION
HAS INQUIRED AT YOUR
OFFICE ABOUT ANY
MAIL I MAY HAVE
LEFT FOR YOU

This morning's
TRIBUNE published
other warnings
for me not to
leave this material
for you.

They have tried
by every means
to discourage

Mr. Loall's interest
and they have lied
to his son,
to try to influence
him.



'My instructions are to avoid a confrontation?'

IT IS MY OPINION
THAT THE ONLY WAY
OUT OF THIS DIFFICULTY,
FOR ALL CONCERNED
IS THE WAY
CALLED "DUE PROCESS
OF LAW.

I WILL APPRECIATE
YOUR DOING WHATEVER
YOU CAN TO SEE
THAT THIS CASE
COMES TO COURT.

Sincerely,

Thomson

1503 SOUTH 3RD EAST
SALT LAKE CITY, UTAH
84115

0000103

During the past two years, due to interference from the Cannon Committee, I have had to change dressmakers, I have had to find a new physician, I have had to locate a new bank, a new lawyer, a new insurance agent, and a new hair salon.

DRESSMAKER: On July 13, 1966, I had gone to the home of Mrs. Anne Norby, 1175 South 12th West, and I was wearing a white maternity top over stretch pants (which is a comfortable manner of dressing that is more characteristic of my clothing when I am in the mountains at our summer home than in the city, but since I was in the company of my tiny nephew, who was two years old, I had decided to wear things he couldn't ruin when he climbed. The maternity blouses are longer and more commodious than ordinary blouses, and I have bought them for that reason). My being at the dressmakers for a fitting of some new clothing was later burlesqued by the newspapers, who rumored that I was pregnant. It was how I discovered that they were using television cameras in their techniques of snooping.

PHYSICIAN: Dr. James Webster, 508 East South Temple, who treated me for pneumonia from January 20, 1968 through January 24th, was not unfamiliar with my problem with the Cannon Committee, because he had asked me what might be troubling me, and I had tried to tell him of the problem and of some of the difficulties I had experienced because of constant harassment. It did not surprise me one day that in examining me, he became familiar. But he was one of the few persons who has indicated by a glance that our conversation was being listened to, and I felt that he was trying to assist me through a difficult trial.

BANK: University Branch of Walker Bank supplied members of the Cannon Committee with a \$1.00 overdraft, which had long-since been paid, but which was burlesqued by the Newspaper Agency committee at a time when my legal representative was in Salt Lake from Washington and was arguing with them over the condition of my finances. I believe Zane Morrison to have been the person who supplied them with the overdraft.

LAWYER: David E. Salisbury, 141 East First South, who has been a most loyal legal adviser, allowed the Cannon Committee to place a camera in his office, during conversations that I was having with him that related to D. James Cannon. It was not until later that I discovered that Mr. Salisbury and Mr. Cannon are business partners in a land development project in Snyderville.

HAIR SALON: David Kimball, who owns "David's Salon" at 3169 Highland Drive, who is a brother-in-law of Herbert Price of the Salt Lake Tribune, was combing my hair one afternoon, when he received a telephone call. Without any provocation, he began to say things to the person on the telephone that were derogatory and disparaging of me. Since his remarks were made in a tone of ridicule, I disregarded them, but I learned through the Tribune and the News that what he did was premeditated and was calculated to influence my legal adviser, who was listening at another place. Mr. Kimball's behavior represented an important development to me, because it indicated that he had read letters I had written and because he was privileged to observe me by television. I have maintained that my letters were being circulated, and that a lewd circle of persons was being entertained by the camera that is in my home. Except for his cutting my hair once a month, David Kimball is an absolute stranger to me.

On three occasions, persons have come to my home who were carrying hidden microphones for the purpose of interviewing me for the Cannon Committee. Their being here was later caricatured.

In January, 1966, Howard O. Lawrence, a school teacher who said he represented the U. S. Department of Labor, Office of Manpower, Automation and Training, asked to interview me for the purpose of discovering why people weren't accepting the retraining programs offered by the government. In doing so, he took down six pages of very personal information concerning my financial situation, all of which he delivered to the Cannon Committee.

On June 20, 1967, Dorrel L. Decker, an agent for the Prudential Insurance Company, who sold me my present policy in 1962, came to my home to collect a semi-annual payment. In doing so, he asked me what my opinion was of a woman who could not give of herself completely to her husband. He pretended to be having such a problem himself, but he really wanted to supply the Cannon Committee with grist for their mill.

Saturday, October 7, 1967, Mrs. Reva Hyatt Snow, a person with whom I had worked at Eitel McCullough Corporation (my first job) came to my home accompanied by another woman on the pretext of paying a social visit. Because I had believed that she had been trying to contact me for this specific purpose prior to this date (she contacted me through my sister, who she had never met, which gave me a clue), I hadn't acknowledged several Christmas cards and telephone messages from her, sent over a three year period, but one day she had the cheek to come uninvited, and afterward, she supplied her information to the Committee.

U.S. DEPARTMENT OF LABOR
OFFICE OF MANPOWER, AUTOMATION AND TRAINING
WASHINGTON, D.C. 20210

January, 1966

M. J. Freebarin
1503 South 3rd East
Salt Lake City, Utah

To Whom It May Concern:

The Department of Labor and the Office of Education are conducting a study of Manpower Development and Training Programs. These two Federal agencies have contracted with the National Opinion Research Center, University of Chicago, for assistance in this effort. An important part of this study involves interviewing persons throughout the country who have participated in the manpower training program.

The information gathered on this study will be used to improve the training program which is presently in operation, and training programs which will be available in years to come. Your opinions and experiences are vital to this study and can be of great assistance in the improvement of the program.

NORC is a non-profit research organization which has conducted surveys all over the country for over twenty years. Their work is for research purposes only. Of course, all answers and statements given to their interviewers are strictly confidential. Names or other identification are never used in their reports and will never be given to anyone else for any reason.

Thank you for your time and cooperation.

Sincerely yours,

Howard O. Lawrence
Salt Lake City
PR: 486-6813

Curtis C. Aller
Curtis C. Aller
Director

0000127

Police procedures in Utah require that anyone who is guilty (or suspected) of criminal conduct be kept under surveillance, and when such a person moves to another city, the police in his new neighborhood must be informed of the arrival of the "criminal." This pertains also to places of employment, as well as residences.

In February of 1967, I accepted a job with Holt, Rinehart and Winston publishers in New York. I was given the task of being the New Products Editor for Field and Stream Magazine, and I was assigned to the Advertising Department, where I had a private office and telephone. The company had not been able to fill this particular position for three months. Consequently, there was a backlog of work that kept me busy and to which I devoted my lunch hour, as well as an hour each morning, which I was able to do by arriving at 8 a.m. instead of 9. When the Newspaper Agency Corporation discovered where I was, an industrial spy named Miss Sonja Ratasky was placed in the organization to sabotage my position. She did this in much the same way that Mr. Kimball tried to ruin my life by saying things into the telephone that he had been tutored to say, although he was a complete stranger to me. Miss Ratasky came to my private office and deliberately began to argue. It became evident that the things she was saying were things she had been asked to say, and although I had met the requirements of the position to the extent that the observation was made by my employer that I was "overqualified" for the work, I was forced to resign because of the unpleasantness that was created. Miss Ratasky was on the staff of the Advertising Department for less than a month.

0000129

When the Newspaper Agency Corporation Committee learned in November of 1967 that I was planning to hire a New York attorney to represent me in a court action against them, the members used cartoons of a threatening nature to let me know that I could expect evil consequences for doing so.

As a result, I remained in Southampton, New York through December, and I returned to Utah the week of January 3rd, 1968.

In Southampton, I rented a room from Mr. and Mrs. Henry Bischoff at 161 Hampton Road, and they were as hospitable as anyone could have been, but it wasn't long before they began to treat me in a manner that told me that they had been asked to keep me under surveillance.

Anyone reading this history might wonder whether I was not able at some time to confront my enemies openly. ("A visible enemy can be subdued, but an invisible foe cannot ever be assailed.")

Fortunately, by a miscalculation, this secret system revealed itself in a manner that could lead to its dissolution, as well as the indictment of its leaders.

When the Committee observed in June of 1966, that I had written a letter to congratulate Mr. Stewart L. Udall, Secretary of the Interior, who gave the Commencement Address at Utah State University, they appointed one of their members to write a letter to Mr. Udall that was derogatory of myself.

When Mr. Udall (who is a member of the Church of Jesus Christ of Latter-day Saints and a cousin through the Jacob Hamblin family of a cousin of mine through the Russell family) treated me without any explanation in an official way, rather than to call me "Mary Jean," as he had done when I was a student at Columbia University, I knew what had happened. As a result of that intuitive direction, I kept writing to him. I implored him to assist me by bringing the charges (whatever they might have been) into the open. (Only someone who has been a prisoner could have understood my concern.) Although Mr. Udall never responded to another letter from me, he investigated the matter.

0000130

It is my belief that Mr. Udall has heard all of the charges that have been made secretly against me and which have been used to keep me from working: it is also my belief that he could verify to the Department of Justice that

- (1) the telephones of my family members have been monitored;
- (2) that television cameras have been placed in my home, and in other locations when the observing of my activities was deemed to be necessary to the work of the Cannon Committee;
- (3) he could testify that my mail has been opened, copied, circulated and burlesqued between the Deseret News and the Salt Lake Tribune;
- (4) he is aware of at least some of the entrapment procedures that have been carried out against me and the consequent fact that in order to have gained the cooperation of the persons who have assisted the Cannon Committee in its schemes, it was necessary for them to have spread criminal libels and slanders against me;
- (5) he knows that the surveillance of me is a continuous process and has been operating for at least five years.

