

1988

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

Utah Court of Appeals

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BRIEF

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DOCKET NO. 88-570 CA

IN THE UTAH COURT OF APPEALS

MARY JEAN FREEBAIRN,

Plaintiff and
Appellant,

vs.

J. RUSSELL SCOTT and Le R BURTON,

Defendants
and Respondents.

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Case No. 880570-CA
(Priority No. 14b.)

REPLY BRIEF OF PLAINTIFF/APPELLANT
MARY JANE FREEBAIRN

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

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APR 24 1989

COURT OF APPEALS

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	:	
Plaintiff and	:	
Appellant,	:	
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BRIEF OF PLAINTIFF/APPELLANT

Plaintiff submits this brief in reply to the brief of defendants. The statement of the facts and the statement of the issues on appeal are unchanged from plaintiff's opening brief.

SUMMARY OF ARGUMENTS

1. The sale of Mary Jean Freebairn's property to Russell Scott is invalid as a matter of law because Miss Freebairn lacked the mental capacity to execute a deed to the property as required by law. Additionally, the agreement between the parties for the purchase of the land was an executory contract and was not performed until after Miss Freebairn was adjudged incompetent and after Mr. Scott was appointed her guardian. Because the requisite judicial authorization was not obtained, the sale of property is invalid.

2. Even if the transaction was not invalid as a matter of law, it should have been set aside because the plaintiff lacked the requisite mental capacity to contract for the sale of her property. Contrary to the defendants' assertion, Utah law requires that one be able to act with discretion in relation to a contract in addition to being able to understand the contract to have the requisite mental capacity to contract.

3. The trial court's finding that Miss Freebairn had the requisite mental capacity to contract is clearly erroneous. The evidence established that she suffered from a mental disease which deprived her of her ability to act with discretion in relation to the contract, and, in all probability, she did not even understand the transaction.

4. Miss Freebairn and Mr. Scott were parties to a confidential relationship at the time of the execution of both the contract and the deed. Mr. Scott intended to assume the duties of a trustee as stated in the Earnest Money Agreement, and they were guardian and ward prior to the execution of the deed. Both of these relationships unquestionably constitute fiduciary relationships. As parties to a confidential

relationship, Mr. Scott had a fiduciary duty toward Miss Freebairn and thus a presumption arose that the transaction was unfair. At trial, Mr. Scott failed to rebut this presumption and show that the transaction was fair. In fact, the evidence clearly shows that Mr. Scott reaped an unfair advantage from the transaction.

5. If this court reverses the decision of the lower court, the proper remedy in this case would be the imposition of a constructive trust. This would simply result in Mr. Scott returning to Miss Freebairn the profit he earned by dealing with her property.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO CONCLUDE THAT THE CONVEYANCE FROM MISS FREEBAIRN TO MR. SCOTT WAS VOID AS A MATTER OF LAW.

A. A GRANTOR MUST HAVE MENTAL CAPACITY AT THE TIME OF EXECUTING A DEED.

Defendants contend that the plaintiff's mental capacity on the date she executed the deed is irrelevant and that only proof of her incompetence when she signed the Earnest Money Agreement can invalidate a transaction. In fact, the law requires that a grantor have the requisite competency on the date the deed is executed and delivered.

In addressing the requirements for the valid delivery of a deed, the Utah Supreme Court has held that it is the intention of a transferor at the time of delivery which governs a deed's validity:

Where a deed is executed with no intent to transfer a present interest, it will be invalidated. . . . This Court has held that a conveyance is valid only upon delivery of a deed with present intent to transfer. . . .

Baker v. Pattee, 684 P.2d 632 at 635 (Utah 1984) (emphasis added). See also, Anderson v. Brinkerhoff, 756 P.2d 95 at 100 (Utah App. 1988) [hereinafter Brinkerhoff]; Chadd v. Moser, 25 Utah 369, 71 P. 870 (1903).

Obviously, if a grantor lacks the requisite mental capacity, he cannot form the intent to deliver a deed that the law requires. Therefore, even if he was in full possession of his faculties when contracting for the sale of his land, lack of capacity at the time he signs a deed will render that conveyance ineffective.

Other jurisdictions have also held that a transferor must have competence at the time of the deed's delivery and execution. See Shepard v. First American Mortgage Co., 289 S.C. 516, 347 S.E.2d 118 at 119 (S.C. App. 1986), ("At common law, where a person is mentally incompetent at the time he executes a legal instrument, and the person taking the instrument has knowledge of that fact, the transaction is void."); 26 C.J.S., "Deeds" § 54 at p. 720 (1956) ("Capacity should be measured as of the date of the execution and delivery of the instrument."); Thompson, Commentaries on the Modern Law of Real Property § 2968 at p. 176 (1957) ("The deed of an insane man under guardianship is absolutely void."); Powell, Powell on Real Property, ¶ 896 at p. 1028 (1968) ("The mental competence of the grantor at the time when the delivery is claimed to have occurred is vital.").

Furthermore, in Ryan v. Colombo, 77 Or. App. 71, 712 P.2d 139 (1985), the court found that the plaintiff could not meet his burden of proving capacity, and observed that

A grantor is required to possess greater competency to execute a deed than is required of one executing a will, because a deed is irrevocable and a will is not, and also because a grantor, unlike a testator must deal with another party to the transaction.

Id. at 142.

Defendants concede that no delivery of the deed in this instance occurred until after the plaintiff was found incompetent and after the grantee was declared her guardian. A closing scheduled for March 1, 1971 did not occur because title to plaintiff's property was in trust with Security Title Company. Since plaintiff lacked capacity on

March 23, 1971, the date of the execution of the deed and the day after the order of guardianship was entered, the deed should be cancelled.

B. ON THE DATE THE GUARDIANSHIP WAS INSTITUTED, THE CONTRACT BETWEEN THE PARTIES WAS EXECUTORY AND UNENFORCEABLE WITHOUT JUDICIAL APPROVAL.

The plaintiff does not dispute that in the ordinary case the principle of equitable conversion applies to an earnest money agreement and that if the agreement itself is enforceable, the purchaser is regarded as holding an equitable interest in the property. The agreement remains an executory contract however, and in the case at bar, on the date the seller was declared incompetent and the purchaser was appointed her guardian, the purchaser had not yet tendered the purchase price, and the seller had not given a deed to the property.

The trial court included among its Findings of Fact a finding that "the closing occurred on March 1, 1971." (See Memorandum Decision and Judgment, Finding of Fact ¶ 17.) This is a finding which is wholly contradicted by the evidence. There was some testimony that the parties signed a closing statement on that date, however, it is undisputed that both a deed and the promissory note were not given until later. (Tr. 109–110, 120–121) Thus, in the ordinary sense of the word, the sale did not close by the date provided for in the Earnest Money Agreement. Unless the failure to close in a timely manner was waived by the parties, this failure was itself a defense to the enforcement of the Earnest Money Agreement which a truly disinterested guardian, as the law requires, might have asserted. The Utah Supreme Court has held that the presence of an explicit time provision "in and of itself, connotes that time was of the essence." Griffeth v. Zumbrennen, 577 P.2d 129 at 131 (Utah 1978). It cannot be said that Miss Freebairn, after a judicial finding of incompetency and the appointment of a guardian to act on her behalf in business transactions, could have accomplished a

valid waiver, defined under Utah law as the "intentional relinquishment of a known right." Morgan v. Quailbrook Condominium Company, 704 P.2d 573 at 578 (Utah 1985).

Likewise, the Earnest Money Agreement contemplates the establishment of a trust and the drafting of a trust instrument which was never accomplished. Again, someone acting on behalf of the seller without Mr. Scott's total conflict of interest, might have asserted this failure to comply with the terms of the agreement as a defense to its enforcement.