The dictionary defines the verb "to pursue" as meaning "to follow with intent to capture or kill." It is my belief that because of the wilful destruction and malicious damage that has been inflicted upon my life by its members, the Cannon Committee has shown that it is morally not removed from the perpetration of murder by any degree. Unless something is done to dissolve the Committee and to divest the Newspaper Agency Corporation of its power, the consequent loss of life could not be doubted.

The persons responsible for the repeated attacks upon my reputation, the harassment and worry, as well as the burlesque are

WILLIAM SMART, Executive Editor of the Deseret News, who I have never met and with whom I have never had a personal conversation.

ROSEMARY PEDERSEN, a society reporter for the Deseret News who I have never met, and to my knowledge have never seen, but who at one time was someone in whom D. James Cannon was interested.

EVELYN BLOOD MAZURAN, Society Editor of the Deseret News, who was Society Editor when I was a society reporter for the News, from May to December in 1953.

D. JAMES CANNON, now employed by a bank, who supplied the Committee with my letters to him, which led to the opening and burlesquing of all of my mail.

ELAINE A. CANNON, Mr. Cannon's wife, and a reporter for the Deseret News.

ARTHUR C. DECK, Executive Editor of the Salt Lake Tribune.

HERBERT PRICE, Promotion Manager of the Salt Lake Tribune

ROBERT WOODY, Business Editor of the Salt Lake Tribune

Newsmen for the CBS Television Station KSL who have burlesqued "bathtub sequences" which served to inform me that the "police procedures" of the Newspaper Agency Corporation were a hoax and were being used for lewd purposes are

BOB WELTI and

PAUL JAMES, both of whom I have never met.

The name of David Kimball, the hairdresser, must also be included here, because it was a slip of his tongue that informed me that he had also been a witness to the television snooping.

It goes without saying that if an indictment is made against these persons, it will have to extend to the postmaster of the Salt Lake post office.

APPENDIX B: TRUST AGREEMENT

TRUST AGREEMENT

THIS AGREEMENT made and entered into this 25th day of June, 1968, by and between MARY JEAN FREEBAIRN hereinafter designated as "First Beneficiary"; and SAMUEL R. FREEBAIRN and AGNES S. FREEBAIRN, his wife, as joint tenants, hereinafter designated as "Second Beneficiary" and SECURITY TITLE COMPANY, a Utah Corporation, hereinafter designated as "Trustee";

W I T N E S S E T H

THAT, WHEREAS, First Beneficiary is the owner of the following described real property, situate in the County of Salt Lake, State of Utah, to-wit:

X Beginning at a point that is North 89°54'10" West 193.975 feet from the Northeast Corner of Section 2, Township 3 South, Range 1 East, Salt Lake Base and Meridian; thence North 89°54'10" West 10.025 feet; thence South 8°50'30" West 346.60 feet; thence South 83°18' West 311.88 feet; thence North 11°25'20" West 105.45 feet; thence North 2°57' East 13.16 feet; thence West 402.70 feet; thence South 1042.492 feet; thence East 25.00 feet; thence South 652.241 feet; thence East 961.00 feet to the East line of said Section 2; thence North 0°06'54" East along said Section line 2126.105 feet to the Westerly line of Wasatch Blvd.; thence along said Westerly line North 21°46'25" West 520.315 feet to the point of beginning. Containing 37.6 acres.

EXCEPTING THEREFROM the following described portions thereof:

BEGINNING at a point that is South 0°06'54" West 1634.485 feet from the Northeast Corner of Section 2, Township 3 South, Range 1 East Salt Lake Base and Meridian; thence South 0°05'54" West along the Section line 322.242 feet; thence West 470.00 feet; thence North 100.00 feet; thence North 42° East 299.05 feet; thence East 270.54 feet to the point of BEGINNING. Containing 2.3 acres.

ALSO BEGINNING at a point that is South 0°06'54" West along the Section line 1956.727 feet and West 470.00 feet from the Northeast corner of Section 2, Township 3 South, Range 1 East, Salt Lake Base and Meridian; thence West 491.00 feet; thence North 395.00 feet; thence South 28° East 627.44 feet; thence East 196.43 feet; thence South 41.00 feet to the point of beginning. Containing 2.97 acres. X

Together with all water and water rights appurtenant to, used upon or in connection with said property.

SUBJECT TO Easements, Restrictions, Reservations and Rights of Way appearing of record or enforceable in law and equity and taxes for the year 1968 and thereafter.

AND WHEREAS approximately one year ago First Beneficiary verbally agreed to sell and Second Beneficiary verbally agreed to purchase said premises and Second Beneficiary has heretofore caused said property to be platted and engineered and has installed some water lines which have materially assisted First Beneficiary by enabling First Beneficiary to fulfill her commitments to provide water to Robert Winstead and Clifford Green to whom she has heretofore sold a piece of

adjoining property, and

WHEREAS it is now the desire of the parties hereto to enter into this written Agreement to facilitate the said sale and purchase of the premises, all upon the terms and conditions hereinafter set forth and contained,

NOW THEREFORE, in consideration of the premises and for and in consideration of the mutual covenants, conditions and agreements set forth herein, the parties hereto agree as follows:

I

First Beneficiary shall and hereby agrees simultaneously with the execution hereof to convey said property to Security Title Company as Trustee free and clear of all liens and encumbrances other than specifically set forth herein, for the purpose and upon the terms and conditions hereinafter set forth and contained.

II

The Trust herein provided for is established and exists and shall be operated for the purpose of carrying out the sale of said property by First Beneficiary to Second Beneficiary and otherwise handling the same to accomplish all of the terms and conditions herein provided. The Trustee is hereby granted full power to do all acts necessary to accomplish the purposes of this Agreement.

III

The title in and to the above described property, shall constitute and be designated as the "Trust Property". The legal title to said property shall be vested in said Trustee, except as hereinafter provided, and no legal interest in and to said property shall be vested in either of said Beneficiaries, and their and each of their rights hereunder are personal consisting only of the right to enforce due performance of the terms and conditions hereof to be performed by the other parties hereto. The Beneficiaries have not and shall not have any right or power to apply for or secure the dissolution or termination of this Trust Agreement or the partition or division of any of the Trust property in any manner except as provided for herein.

IV

The First Beneficial Interest under this Trust is vested in MARY JEAN FREEBAIRN.

The Second Beneficiary Interest under this Trust is vested in SAMUEL R. FREEBAIRN and AGNES S. FREEBAIRN his wife, as joint tenants,

ALL monies coming into the hands of Trustee for disbursement to the First Beneficiary shall be paid to them in accordance with the beneficial interests set forth above.

V

First Beneficiary agrees to sell and Second Beneficiary agrees to purchase the entire interest in the Trust Property hereinbefore described for the total purchase price of NINETY SIX THOUSAND NINE HUNDRED NINETY AND NO/100 DOLLARS (\$96,990.00) which the Second Beneficiary agrees to pay to the Trustee herein for the benefit of the First Beneficiary as follows:

The sum of SEVEN THOUSAND AND NO/100 DOLLARS (\$7,000.00) or more on the 15th day of June in the year 1969 and the sum of SEVEN THOUSAND AND NO/100 DOLLARS (\$7,000.00) or more on the 15th day of June of each and every succeeding year thereafter until the total purchase price has been paid in full. It is expressly understood and agreed by the parties hereto that no interest shall be charged or paid on the unpaid portion of said purchase price. The parties hereto acknowledge that the total purchase price has been determined on the basis of \$3,000.00 per acre, there being a total of 32.33 acres in said trust property. Second Beneficiary expressly agrees that there shall not be paid hereunder to First Beneficiary in the calendar year 1968 a sum of money in excess of 29% of the total purchase price of \$96,990.00.

VI

All taxes and assessments levied and assessed upon and against said property for the year 1967 and all prior years thereto, shall be paid by First Beneficiary, all such taxes and assessments for the year 1968 shall be prorated between the parties as of June 15, 1968, and all subsequent taxes and assessments levied and assessed upon and against said property commencing with the year 1969 shall be paid by Second Beneficiary.

In the event Second Beneficiary shall fail to pay before delinquent, any such taxes, charges and assessments, First Beneficiary shall have the right to pay the same and any payments so made by First Beneficiary shall be prima facie evidence of the necessity therefor, and the amounts so paid shall be secured hereby and shall be repaid to First Beneficiary by Second Beneficiary on demand, together with interest thereon at the rate of eight per cent (8%) per annum from the date first paid by First Beneficiary until repaid. In the event said Trustee shall receive notice in writing from First Beneficiary of any such payments said Trustee shall not convey said property, or any part thereof, unless and until the repayment thereof, with interest thereon shall have been made.

VII

Second Beneficiary shall not, prior to payment in full of the purchase price herein provided for, allow any lien or any other claim of any kind or nature whatsoever to be imposed upon or against said property which shall affect any portion of said property not theretofore released from any claim or interest of First Beneficiary as provided for herein. It is expressly understood and agreed however that nothing in this paragraph contained shall restrict the right of Second Beneficiary to sell said Trust property or any part or parcel thereof on a deferred payment basis, it being further understood however, that, there being no privity of contract between First Beneficiary and purchasers of land from Second Beneficiary, that First Beneficiary shall not in any way be obligated to have conveyed title to said Trust property except as provided for herein and shall not in any way be liable or obligated to said purchasers.