The facts of this case illustrate why Utah's former Probate Code expressly required court approval of any sale by a guardian of the ward's property. (See Utah Code Ann. §§ 75-13-32, 75-13-33, 75-13-42, 75-10-2 and 75-10-3 (repealed and replaced in 1975), set out in their entirety on pages 2-3 of Plaintiff's Opening Brief, and the discussion of those sections found at pages 23-26 of Plaintiff's Opening Brief.) Given that the very purpose of a guardianship is to conserve the property of someone who has demonstrated an inability to make rational judgments about his own affairs, the law did not permit even an impartial guardian to make the ultimate decision about whether a transfer of property was in the ward's interests; it was the court's responsibility to exercise that discretion. To ensure the court's opportunity to pass upon any sale, the Legislature specifically provided in former Utah Code Ann. § 75-10-3 that ". . . no title passes unless the sale is confirmed by the court."

Given that on the date Miss Freebairn's guardianship was instituted the contract between the guardian and the ward was executory, and neither a deed nor a promissory note had been exchanged, it is wholly illogical to conclude that the sale had already occurred and therefore was not subject to the requirement that the sale of the property be approved or confirmed by the court. In this instance, the existence of this unperformed contract was deliberately concealed. The judge who appointed Mr. Scott as the guardian of Miss Freebairn never knew that Mr. Scott, a few weeks beforehand,

had accepted Miss Freebairn's signature on an agreement to convey to him virtually the entire estate which, as guardian, he was required to conserve.

In view of these undisputed facts, the trial court erred in not concluding that the conveyance was invalid as a matter of law.^{1/}

POINT II

CONTRACTUAL CAPACITY UNDER UTAH LAW REQUIRES BOTH AN ABILITY TO UNDERSTAND AN AGREEMENT AND AN ABILITY TO ACT WITH DISCRETION IN RELATION TO IT

Defendants contend that the test for contractual capacity is merely whether a party has the ability to understand the document he signs. Their position is that if a person can understand the words contained in a written contract, the fact that a mental disease prevents him from being able to rationally chose whether or not to enter into the agreement, is irrelevant. Plaintiff agrees that understanding is one part of determining competency. However, contractual capacity also requires that a person be capable of acting with discretion in relation to the contract.

There is no basis for disputing the test for contractual capacity in Utah; it has been repeated in numerous decisions without variation:

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?

Anderson v. Thomas, 108 Utah 252, 159 P.2d 142 at 146 (1945) (emphasis added); See also Brinkerhoff.

It is clear that this test has two components, one which concerns the cognitive ability of the contracting party to understand the contents of the document, and a second

^{1/} Contrary to the defendants' assertion, the plaintiff continues to challenge, as it has, both below and throughout this appeal, the trial court's "finding" that "the appointment of a guardian following this sale was not in and of itself a basis for avoiding the sale."; e.g. Docketing Statement, Para. 5(a)

which focuses on his ability to make a rational judgment about the contract, that is, to "act with discretion" in relation to it.

It is true that some courts have in the past focused exclusively on the cognitive abilities of a contracting party. However, even courts which rely on the cognitive test have recognized an exception for cases of "insane delusions," and the modern view, as incorporated in the Restatement Second of Contracts, is that courts should examine both an actor's cognitive abilities and his ability to rationally control his actions, before finding contractual capacity. Restatement (2d) Contracts § 15 (1981). (See discussion at pages 31–32 of Plaintiff's Opening Brief). Courts have long recognized that a person who is intermittently rational may suffer from delusions which, when intertwined with the subject matter of a business transaction, deprive him of contractual capacity. See Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 at 260 (1946) (contractual capacity is lacking when one is incapable of "acting rationally in the transaction"); See also 17 C.J.S., "Contracts" § 133(1)(1963).