VIII

Possession of the Trust Property shall be delivered by First Beneficiary to Second Beneficiary on June 15, 1968.

IX

Second Beneficiary shall have and is hereby given the right from time to time to subdivide portions of the property being sold and purchased hereunder, subject nevertheless to the terms and conditions hereinafter set forth. Second Beneficiary shall and hereby agrees to pay all costs and expenses of said subdividing including, but not limited to, surveying, platting, engineering, installation of water and sewer lines, culverting, grading and surfacing of streets and such other off-site improvements and utilities as may be required, the intent being that First Beneficiary shall be under no obligation or expense in connection therewith. Second Beneficiary further agrees to indemnify and save First Beneficiary harmless from any and all loss, cost or expense which First Beneficiary may suffer or sustain in connection with said

subdividing and improvements including those heretofore installed and constructed. First Beneficiary is aware of the fact that Second Beneficiary has borrowed approximately \$15,000.00 from Russell Scott to finance the construction of said off-site improvements heretofore installed and Second Beneficiary hereby agrees to pay the same. Trustee shall have and is hereby given the authority to execute and have acknowledged all instruments and documents necessary to have subdivision plats fully approved and placed of record in the Salt Lake County Recorder's office, together with the authority to execute upon request of Second Beneficiary any subdivision restrictions that Second Beneficiary may desire or require. It is agreed that the lots in any subdivisions developed by Second Beneficiary be of any size and acreage which Second Beneficiary may desire. The parties hereto acknowledge the fact that First Beneficiary is retaining title to two parcels of land consisting of 2.3 acres and 2.97 acres which are excepted from the Trust Property on Page 1 hereof and adjoin the Trust Property on the Southerly boundary. Second Beneficiaries' proposed development involves the construction of a road adjoining the same and First Beneficiary hereby agrees, when said road and other off-site improvements are installed by Second Beneficiary adjacent to her two retained parcels, to immediately pay to Second Beneficiary her proportionate share of the cost thereof.

X

The parties hereto acknowledge the fact the Second Beneficiary is purchasing said property for the express purpose of subdividing the same and selling building lots. Second Beneficiary has heretofore had said property surveyed and a preliminary subdivision plot plan prepared, installed certain of the off-site improvements and now has ready for recording an approved subdivision plat known as Russell Park Subdivision affecting a portion of said property namely 6.987 acres and containing 17 subdivision lots.

*2nd Plat
acres
6.987
17
2nd Sub*

The parties hereto recognize the fact that Second Beneficiaries' development of said property will necessitate Second Beneficiaries obtaining fee title to said property in order to finance the construction of subdivision and off-site improvements through a lending institution by means of a first mortgage. Therefore in order to facilitate and assist Second Beneficiary in their development of said property First Beneficiary hereby agrees, and Trustee is hereby authorized and directed, upon receipt of written request by Second Beneficiary, to convey to Second Beneficiary fee title to the 6.987 acres which constitute Russell Park Subdivision when Second Beneficiary has obtained financing for the construction of the off-site improvements therefor and has presented to the Trustee a mortgage or Deed of Trust to be recorded in the Salt Lake County Recorder's office. Simultaneously therewith Second Beneficiary shall and hereby agrees to execute and deliver to Trustee a promissory note and Deed of Trust in favor of Security Title Company as Trustee for First Beneficiary in the sum of \$20,961.00 (said amount being determined by multiplying the number of acres in said subdivision by the per acre price of \$3,000.00 which Deed of Trust shall be so recorded immediately after the recordation of the aforesaid mortgage or Deed of Trust for the off-site improvements to the end that said Deed of Trust in favor of Security Title Company as Trustee for First Beneficiary shall be a good and valid second Deed of Trust upon said 6.987 acres in a first and superior position over all other liens and encumbrances except that of the lender providing the first mortgage or Deed of Trust financing for the off-site improvements and possible liens in connection with the improvements already constructed.

It is further agreed by the parties hereto that in the event Second Beneficiary has paid to the Trustee for the account of First Beneficiary three-fourths of the \$20,961.00 due to First Beneficiary for the said 6.987 acres and in the event Second Beneficiary is not in default hereunder, and especially not in default with respect to the \$7,000.00 annual payments provided for in Paragraph V above, Second Beneficiary shall have and is hereby given the right to record another subdivision plat which shall be contiguous to Russell Park Subdivision and which shall not contain more than seven acres. Second Beneficiary shall further be entitled to receive a conveyance of said subdivision acreage upon obtaining financing for the construction of off-site improvements and executing a note and Trust Deed in favor of Security Title Company as Trustee for First Beneficiary, all in accordance with the terms and conditions provided for above. Additional subdivisions, conveyances and Deeds of Trust may be had upon the same terms and conditions provided for above if all monies due by Second Beneficiary to First Beneficiary have been paid except one-quarter of the monies due on the last preceding subdivision so conveyed and mortgaged.

XI

Second Beneficiary when not in default hereunder shall at any time be entitled to receive a Special Warranty Deed from the Trustee conveying and releasing acreage and/or subdivision lots upon payment by Second Beneficiary to Trustee for the account of First Beneficiary as follows:

(a) One (1) acre of land, or multiples thereof, for each sum of \$3,000.00 paid and applied upon the principal balance due hereunder.

(b) In the event Second Beneficiary has recorded a subdivision plat or plats with respect to any particular portion of said Trust Property and fee title has not been conveyed and a second Deed of Trust executed, as provided for in Paragraph X above, Second Beneficiary shall be entitled to receive from Trustee a conveyance of any one subdivision lot for a sum of money the amount of which shall be computed and determined by the use of the following mathematical formulae: The total amount of acreage contained within the exterior boundaries of a particular subdivision plat, as determined by a competent surveyor duly licensed in the State of Utah, shall be multiplied by the acreage release price hereinbefore specified, being the sum of \$3,000.00 per acre, thus determining the total amount due to First Beneficiary for the particular acreage involved. The total number of lots contained within the said subdivision shall then be divided into the total amount of monies due to First Beneficiary and the quotient shall constitute the particular release and conveyance price for all of the lots in that particular subdivision plat. This formula is based on the presumption that all lots in a particular subdivision will be of approximately the same size and in the event this is not the situation then the actual release price for each particular lot in that subdivision shall be determined by the mutual written consent of the parties hereto. Once a particular area has been subdivided and a subdivision lot release price thus established the said release and conveyance price shall not be changed.

(c) In the event Second Beneficiary has recorded a subdivision plat or plats with respect to any particular portion of said trust property and title has been conveyed to Second Beneficiary and a second Deed of Trust has been executed and recorded, from Second Beneficiary to Security Title Company as Trustee for First Beneficiary as provided for in Paragraph X above, Second Beneficiary shall be entitled to receive from Trustee a conveyance of any one subdivision lot for a sum of money to be determined and calculated on the same basis as provided for in subparagraph (b) above.

Second Beneficiary shall have and is hereby given the right and option to select and designate the particular acreage to be so released and conveyed provided however, that after the first such selection is made, all future acreage and/or subdivisions so designated must be contiguous. Also, it is agreed that Second Beneficiary shall have and is hereby given the right to select any particular subdivision lot or lots to be so released and conveyed. Second Beneficiary shall, prior to requesting a release and conveyance of any acreage or subdivision plats, furnish Trustee and First Beneficiary a certification from a surveyor duly licensed in the State of Utah showing the location and amount of acreage in the event acreage is so selected for release and conveyance, or in the event of a subdivision, a subdivision plat containing a description of the exterior boundary thereof, and the amount of total acreage contained therein, to the end that the parties hereto and the Trustee may determine with certainty the release and conveyance price to be paid by Second Beneficiary as provided for herein.

(d) All conveyances of acreage shall be free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts of neglect of Second Beneficiary. The parties hereto acknowledge the existence of a first mortgage against the premises executed by First Beneficiary in favor of Beehive State Bank having an approximate balance of SIXTY ONE HUNDRED TWENTY FIVE AND NO/100 DOLLARS (\$6,125.00) _____ which obligation shall remain the obligation of and be paid by First Beneficiary to the end that all conveyances of trust property to Second Beneficiary shall be free and clear thereof.