Furthermore, even courts which may describe the test for contractual capacity as one which concerns a party's "understanding" typically recognize that mere understanding is not enough if a mental disease has deprived a party of the ability to bargain. See First Christian Church In Salem v. McReynolds, 194 Or. 68, 241 P.2d 135 at 137 (1952), (cited with approval by this court in Brinkerhoff) ("... a grantor must be able to reason, to exercise judgment, to transact ordinary business and to compete with the other party to the transaction.")

A legal test which focuses exclusively on cognitive capacity has been severely criticized. It was noted in a comment entitled "Mental Illness and the Law of Contracts", 57 Mich. L. Rev. 1020 (1959), that the cognitive test of contractual capacity has its origins in a primitive scientific understanding of mental illness. Id. at 1033.

The Texas Court of Civil Appeals, after reviewing decisions from other courts which rejected the single prong "understanding" test, held:

We believe that the understanding test does fail to afford the finder of facts the opportunity to determine whether a person who is mentally ill, having met the standard of cognition, nevertheless lacks the ability to control his conduct, at the time the contract was made, because of his mental affliction.

Nohra v. Evans, 509 S.W. 2d 648 at 654 (Tex. Civ. App. 1974). See also Note, 39

N.Y.U.L. Rev. 356, "Manic-Depressive Held Incompetent to Contract Despite Apparent Ability to Understand Transaction" (1964); Ortelere v. Teacher's Retirement Board of New York, 25 N.Y.2d 196, 250 N.E.2d 460 (1969).

It seems clear that the law of contractual capacity in this state has always focused on both aspects of a person's mental state and that the Restatement's test of contractual capacity discussed in Plaintiff's Opening Brief is wholly consistent with the law of Utah.^{2/}

POINT III

THE TRIAL COURT'S FINDING THAT THE PLAINTIFF HAD THE MENTAL CAPACITY TO CONTRACT IS CLEARLY WRONG

The defendants contend that the plaintiff misunderstands the standard of review to be applied by this court to the trial Judge's findings.

Actually, there is no mystery about the applicable standard of review: this court will set aside the findings of the trial court if they are against the clear weight of

^{2/} It is true that some jurisdictions hold that the deed or contract of an incompetent under guardianship is merely "voidable" rather than void. Where the contracts or deeds are "void" they are a nullity from the outset. Where they are "voidable" the incompetent has the power to avoid them but must assert the right of avoidance. 39 C.J.S., "Guardian and Ward" § 99 at p. 201 (1976); 26 C.J.S., "Deeds" § 68(a) at p. 788 (1956). Since in this instance the incompetent has asserted that the transaction is void, the distinction is irrelevant.

the evidence. Brinkerhoff at 98. The question of Miss Freebairn's capacity is a mixed question of law and fact. Under the proper legal standard for contractual competency, the evidence is overwhelming that Miss Freebairn lacked contractual capacity both on January 13, 1971, the day she signed the Earnest Money Agreement, and on March 23, the day she signed a deed conveying her property to her guardian.

The trial court concluded as a matter of law that the plaintiff "was intelligent, educated and had the ability to understand the terms of the sale, despite her mental illness". It concluded, therefore, that she "had the contractual capacity to enter into a legally binding contract." (See Memorandum Decision and Judgment, Finding of Fact ¶ 27, Conclusions of Law ¶ 4).

Evidence which arguably supports the trial court's finding of competency can be found in the testimony of the Le R Burton, Agnes Freebairn ("Mrs. Freebairn") and Dr. Carl Malouf.

Le R Burton was the realtor who prepared the Earnest Money Agreement. He was a friend and long time business associate of the purchaser, Mr. Scott. He was the secretary-treasurer and a director of the Scott Investment Corporation, the family corporation through which Mr. Scott funneled the purchase of the disputed property. He earned a significant commission through the transaction by reselling building lots in the subdivision developed by the late Sam Freebairn. He is a defendant in this action. (Tr. 719-723, 749, 700-702).

Mr. Burton testified that the terms of the Earnest Money Agreement were dictated in their entirety by Miss Freebairn: that she set the purchase price, that she was diligent in contacting Mr. La Mar Duncan for advice about the transaction, that she was concerned about the tax consequences of the transaction, that the trust provision was her idea and that she never indicated that she needed money from the sale to combat the efforts of her persecutors. (Tr. 684-691).

Mrs. Agnes Freebairn testified that she was also present when the plaintiff signed the Earnest Money Agreement. (Tr. 544) Mrs. Freebairn was anxious to find a buyer for the property to relieve her of the obligation to develop it (which she was unable to do) and to save her home, which served as collateral for her late husband's development loan, from foreclosure. At a deposition taken several months before trial, Mrs. Freebairn denied having been present when the Earnest Money Agreement was executed, but at trial recalled having been present. (Tr. 544-546).

Mrs. Freebairn testified that she and the plaintiff approached Mr. Burton together to seek a buyer for the property, that she was present when Mr. Burton prepared the Earnest Money Agreement on January 13, that she "sat back and Mary talked with Le R about the way they wanted to set this up . . .", that they discussed the need to terminate the prior trust agreement, that they discussed the terms "back and forth . . . like any people that were discussing business . . .", and that the plaintiff conducted herself in a "business like" manner. She denied that there was any discussion about the plaintiff needing money to combat her persecutors, and stated that she did not appear panicked except in the sense that her creditors were closing in on her. (Tr. 529-533)

Finally, Dr. Carl Malouf, who confirmed that the plaintiff suffered from a paranoid delusional disorder, testified that in his opinion on the date of the signing of the Earnest Money Agreement, the plaintiff 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." (Tr. 497)

Turning to the evidence which weighs against the trial court's conclusion, there is, to begin with, the consensus among both parties' experts that the plaintiff suffered from a serious mental illness which had been present for many years prior to the transaction in question. (Tr. 290-295, 497). Her mental illness involved an elaborate delusional scheme through which she imagined being hounded by a group of persecutors

who interfered with many of her daily activities and interposed themselves between herself and others, including her lawyer, doctor, hairdresser, banker, etc. (Tr. 60). This is not a case of someone who simply suffers from "senility" or eccentric behavior; she was undisputedly seriously mentally ill at the time she signed the contract.

Next, there is the dramatically different description of the transaction which Miss Freebairn gave. (The transcript of this testimony is set out in Appendix A).

Miss Freebairn testified that prior to January 13, 1971 she had never met La Mar Duncan although she knew that Mr. Scott had arranged for Mr. Duncan to draft the "protective mortgage" she gave him, and to handle another matter, but that she had never talked to him about the sale of this property. She said that she told Le R Burton and Russell Scott on January 13 that she was not prepared to discuss anything about her property that day and that if she gave her signature, it could only be on the condition that she could take it to a lawyer for advice first, and that if he advised against it they would disregard her signature. She testified that she did not know how the purchase price had been computed but that it was "outrageous" and made her "absolutely ill"; that the trust was not her idea, that she only signed the agreement because she was told they needed her signature to "get going". She testified that she had been told by the defendant and another cousin that if she were to sell her property it should be to them. She testified that, two weeks later, after hearing nothing further, she went to Mr. Duncan's office, that he told her she had already exchanged her real property for an unsecured note, which, she said, made her sick. (Tr. 238-245).

Miss Freebairn testified additionally that she was dealing with "an invisible influence" in the form of Mr. Stuart Udall whom she expected to intervene and keep her from having to go through with the transaction because he had so much money that he could fly surveillance planes over her house. She testified that she heard conversations in

her home which she perceived to include Mr. Udall, but that although she had asked him several times to meet her, he had not come forth. (Tr. 236-248).

It is not uncommon for interested parties to a lawsuit to give opposing descriptions of a disputed transaction. There is, however, an important piece of additional contemporary evidence which wholly corroborates the plaintiff's position on appeal.