XII

In the event Second Beneficiary shall fail to comply with any of the terms hereof or fail to make any payment or payments when the same shall become due then the First Beneficiary shall have, at her option, the right to serve written notice upon Second Beneficiary to remedy the default within thirty (30) days after service of such notice, a copy of which shall be served upon Trustee by First Beneficiary, and should the Second Beneficiary fail to do so, then and in that event, all right, title and interest of Second Beneficiary in and to said Trust property shall terminate without further notice all monies therefor

paid by Second Beneficiary shall be retained by First Beneficiary as rent and liquidated damages and as consideration for the establishment of this Trust and all property theretofore released and conveyed, and Second Beneficiary agrees that First Beneficiary may re-enter and take possession of all property not theretofore paid for or released and conveyed, with or without legal process, together with all improvements and additions made by the Second Beneficiary thereon, which improvements and additions shall remain with the land and become the property of First Beneficiary, Second Beneficiary becoming at once a tenant at will of First Beneficiary, and in the event that possession of said property is not delivered to First Beneficiary upon demand, Second Beneficiary shall be subject to all statutory actions for unlawful detainer. The interest of Second Beneficiary hereunder shall be deemed terminated when written notice thereof, after expiration of said 30 day period, has been filed with the Trustee for the First Beneficiary. In addition and in the event of such default and termination, Second Beneficiaries shall and hereby agree, within ten (10) days thereafter, to execute and deliver to Trustee a Quit Claim Deed conveying to Trustee all of their right, title and interest in and to that portion of said property not theretofore deeded to Second Beneficiary. Trustee shall, upon receipt of written notice from First Beneficiary, after the expiration of said thirty (30) day period, of Second Beneficiary's default and upon request of First Beneficiary and without liability to anyone, convey by Special Warranty Deed to First Beneficiary all property not theretofore conveyed which remains vested in Trustee. First Beneficiary shall also have the right, at its option, in the event Second Beneficiary fails to remedy its default within the thirty (30) day period above provided, to declare the entire unpaid balance due hereunder at once due and payable, treat this Agreement as a note and mortgage or Deed of Trust, have the Trustee convey to Second Beneficiary title to all of the property not theretofore conveyed to Second Beneficiary and proceed immediately to foreclose the same in accordance with the laws of the State of Utah and have the property sold and the proceeds applied to the payment of the balance owing, provided however, that First Beneficiary shall not in any event have the right or be entitled to have a judgment against Second Beneficiary for any deficiency which may remain.

It is further understood and agreed that any default by Second Beneficiary in the terms and conditions herein contained shall constitute a default with respect to any and all notes and deeds of trusts executed by Second Beneficiary to Security Title Company as Trustee for First Beneficiary in connection with the conveyance of acreage contained within a subdivision plat for the financing of off-site improvements as provided for in Paragraph X above and First Beneficiary, shall have and is hereby given the right and option to foreclose the same pursuant to the statutes of the State of Utah, provided however that First Beneficiary shall not in any event be entitled to obtain or have a judgment against Second Beneficiary for any deficiency which may remain.

XIII

It is covenanted and agreed by the First Beneficiary that her sole remedy against the Second Beneficiary, in the event of default, is the right to terminate this agreement in the manner hereinbefore provided, excepting that First Beneficiary has a right of action against Second Beneficiary for the amount of any unpaid taxes or other assessments as of the date of such termination, and for any loss, cost and expense suffered or sustained by reason of any liens or encumbrances against the Trust Property which is repossessed or foreclosed upon by Second Beneficiary.

XIV

As between First Beneficiary and Second Beneficiary it is agreed that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee which may arise or accrue from enforcing this agreement as provided for herein.

XV

The Beneficiaries jointly and severally agree that they will fully pay, indemnify and protect, save and hold harmless the Trustee of and from any and all suits, claims, demands, judgments, costs or expenses, including attorney's fees and other obligations and liabilities of whatever nature that the Trustee may for any reason or at any time suffer, sustain, incur or expend by reason of or in connection with this Trust or the administration thereof otherwise than through its own misconduct or neglect. Said Beneficiaries further agree that the Trustee shall not be required to pay or attend to the payment of any claim, lien or encumbrance, including but not limited to taxes, income, inheritance or estate taxes, or special assessments against the Trust property unless instructed so to do and proceeds are received and made available for such payment, shall not be required to attend, to any assessment or valuation of the property but all such services shall be performed and all expenses borne by the Beneficiaries or their representatives.

The parties hereto further agree that the Trustee shall not be required to commence or defend any suit in connection with this Trust or the Trust property without its express written consent and unless and until there shall have been paid to the Trustee a sum of money sufficient in its judgment to pay all costs incurred or to be incurred in relation thereto including attorney's fees and a reasonable compensation to the Trustee for its services and the time of its officers and employees spent in connection therewith.

As between First Beneficiary and Second Beneficiary, it is agreed that all of the obligations of the Beneficiaries in this Section set forth are the obligations of Second Beneficiary; provided, however, that the Trustee may look to both of said Beneficiaries or any property or funds in its hands for the compliance therewith and to indemnify it and hold it harmless on account of failure to make any payment to or to do any act that is hereinbefore set forth.

XVI

No person dealing with the Trustee shall be obligated to ascertain whether or not the Trustee has exceeded its powers in any act it may perform or cause to be performed incident to or in connection with its administration of this Trust and the property described herein or any part or parcel thereof, nor to see to the proper handling, application, or disbursement by the Trustee of any funds paid to the Trustee.

XVII

All instruments affecting any property included in this Trust shall be executed by SECURITY TITLE COMPANY, Trustee; provided, however, that the Trustee at its option may cause or permit such instrument to be executed by some other person or corporation. The Trustee shall not be obligated to warrant title to any property sold or conveyed by it except as against its own acts. Any Deeds executed by the Trustee shall be made subject to any taxes, assessments, liabilities or obligations existing against the Trust property at the time of said conveyance.

XVIII

The accounting records of the Trustee shall at all reasonable times be open for inspection by the parties interested in this Trust only. The Beneficiaries shall be entitled to periodic statements from the Trustee showing all the receipts and disbursements and charges made in connection with this Trust.

XIX

No assignment or transfer of any interest of any party hereunder at any time shall be valid and binding upon the Trustee until an executed original of the assignment or other instrument evidencing the transfer has been filed with and accepted by the Trustee and the Trustee's assignment fee paid therefore

ing only where such interest may pass or be transferred by decree or of the court and then only upon satisfactory proof of the regularity and of the proceedings in such matter being presented to the Trustee.

XX

This Trust shall be exempt from the provisions and operations of Uniform Principal and Income Act of Utah.

This Trust shall terminate upon conveyance of all of the property of the Trust in accordance with the provisions hereof, and the distribution of the funds in the hands of the Trustee to the person or persons named therein in accordance with the terms hereof. In the event said property has not been conveyed by the Trustee within one year after the time stated in Paragraph V for the last payment due to First Beneficiary the Trustee may, as soon thereafter as practicable and upon payment of all of the costs, charges and damages for which it may become liable, convey the property to the Second Beneficiary if the Second Beneficiary shall have paid the purchase price in full and any other amounts due and owing to First Beneficiary. In the event said purchase price and any other amounts due and owing to First Beneficiary shall not have been paid prior to said date, the Trustee shall have the right to institute an action in a Court of competent jurisdiction to determine the rights of the respective Beneficiaries and to convey the property in accordance with the decree entered in said action when said decree shall become final and the statutory time for appeal thereon has expired. In the event of any such action being brought by the Trustee, the Trustee shall have a first and prior lien against the said property for its attorney's fees and all costs and reasonable payment for the services of its officers and employees in connection therewith.

XXI

It is agreed that time is the essence of this Agreement.

XXII

All notices provided for herein shall be in writing and served personally or by depositing the same in the United States mail as certified by return receipt requested, and with postage pre-paid and shall be complete upon the date the same is delivered to the addressee as disclosed by return receipt. All notices to First Beneficiary shall be mailed to SAMUEL R. FREEBAIRN at 1503 South 3rd East Salt Lake City, Utah notices to Second Beneficiary shall be mailed to SAMUEL R. FREEBAIRN and FREEDBAIRN at 4161 Jupiter Drive Salt Lake City, Utah notices to Trustee shall be addressed to SECURITY TITLE COMPANY at 330 East South Salt Lake City, Utah. It is agreed by the Beneficiaries herein whether singular or plural, that the above named persons respectively and are hereby appointed and designated as their representatives and that notice to them shall constitute and be service of notice to all said parties.

XXIII

It is understood and agreed by the Beneficiaries that Security Title Company and its officers and employees make no representations or recommendations as to said property, its condition, its value or desirability, or any other matter relating thereto; that no sales or promotional campaigns or advertising of any kind shall include the name of Security Title Company as making such representations, provided, however, that the same may disclose the fact that Security Title Company is acting as Trustee and will issue title insurance. A) such advertising and all notices shall clearly show that the Trustee or their agents are the authors thereof and the Trustee shall not be responsible for any statements or representations made therein.

XXIV

It is agreed by the parties hereto that this Trust Agreement may be amended, provided, however, that said modifications and amendments must be in writing and shall be approved and accepted by the Beneficiaries and

executors, administrators, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have duly executed and delivered this Agreement the day, month and year first above written.

Mary Jean Freebairn
MARY JEAN FREEBAIRN

Samuel R. Freebairn
SAMUEL R. FREEBAIRN

Agnes S. Freebairn
AGNES S. FREEBAIRN

ACCEPTED BY

SECURITY TITLE COMPANY
330 East Fourth South, Salt Lake City, Utah

By: _____

By: _____

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 2nd day of June, A.D., 1968, personally appeared before me MARY JEAN FREEBAIRN, a woman, the signer of the within instrument who duly acknowledged to me that she executed the same.

Robert W. Holliday
Notary Public

Residing in: Salt Lake City Utah
My Commission Expires: 12-22-71

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the day of June, A.D., 1968, personally appeared before me SAMUEL R. FREEBAIRN and AGNES S. FREEBAIRN, his wife, the signers of the within instrument who duly acknowledged to me that they executed the same.