On March 1, 1971 the plaintiff made a phone call to Herbert Halladay, a person disinterested in the outcome of this action, and the trust officer who had been in charge of Miss Freebairn's trust agreement with her late brother and her sister-in-law. On that day, the property was still subject to the trust agreement and legal title was still held by Security Title. This was the day the "closing" of the transaction was said to have occurred, although as noted, no deed was given by the seller and no note was given by the purchaser until much later. (Tr. 389-391). This conversation between Miss Freebairn and Mr. Halladay took place six weeks after Miss Freebairn allegedly dictated the terms of the Earnest Money Agreement to Mr. Burton and conducted herself in the "business like" manner which Agnes Freebairn belatedly recalled. Mr. Halladay's contemporaneous memorandum states, 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 visit stopped.

As noted in Plaintiff's Opening Brief, this memorandum reveals several important things about the plaintiff's mental state on the day of the so-called closing. First, it suggests that she still did not regard the contract as a fully consummated,

binding agreement. Second, she discloses a serious factual misunderstanding about the agreement she signed; she is totally wrong about the purchase price, and imagines payments being made for her niece's and nephews' education which are simply not any part of the agreement. Third, she speaks in terms of compulsion, "being forced" to pay for a water pipe (referring to one of the credits Mr. Scott was taking from the purchase price). Finally, she intertwines her delusional references to her other persecutors with her paranoia about this transaction: "Russell Scott now tired of helping her and has only done so in the past because he wants her land."

It is telling that, in contrast to Mr. Burton who portrayed Miss Freebairn as astute and sophisticated about her business dealings, Mr. Halladay, a witness without any personal interest in the pending dispute gave this testimony:

Q. Did you form an impression during the occasions when you spoke with Miss Freebairn about the extent to which she appeared to understand the nature of her business with Security Title?

A. Well, I do have a recollection of that because I can remember Sam telling me that he was looking {sic} at {"out for"} Mary Jean and that he had — for some time that she needed help. And there were occasions when Mary Jean was there to see me that I felt like she understood whatever it was we were talking about and there were other occasions when I knew from what she said that she really didn't understand what was happening.

(Tr. 392).

Next, among the evidence which weighs against the trial court's finding of competency, is the uncontradicted testimony of Dr. Stephen Golding, quoted at length on pages 33 through 37 of Plaintiff's Opening Brief. Dr. Golding expressed his opinions based on a review of materials written by Miss Freebairn near the time of the disputed transaction, testing of Miss Freebairn by Dr. Malouf, and of his own examinations of her. He concluded that Miss Freebairn signed the Earnest Money Agreement as the result of "panic caused by the delusional system and her mental disorder . . .", that "she did not

have the rational anticipation of the nature of the transaction, although she understood she was selling land," that she suffered from an internal delusional "coercion" in signing the agreement, and that she did not look upon the contract, or the world as a whole with a "free and rational intellect" (Tr. 304–310).

None of this testimony was refuted by the defendants' expert, Dr. Malouf, as noted, who merely concluded that Miss Freebairn 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." (Tr. 497)

As if the scales did not weigh heavily enough against the finding of competency without them, the astounding judicial admissions of Mr. Scott himself are important evidence as well. Less than six weeks after entering into the Earnest Money Agreement which acknowledges his need to protect Miss Freebairn as her "trustee", Mr. Scott swore under oath that she was "incompetent, . . . incapable without the assistance of some other person to properly manage and care for her property," and "likely to be deceived or imposed upon by artful or designing persons."

Several years later, in a verified answer filed in the Third District Court (which, contrary to the assertion of the defendants' in their brief, was received in evidence in this matter as Exhibit 30P), Mr. Scott swore that Miss Freebairn was "wholly incompetent and unable to comprehend the meaning of the contract heretofore entered into and therefore said contract is a nullity." As a separate legal defense he asserted that on March 22, 1971 Miss Freebairn was adjudicated incompetent "because of certain mental disorders," and that she was therefore "unable to enter into any contract whatsoever." (Exhibit 30P, Tr. 188).