Notary Public

Residing in:
My Commission Expires:

APPENDIX C: EARNEST MONEY AGREEMENT



EARNEST MONEY RECEIPT AND OFFER TO PURCHASE

This may be a legally binding form, if not understood seek other advice

TO: LeR Burton, Realtor Salt Lake City, Utah, January 13, 1971
 Name of Broker Company

ON CONSIDERATION OF your agreement to use your efforts to present this offer to the Seller, I/we Scott Investment Corporation
 hereby deposit with you as earnest money the sum of \$ 200.00, TWO HUNDRED AND NO/100 DOLLARS
 in the form of Check made direct to seller, Mary Jean Freebairn
 to secure and apply to the purchase of the property situated at: As described in the attached Exhibit "A" which by this reference
is made a part of this agreement. All of my interest in said property is to be conveyed to
seller on or about February 1, 1971 and not later than March 1, 1971

Salt Lake City, Utah County, State of
 including any of the following items if of present interest to the parties: Plumbing and heating fixtures and equipment including boiler and oil tanks, water heaters, and burners,
 electric light fixtures including bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, window blinds, shades and door screens, bookshelves, all shrubs and trees, and any other
 fixtures except No exceptions

The following personal property shall also be included as part of the property purchased: none. Buyer may elect to make payments in
excess of those outlined below with a corresponding reduction of principal and interest
payments to follow

The total purchase price of \$ 57,200, FIFTY SEVEN THOUSAND TWO HUNDRED & NO/100 DOLLARS
 shall be payable as follows: \$ 200.00 which represents the aforementioned deposit, receipt of which is hereby acknowledged by you & by seller

when seller agrees to: \$ 275.00 on delivery of deed and satisfaction of
 said debt shall be on or before March 1, 1971, and \$ 275.00 each month commencing 30 days after possession

which shall be interest only on the unpaid balance. Beginning with the first month of the
eleventh year the buyer shall pay the monthly amount that will amortize the then remaining
balance over a period of an additional 120 months together with interest on the unpaid balance
at the rate of 6% per annum. There are certain debts which are assumed by the buyer which
will not decrease the interest payment for the first 10 years even though their payment will
reduce the principal balance, and these payments are limited to the following: (1) Property taxes

until the balance of \$ _____ together with interest is paid; provided, however, that buyer at his option, at any time, may pay amounts in excess of the monthly
 payment, upon the unpaid balance, subject to the limitation of any mortgage or contract by the buyer hereto assumed. Interest at 6 except as described -
otherwise in this agreement.

purchase price to be included in the preceding payment, and shall begin on or date of possession which shall be on or before Feb 1, 1971. All risk of loss and destruction
 of property and expenses of insurance shall be borne by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall
 be prorated as of date of possession. All other taxes and all assessments, mortgages, utility fees and other first encumbrances or charges against the property of any nature shall be paid

by the seller except: No exceptions
 The following special improvements are included in this sale. Buyer ☐ Connected ☐ Basic Tank and/or Cesspool ☐ Sidewalk ☐ Gaze and Gutter ☐ Special Street
 Paving ☐ Special Street Lighting ☐ Culinary Water (City) ☐ Other Community ☐ Connected ☐ Private ☐ (Legend: Yes (x) No ())

Contract of Sale or Instrument of conveyance to be made on the approved form of the Utah State Securities Commission in the name of
Scott Investment Corporation

This payment is received and offer is made subject to the written acceptance of the seller endorsed herein within _____ days from date hereof, and unless so
 approved the return of the money herein deposited shall mean this offer without damage to the undersigned agent.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid herein shall, at the option of the seller,
 be retained as liquidated and agreed damages.

It is understood and agreed that the terms written on this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made
 by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of the final contract shall
 supersede this Earnest Money Receipt and Offer to Purchase.

LeR Burton, Realtor Agent By LeR Burton
 Broker Company

We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract brought to date or at Seller's

option a policy of title insurance in the name of the purchaser and to make first mortgage by warranty deed or _____;
 to the extent of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails to do so, he agrees to pay all expenses of enforcing
 this agreement or of any right arising out of the breach thereof, including a reasonable attorney's fee.

The seller agrees to consideration of the offer of the equal to providing a purchaser to pay and agent a commission equal to the minimum recommended by the Salt Lake Board
 of Realtors. In the event seller has entered into a listing contract with a broker, the broker is hereby notified that this agreement is in full compliance with the terms of such contract.
 A copy of all the papers and work will be filed in the office of Lamar Duncan
 Scott Investment Corporation

1/13/71 Date Mary Jean Freebairn Seller J. Russell Scott Purchaser by President

on home at 1503 South Third East. (2) Curb and Gutter assessments for same property (3)

a judgement and costs in the amount of approx \$1240 presently existing against seller.

(4) Back taxes to the state of Utah that are limited to those now outstanding and are in the

approximate amount of \$4250.00. It is understood that buyer is to pay J. Russell Scott \$8,000

for money he has invested in subject property which debt is separate from those listed above

and for which buyer has received credit as a reduction from the purchase price. All of the interest

of the seller in Russell park Development Corporation is hereby assigned to LeR Burton as

consideration for the effecting of this transaction. The purchase of this property is by an

agreement to buyer and seller and the Deed is to be given on possession date without any of the

subject property acting as security for future payments. All of the rights and benefits to seller

arising as a part of this agreement are to be placed in a protective trust for the purpose of safe-

guarding the assets and welfare of the seller to the extent that the income she needs for personal

welfare cannot be preyed upon by others. J. Russell Scott is to act personally as trustee for
 such trust and to receive all money and disburse it according to the instruction of the trust
 with general outline to be \$200 per month to seller including taxes and \$75.00 to current bills.

(State law requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. Dependent upon the method used, one of the following forms must be completed.)
 I acknowledge receipt of a final copy of the foregoing agreement bearing all signatures: Scott Investment Corp
Mary Jean Freebairn 1/13/71 J. Russell Scott 1/13/71
 Seller Date Purchaser Date
 I personally caused a final copy of the foregoing agreement bearing all signatures to be mailed to the ☐ Seller, ☐ Purchaser, on
 _____, by registered mail and return receipt is attached hereto.

Exhibit "A" For agreement of Sale to Scott Investment Corp. To be used to include description of land which is approximately 25 acres and is arrived at by taking the original amount sold to Sam Freebairn and subtracting only that portion which has already been deeded to Russell Park Development Corp.

Jan 13 1971 JLB
Jan 13, 1971, 7:00, 7-1-1-1-1-

the following described
real property, situate in the County of Salt Lake, State of Utah, to-wit:

Beginning at a point that is North 89°54'10" West 193.975 feet from the Northeast Corner of Section 2, Township 3 South, Range 1 East, Salt Lake Base and Meridian; thence North 89°54'10" West 10.025 feet; thence South 8°50'30" West 346.60 feet; thence South 83°18' West 311.88 feet; thence North 11°25'20" West 105.45 feet; thence North 2°57' East 13.16 feet; thence West 402.70 feet; thence South 1042.492 feet; thence East 25.00 feet; thence South 652.241 feet; thence East 961.00 feet to the East line of said Section 2; thence North 0°06'54" East along said Section line 2126.105 feet to the Westerly line of Wasatch Blvd.; thence along said Westerly line North 21°46'25" West 520.315 feet to the point of beginning. Containing 37.6 acres.

EXCEPTING THEREFROM the following described portions thereof:

BEGINNING at a point that is South 0°06'54" West 1634.485 feet from the Northeast Corner of Section 2, Township 3 South, Range 1 East Salt Lake Base and Meridian; thence South 0°06'54" West along the Section line 322.242 feet; thence West 470.00 feet; thence North 100.00 feet; thence North 42° East 299.05 feet; thence East 270.54 feet to the point of BEGINNING. Containing 2.3 acres.

ALSO BEGINNING at a point that is South 0°06'54" West along the Section line 1956.727 feet and West 470.00 feet from the Northeast corner of Section 2, Township 3 South, Range 1 East, Salt Lake Base and Meridian; thence West 491.00 feet; thence North 595.00 feet; thence South 28° East 627.44 feet; thence East 196.43 feet; thence South 41.00 feet to the point of beginning. Containing 2.97 acres.

Together with all water and water rights appurtenant to, used upon or in connection with said property.

SUBJECT TO Easements, Restrictions, Reservations and Rights of Way appearing of record or enforceable in law and equity and taxes for the year 1971 and thereafter

APPENDIX D: PETITION FOR APPOINTMENT OF GUARDIAN

Attorney for Petitioner
706 Phillips Petroleum Bldg.
Salt Lake City, Utah 84101
Telephone: 328-9689

FILED IN CLERK'S OFFICE

Salt Lake County Utah

MAR - 2 1971

W. Sterling Evans, Clerk of Dist. Court

By

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF UTAH

IN AND FOR SALT LAKE COUNTY

PROBATE DIVISION

IN THE MATTER OF THE ESTATE AND
GUARDIANSHIP OF MARY JEAN FREEBAIRN,
an incompetent

PETITION FOR APPOINTMENT
OF GUARDIAN

57893

TO THE HONORABLE DISTRICT COURT
IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

The petition of J. RUSSELL SCOTT, of Salt Lake City, Salt Lake County,
State of Utah, respectfully represents:

1.

That the Petitioner is the cousin of MARY JEAN FREEBAIRN, an incompetent,
now of the age of forty-seven years.

2.

That the said MARY JEAN FREEBAIRN is unmarried, has never been married,
and is now living alone and is incapable, without the assistance of some other
person, to properly manage and care for her property, and by reason thereof,
would be likely to be deceived or imposed upon by artful or designing persons.

3.

That the said incompetent has an estate within the County of Salt Lake
consisting of cash and real property, said cash amounting to approximately the
sum of \$100.00; that the interest of the said MARY JEAN FREEBAIRN in the real
property which is raw, undeveloped ground, suitable for subdividing into home
sites, is of the approximate value of \$57,000.00; that said property has an an-
nual rental value of approximately \$600.00; that in addition thereto said in-
competent is the owner in fee simple of a certain home in which she now resides
at 1503 South 3rd East Street, Salt Lake City, Utah, of the approximate value
of \$12,000.00; that said home has an annual rental value of \$900.00.

4.

That the only immediate relatives of the said MARY JEAN FREEBAIRN are the
following.

DEPOSITION
EXHIBIT

LALLA JUNE FREEBAIRN, a sister, who resides at 1511 South 3rd East, Salt Lake City, Utah.

JOHN HAMILTON FREEBAIRN, JR., a brother, who resides at 2006 East Crystal Avenue, Salt Lake City, Utah.

AGNES STAM FREEBAIRN, a sister-in-law, who resides at 4181 Jupiter Drive, Salt Lake City, Utah; that the said MARY JEAN FREEBAIRN resides at 1503 South 3rd East in Salt Lake City, Utah

That the Petitioner, J. RUSSELL SCOTT, resides at 431 South 3rd East in Salt Lake City, Utah.

5.

That it is necessary that some fit and proper person be appointed the guardian of said incompetent, to care for and properly manage the properties and estate of said incompetent; that there has not been appointed any person or persons as such guardian by law or by will or by deed or otherwise.

6.

That the Petitioner herein as a cousin of said incompetent, is entitled to Letters of Guardianship of the estate of said incompetent; that the said JOHN HAMILTON FREEBAIRN, a brother, LALLA FREEBAIRN, a sister, and AGNES STAM FREEBAIRN, a sister-in-law, have all consented that Petitioner act as such guardian.

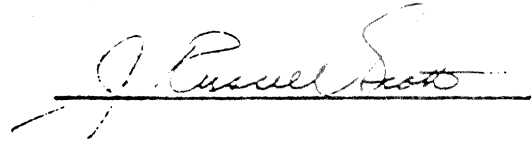
WHEREFORE, Petitioner prays that notice of this application be given in the manner designated by this Court and a time be set for the hearing of this application and petition, and that upon the hearing and proofs to be adduced, that said petition be granted and that Letters of Guardianship issue to him and that such other order may be made as to the Court may seem reasonable and proper in the premises.


PETITIONER

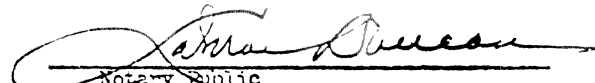
ATTORNEY FOR PETITIONER

STATE OF UTAH
COUNTY OF SALT LAKE.SS

J. RUSSELL SCOTT, being first duly sworn, deposes and says: that he is the petitioner named in and who subscribed the foregoing petition; that he has read said petition, knows the contents thereof and that the same is true of his own knowledge.

A handwritten signature in cursive script, appearing to read "J. Russell Scott", is written over a horizontal line.

Subscribed and sworn to before me this 27 day of February, 1971

A handwritten signature in cursive script, appearing to read "Anna Duesen", is written over a horizontal line.

Notary Public
I reside in Salt Lake City, Utah
My commission expires July 28th, 1974

APPENDIX E: NOTES BY HALLADAY CONCERNING FREEBAIRN

per Mary Jean Freebairn 3/1/71.

Duncan wants Mary Jean to establish a guardian for her. alleges Wm Smart at Desert News is guilty of a conspiracy against her. Russell Scott now tried of helping her & only has done so in the past because he wants her lands. They offered her \$500 per mo income she said \$250 for her and 250 for her niece & nephews college educ. cost value of cont about \$20,000 - forcing her to pay for water pipe. Wm Smart involved in her life - very complicated - the zoning she has done would reveal the whole story. sending people to her house at all. (house) ^{to entrap her.} - she complained to Bruce McConkie & visit stopped.

APPENDIX F: VERIFIED ANSWER OF SCOTT

(Original Exhibit was executed, notarized, and certified. The copy included here is identical but not executed, notarized and certified.)

LA MAR DUNCAN
Attorney for Guardian
818 Kearns Building
Salt Lake City, Utah 84101
Telephone 328-2553

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

THE CARTER HAWLEY HALE STORE,)
INC., dba WEINSTOCK'S,) A N S W E R
Plaintiff,) Civil No. 82-17-4895
vs.)
MARY JEAN FREEBAIRN,)
Defendant.)

Comes now Defendant above named and through her duly appointed, qualified, and acting Guardian, J. Russell Scott, of the person and estate of the said Mary Jean Freebairn, and answers Plaintiff's Complaint as follows:

1.

Admits Paragraph 1 of Plaintiff's Complaint.

2.

Denies Paragraphs 2 and 3 of Plaintiff's Complaint on the ground that Defendant is wholly incompetent and unable to comprehend the meaning of the contract heretofore entered into and therefore said contract is a nullity.

3.

Further answering and by way of an affirmative answer, heretofore, on the 22nd day of March, 1971, the above-entitled Court in Probate No. 57693, adjudicated the Defendant an incompetent, because of certain mental disorders; that Defendant is therefore unable to enter into any contract whatsoever and the attempts on the part of Plaintiff are null and void.

Wherefore, Defendant prays that Plaintiff's Complaint be dismissed with prejudice.

Attorney for Guardian

STATE OF UTAH)
)SS
COUNTY OF SALT LAKE)

J. RUSSELL SCOTT, being first duly sworn, deposes and says:
That he is the duly appointed, qualified, and acting Guardian
of the person and estate of MARY JEAN FREEBAIRN, an incompetent;
that he has read the foregoing Answer to Plaintiff's Complaint,
knows the contents thereof and that the statements therein con-
tained are true of his own knowledge, information, and belief.

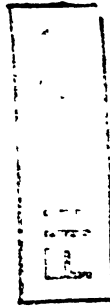
Subscribed and sworn to before me this _____ day of November,
1982.

NOTARY PUBLIC
I reside in Salt Lake City, Utah.

My commission expires:
August 11, 1986

APPENDIX G. ANSWER OF LA MAR DUNCAN

LA MAR DUNCAN
Attorney for Defendants
818 Kearns Building
Salt Lake City, Utah 84101
Telephone 328-2553



FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

MAY 3 1 56 PM '83

H. DIXON HINDLEY CLERK
3rd DIST. COURT

BY _____
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF UTAH
IN AND FOR SALT LAKE COUNTY

MARY JEAN FREEBAIRN,

Plaintiff,

vs.

J. RUSSELL SCOTT, Etc., &
LeR BURTON, et al,

Defendants.

)

)

)

)

)

)

A N S W E R

Civil No. C-83-2731

Come now Defendants and for answer to Plaintiff's Complaint
on file herein, admit, deny, and allege as follows:

;
1.

Answering Paragraph 1, Defendant, J. RUSSELL SCOTT, states
that he, as a first cousin of Plaintiff, was, at the request and
urging of Plaintiff, appointed Guardian of Plaintiff, an incom-
petent.

2.

Admit Paragraphs 2, 3, 4, and, 5 of Plaintiff's Complaint.

3.

Deny Paragraph 6 of Plaintiff's Complaint.

4.

Answering Paragraph 7, Defendants allege that the primary
business of Scott Investment Corporation was and is investments.

5.

Admit Paragraph 8 of Plaintiff's Complaint.

6.

Defendants deny any urging on the part of Defendant Scott and allege the ward Freebairn did all the urging.

7.

Deny Paragraph 10 of Plaintiff's Complaint.

8.

Admit Paragraph 11 of Plaintiff's Complaint and further allege that she is still incompetent and subject to acts of artful and designing persons.

9.

Admit Paragraph 12 of Plaintiff's Complaint.

10.

Deny allegations in Plaintiff's Paragraph 13 that the ward signed the closing paper on March 1, 1971; admit rest of Paragraph 13.

11.

Deny Paragraphs 14, 15, 16, 17, 18, 19, 20, 21, through Paragraph 62.

12.

Admit Paragraphs 63, 64, and 65 of Plaintiff's 10th Cause of Action.

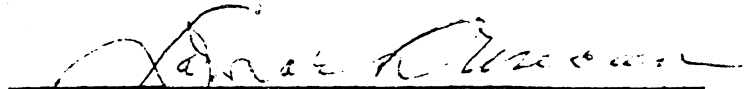
13.

Admit Paragraph 66 of Plaintiff's 11th Cause of Action.

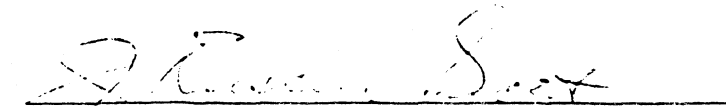
14.

Deny Paragraphs 67 through Paragraph 72 of Plaintiff's voluminous and wordy Complaint.

WHEREFORE, Defendants pray that Plaintiff's Complaint be dismissed; that Defendant, J. Russell Scott, as the only living and caring relative, either be continued as Guardian of Plaintiff or that some other suitable person or institution that has no artful design upon the welfare or property of Plaintiff be appointed to continue to act as her Guardian.



Attorney for Defendants



Defendant

STATE OF UTAH)
) SS
COUNTY OF SALT LAKE)

On the 12 day of May, 1983, personally appeared before me, J. RUSSELL SCOTT, one of the Defendants and the signer of the foregoing Instrument, who duly acknowledged to me that he executed the same.



NOTARY PUBLIC
I reside in Salt Lake City, Utah.

My commission expires:
August 11, 1986

APPENDIX H: MEMORANDUM DECISION OF THE TRIAL COURT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARY JEAN FREEBAIRN,	:	MEMORANDUM DECISION
Plaintiff,	:	PROBATE NO. 57693
vs.	:	
J. RUSSELL SCOTT,	:	
Defendant.	:	

The above-entitled matter was tried on the 12th day of January, 1988. Plaintiff was present and represented by Brian M. Barnard and Timothy C. Houpt. Defendant was present and represented by David J. Jordan. The Court heard the testimony of witnesses and admitted documentary evidence. At the conclusion of the trial the Court advised counsel that closing arguments would be continued to a future date. On the 29th day of January, 1988, counsel for the respective parties made their closing arguments. The Court took the matter under advisement. The Court having had an opportunity to review its notes, the Memoranda on file, the exhibits admitted, and the pertinent authorities cited, now renders its decision.

The Court finds as follows:

1. Plaintiff and defendant are first cousins who inherited real property located near the mouth of Big Cottonwood Canyon from their uncle.

2. Defendant inherited 400 acres and plaintiff inherited 60 acres from their uncle.

3. Plaintiff, during the 1960's, sold 15 acres to defendant.

4. Plaintiff in 1968, entered into a trust agreement with her brother Samuel Freebairn and his wife Agnes Freebairn for the purpose of developing their respective properties.

5. Samuel Freebairn encumbered the land by a mortgage in favor of Beehive State Bank for \$50,000.00.

6. Samuel Freebairn died on July 30, 1969, and as a result of his death Agnes Freebairn was unable to develop the property or make the payments on the mortgage or pay the property taxes.

7. The 1968 trust agreement was prepared by Herbert Halliday, attorney for Security Title Co., who was charged with the administration of the trust.

8. At the time of the creation of the 1968 trust agreement there was no evidence presented that at that time plaintiff was not competent to contract.

9. The 1968 trust was terminated by plaintiff and Agnes Freebairn in March of 1971. Mr. Halliday handled the termination, but did not make a determination as to plaintiff's mental status at that time.

10. Plaintiff and Agnes Freebairn, facing the risk of losing the property which was the subject matter of the 1968 trust agreement, agreed to sell the property.

11. Plaintiff and Agnes Freebairn contracted with LeR Burton to sell the property. Mr. Burton listed the property for sale on the multiple listing book, and advertised the same in a newspaper of state-wide circulation.

12. Plaintiff and Agnes Freebairn established an asking price, and sought out defendant to purchase the property.

13. Defendant on January 13, 1971 entered into an Earnest Money Agreement with Scott Investment Corporation, owned by defendant, and Agnes Freebairn for the sale and purchase of approximately 25 acres for \$65,000.00, with interest at the rate of 6% per annum.

14. Plaintiff had transacted a number of loans and sales of parcels of land prior to this particular transaction, and there was no evidence presented that she didn't understand the nature of the transactions.

15. The Earnest Money Agreement provided, among other things, as follows:

"to be placed in a protective trust for the purpose of safeguarding the assets and welfare of the seller to the extent that the income she needs for personal welfare cannot be preyed upon by others."

16. Prior to the closing LaMar Duncan, attorney, was consulted by plaintiff and defendant regarding the creation of the trust for the sale proceeds. Mr. Duncan recommended that instead of the trust, a guardianship be created.

17. The closing for the sale of the property took place on March 1, 1971.

18. The guardianship was created and defendant was named guardian for plaintiff on March 22, 1971.

19. On March 23, 1971 plaintiff executed a warranty deed in favor of Scott Investment Corporation, and retained no security interest in the property despite the fact that defendant was to make monthly payments for the purchase of the property.

20. In January of 1972 defendant exchanged the land acquired from plaintiff in a four-way trade. In the exchange, the defendant received the land under or around the Metro Building located at 431 South 300 East, Salt Lake City, Utah, having a value of \$76,000.00.

21. The property sold by plaintiff to Scott Investment Corporation, who in turn conveyed the property to defendant was exchanged for the Metro Building property.

22. The party who obtained the property, formerly owned by plaintiff, in the four-way exchange sold the subject property within two years for \$6,000.00 per acre.

23. Real estate values increased dramatically immediately after the subject sale.

24. The land sold by plaintiff to defendant in 1971 was retroactively appraised by two appraisers for this lawsuit and they established values for the property in 1971 as being \$3,100.00 and \$5,500.00 per acre.

25. Plaintiff during her adult years had transacted a number of land transactions, conducted her own business affairs, attended college, was employed by the Deseret News, Salt Lake Tribune and Brigham Young University.

26. Plaintiff has been diagnosed as a paranoid schizophrenic.

27. Plaintiff is intelligent and educated, and could factually understand the sale of property.

28. Plaintiff is not a good manager of her personal finances, but she has personally managed her finances, even though the court had appointed a guardian for her.

29. Plaintiff received all of the payments from defendant in accordance with the promissory note that was given for the payment of the property.

30. LaMar Duncan acted as attorney for plaintiff and defendant, and the parties relied upon his representations concerning the creation of the guardianship in lieu of the trust.

31. Prior to the creation of the guardianship, Mr. Duncan reviewed the Earnest Money Agreement in behalf of plaintiff.

32. The closing was held before the guardianship proceeding was initiated.

33. At the time of closing, a deed was not executed by plaintiff to the buyer Scott Investment Corporation.

34. After the appointment of the guardian, the plaintiff and not the guardian executed a deed to the property to Scott Investment Corporation on March 23, 1971, and on March 24, 1971 Scott Investment Corporation conveyed the property to defendant.

35. A petition to approve the execution of a deed was not submitted to the court.

36. There is no statutory provision that precludes a guardian of a ward selling to a guardian, but the Court does not condone or look upon with favor when a guardian purchases from a ward.

CONCLUSIONS

The Court concludes as follows:

1. The plaintiff was intelligent, educated and had the ability to understand the terms of the sale despite her mental illness.

2. The appointment of a guardian following the sale was not in and of itself a basis for voiding the sale.

3. The defendant did not take advantage of plaintiff; exercise undue influence over her; or perpetrate a fraud upon her by purchasing plaintiff's property.

4. The plaintiff did not lack the mental capacity to enter into a legally binding contract.

5. The failure to obtain court approval for the execution of a deed after the guardian was appointed did not void the deed.

6. The plaintiff had the contractual capacity to enter into a legally binding contract.

7. That plaintiff have judgment of no cause of action against defendant.

The Court refers the parties to defendant's Memorandum for the case law.

Defendant's counsel shall prepare the Findings of Fact and Conclusions of Law, and Decree accordingly.

Dated this 11 day of March, 1988.

JOHN A. ROKICH
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 11 day of March, 1988:

Dean Becker, Esq.
4059 South 4000 West
West Valley City, Utah 84120

Timothy C. Houpt
Attorney for Plaintiff
419 Boston Building
Salt Lake City, Utah 84111

David J. Jordan
Attorney for J. Russell Scott
50 S. Main, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145

APPENDIX I: MEMORANDUM DECISION AND JUDGMENT

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

MARY JEAN FREEBAIRN,)	
)	MEMORANDUM DECISION
Plaintiff,)	AND JUDGMENT
)	
vs.)	PROBATE NO. 57693
)	
J. RUSSELL SCOTT,)	
)	
Defendant.)	
)	

The above-entitled matter was tried on the 12th day of January, 1988. Plaintiff was present and represented by Brian M. Barnard and Timothy C. Houpt. Defendant was present and represented by David J. Jordan. The Court heard the testimony of witnesses and admitted documentary evidence. At the conclusion of the trial the Court advised counsel that closing arguments would be continued to a future date. On the 29th day of January, 1988, counsel for the respective parties made their closing arguments. The Court took the matter under advisement. The Court having had an opportunity to review its notes, the Memoranda on file, the exhibits admitted, and the pertinent authorities cited, now renders its decision.

FINDINGS OF FACT

1. Plaintiff and defendant are first cousins who inherited real property located near the mouth of Big Cottonwood Canyon from their uncle.

2. Defendant inherited 400 acres and plaintiff inherited 60 acres from their uncle.

3. Plaintiff, during the 1960's, sold 15 acres to defendant.

4. Plaintiff in 1968, entered into a trust agreement with her brother Samuel Freebairn and his wife Agnes Freebairn for the purpose of developing their respective properties.

5. Samuel Freebairn encumbered the land by a mortgage in favor of Beehive State Bank for \$50,000.00.

6. Samuel Freebairn died on July 30, 1969, and as a result of his death Agnes Freebairn was unable to develop the property or make the payments on the mortgage or pay the property taxes.

7. The 1968 trust agreement was prepared by Herbert Halliday, attorney for Security Title Co., which was charged with the administration of the trust.

8. There was no evidence presented that at the time of the creation of the 1968 trust agreement plaintiff was not competent to contract.

9. The 1968 trust was terminated by plaintiff and Agnes Freebairn in March of 1971. Mr. Halliday handled the termination, but did not make a determination as to plaintiff's mental status at that time.

10. Plaintiff and Agnes Freebairn, facing the risk of losing the property which was the subject matter of the 1968 trust agreement agreed to sell the property.

11. Plaintiff and Agnes Freebairn contracted with LeR Burton, a real estate agent, to sell the property. Mr. Burton listed the property for sale in the multiple listing book, and advertised the same in a newspaper of state-wide circulation.

12. Plaintiff and Agnes Freebairn established an asking price, and sought out defendant to purchase the property.

13. Plaintiff on January 13, 1971 entered into an Earnest Money Agreement with Scott Investment Corporation, owned by defendant, for the sale and purchase of approximately 25 acres for \$65,000.00, with interest at the rate of 6% per annum.

14. Plaintiff had transacted a number of loans and sales of parcels of land prior to this particular transaction, and there was no evidence presented that she didn't understand the nature of those transactions.

15. The Earnest Money Agreement provided, among other things, that the proceeds were to be:

"placed in a protective trust for the purpose of safeguarding the assets and welfare of the seller to the extent that the income she needs for personal welfare cannot be preyed upon by others."

16. Prior to the closing LaMar Duncan, attorney, was consulted by plaintiff and defendant regarding the creation of

a trust for the sale proceeds. Mr. Duncan recommended that instead of a trust, a guardianship be created.

17. The closing for the sale of the property took place on March 1, 1971.

18. The guardianship was created and defendant was named guardian for plaintiff on March 22, 1971.

19. On March 23, 1971 plaintiff executed a warranty deed in favor of Scott Investment Corporation, and retained no security interest in the property despite the fact that defendant was to make monthly payments for the purchase of the property.

20. In January of 1972 defendant exchanged the land acquired from plaintiff in a four-way trade. In the exchange, the defendant received the land under or around the Metro Building located at 431 South 300 East, Salt Lake City, Utah, having a value of \$76,000.00.

21. The property sold by plaintiff to Scott Investment Corporation, who in turn conveyed the property to defendant was exchanged for the Metro Building property.

22. The party who obtained the property, formerly owned by plaintiff, in the four-way exchange sold the subject property within two years for \$6,000.00 per acre.

23. Real estate values increased dramatically immediately after the subject sale.

24. The land sold by plaintiff to defendant in 1971 was retroactively appraised by two appraisers for this lawsuit and they established values for the property in 1971 as being \$3,100.00 and \$5,500.00 per acre. The Court finds that the value established by defendants' appraiser more accurately reflects the fair market value of the property at the time of the sale from plaintiff to defendant. Defendant's expert further testified that if the sales price of the subject property at the time of the creation of the 1968 trust agreement were considered as an additional comparable, the appraised value would be lower than \$3,100.00 per acre. The Court finds that the sales price paid by defendant to plaintiff was a fair price and consistent with the fair market value at the time.

25. Plaintiff during her adult years had transacted a number of land transactions, conducted her own business affairs, attended college, was employed by the Deseret News, Salt Lake Tribune and Brigham Young University.

26. Plaintiff's expert diagnosed plaintiff as a paranoid schizophrenic. Defendant's expert diagnosed plaintiff as suffering from a delusional paranoid disorder.

27. Plaintiff is intelligent and educated, and could and did factually understand the sale of property. Plaintiff was competent to sell the property to defendant.

28. Plaintiff is not a good manager of her personal finances, but she has personally managed her finances, even though the court had appointed a guardian for her.

29. Plaintiff received all of the payments from defendant in accordance with the promissory note that was given for the payment of the property.

30. LaMar Duncan acted as attorney for plaintiff and defendant, and the parties relied upon his representations concerning the creation of the guardianship in lieu of a trust.

31. Prior to the creation of the guardianship, Mr. Duncan reviewed the Earnest Money Agreement in behalf of plaintiff.

32. The closing was held before the guardianship proceeding was initiated.

33. At the time of closing, a deed was not executed by plaintiff to the buyer Scott Investment Corporation.

34. After the appointment of the guardian, the plaintiff and not the guardian executed a deed to the property to Scott Investment Corporation on March 23, 1971, and on March 24, 1971 Scott Investment Corporation conveyed the property to defendant.

35. A petition to approve the execution of a deed was not submitted to the court

36. There is no statutory provision that precludes a guardian of a ward selling to a guardian, but the Court does not look upon with favor when a guardian purchases from a ward.

LAW

I. Contracts by Persons Subject to Guardianships are not Void.

The Utah Supreme Court has held that the appointment of a guardian is only prima facie evidence of incompetence to contract and may be rebutted. In Hometown Finance Corp. v. Frank, 13 Utah 2d 26, 368 P.2d 72, 76 (1962), the Court held:

[T]he appointment of a guardian is prima facie evidence of the incompetency of the ward, but . . . such prima facie [evidence] may be rebutted by evidence which shows that the ward was competent to understandingly manage his business affairs and enter into contracts at a time of making the alleged contract in question.

Accord, Brisacher v. Tracy-Collins Trust Co., 277 F.2d 519, 522-23 (10th Cir. 1960). In order to determine a person's competency to contract, courts look to see if the person's mental faculties were so deficient or impaired at the time the contract was made that the person lacked the power to comprehend the subject of the contract, its nature, and its probable consequences. Hatch v. Hatch, 46 Utah 218, 148 P. 433, 438 (1914) The Court in Brisacher, supra, held that a person may meet the statutory definition of the mental condition necessary to establish a guardianship and nevertheless be competent to contract under the Hatch test. As the Court in Brisacher held, "[T]he recognition by a court in Utah that a person is incompetent to manage his affairs [under U.C.A. 75-13-20] is not tantamount to an adjudication

that he is incapable of intelligently entering a contract." Brisacher, 277 F.2d at 522. As stated above, the Court finds that plaintiff was competent.

II. The Transaction was Fair and Therefore Valid.

In Cunningham v. Cunningham, 690 P.2d 549, 553 (Utah 1984), the Court held that the existence of a confidential relationship between contracting parties does not make the contract void. The Court stated:

When a confidential relationship exists between parties, and a transaction occurs that benefits the one in whom the confidence is placed, a presumption arises that the transaction is unfair. This shifts to the benefiting party the burden to persuade the Court that there is no fraud or undue influence exercised toward the other.

The principle applied by the Utah Supreme Court in Cunningham v. Cunningham is followed in many other jurisdictions. For example, in Egr v. Egr, 170 Or. 1, 131 P.2d 198, 201 (1942) the Court held:

The law seems to be well settled where one accepts a confidential or fiduciary relationship to another as that of a guardian and ward . . . where the donee or grantee is supposed to exercise an unusual and commanding influence over the grantor, courts will set aside the conveyance unless the grantee can show that the transaction was fair and without fraud or undue influence.

See also Matter of Estate of Nelson, 134 Ariz. 439, 657 P.2d 437, 430 (1982); Lindsay v. Gibson, 635 P.2d 331, 332-33 (Okla. 1981); In Re Guardianship of Chandos, 18 Ariz. 583, 504

P.2d, 524, 526 (1972); Nelson v. Gossage, 152 Kan. 805, 107 P.2d 682, 684-85 (1940). In this jurisdiction the effect of the fiduciary relationship is not to invalidate the contract but rather to shift the burden to the fiduciary to prove that the transaction was fair and without fraud or undue influence. Defendant has met that burden.

CONCLUSIONS

The Court concludes as follows:

1. The plaintiff was intelligent, educated and had the ability to understand the terms of the sale despite her mental illness.
2. The appointment of a guardian following the sale was not in and of itself a basis for voiding the sale.
3. The defendant did not take advantage of plaintiff; exercise undue influence over her; or perpetrate a fraud upon her by purchasing plaintiff's property.
4. The plaintiff did not lack the mental capacity to enter into a legally binding contract.
5. The failure to obtain court approval for the execution of a deed after the guardian was appointed did not void the deed.
6. The plaintiff had the contractual capacity to enter into a legally binding contract.
7. That plaintiff have judgment of no cause of action against defendant.

Accordingly it is hereby Ordered, Adjudged and Decreed
that plaintiff have judgment of no cause of action against
defendant. This action is hereby dismissed with prejudice.

Dated this 29 day of April, 1988.

JOHN A. ROKICH
DISTRICT COURT JUDGE

DATED this 22 day of April, 1988.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By 

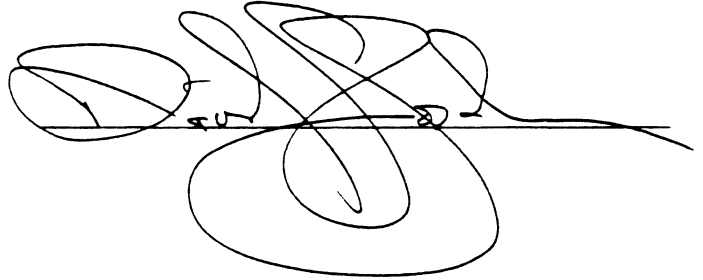
David J. Jordan
Attorneys for J. Russell Scott
50 South Main, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the within and foregoing Memorandum Decision and Judgment to be mailed, postage prepaid, this 22 day of April, 1988, to the following:

Dean Becker, Esq.
4059 South 4000 West
West Valley City, Utah 84120

Timothy G. Houpt, Esq.
Boston Building #419
Salt Lake City, Utah 84111

A handwritten signature in black ink, featuring a large, stylized 'S' or 'B' shape with a horizontal line extending to the right.

7548J