True, the contract to which Mr. Scott's sworn statements were directed in Exhibit 30P was entered into in 1981. But the defendants' own expert, Dr. Malouf,

testified that in his opinion Miss Freebairn's condition was essentially the same when he examined her in 1983 as it would have been in 1971. (Tr. 491).

Now that the disputed issue is whether Mr. Scott is entitled to keep the large profit he earned by acquiring Miss Freebairn's property, he would have the court believe that she was a rational business woman who knew exactly what she was doing when she agreed to sell her property to him. In other contexts, however, he has sworn to the contrary, and his judicial admission that Miss Freebairn was incapable of managing her own affairs and was unable to understand a contract are important additional pieces of evidence in support of the plaintiff's position on appeal.

The trial court noted in Finding of Fact No. 14 that the plaintiff had transacted "a number of loans and sales" prior to this transaction, "and there was no evidence presented that she didn't understand the nature of those transactions." This finding is not supportive of the conclusion that the plaintiff had contractual capacity to contract on the critical dates and is not an accurate description of the evidence.

First, all such prior transactions were either between Miss Freebairn and Mr. Scott, or were arranged by Mr. Burton. They consisted of two sales of land by Miss Freebairn to Mr. Scott in the early sixties, and three sales to third parties arranged by Mr. Burton and/or Mr. Scott. The sales to Mr. Scott occurred at a time when, it is undisputed, Miss Freebairn operated under the delusion that Walt Disney was interested in buying her property to build another Disneyland. (Tr. 15-16). One of the sales to third parties was a disaster because it included a totally unrealistic agreement by Miss Freebairn to install a water line which she was incapable of doing (Tr. 661-662). The record is filled with evidence of Miss Freebairn's inability to hold a job, and the various overt manifestations of her mental disease during this time period. (Tr. 55-63; 290-295). Those prior transactions were not the subject of this lawsuit, and would have been subject to different periods of limitations which have probably long since run.

This court is not required to affirm the trial court's conclusion about the plaintiff's competency simply because some evidence can be found in the record which supports that conclusion. The self serving testimony of those who profited from the transaction arguably does tend to support such a finding. However, the clear weight of the evidence is to the contrary, and when the record as a whole is considered, it is apparent that the trial judge was wrong in concluding that the plaintiff had the mental capacity to agree to sell her land to Mr. Scott.

POINT IV

PLAINTIFF AND DEFENDANT WERE, AS A MATTER OF LAW,
PARTIES TO A CONFIDENTIAL RELATIONSHIP AND
MR. SCOTT DID NOT CARRY HIS BURDEN OF
PROVING THAT THE TRANSACTION WAS FAIR

Incredibly, defendants deny that a fiduciary relationship existed between Mr. Scott and Mrs. Freebairn at the critical times in the disputed transaction. However, it is a matter of settled law that both trustee/cestui relationships and guardian/ward relationships are confidential, and that transactions between them are governed by the standards which apply to fiduciaries.

It is simply beyond dispute that a guardian and a ward occupy a confidential relationship. See 39 C.J.S., "Guardian & Ward" § 3, at p. 13 (1976); In re Estate of Swieciki, 106 Ill. 2d 111, 477 N.E. 2d 488 (Ill. 1985) ("A fiduciary relationship exists between a guardian and a ward as a matter of law"); In re Thelen's Estate, 450 P.2d 123 (Ariz. App. 1969); In re Johnson's Estate and Guardianship, 320 P.2d 429 (Wyo. 1958). As of March 22, 1971, Mr. Scott was appointed Miss Freebairn's guardian and he owed her a fiduciary duty. Thus, if permitted at all, dealings between them were subject to the strict standards which apply to fiduciaries.

It is equally clear, however, that the parties had a confidential relationship on the date the Earnest Money Agreement was executed. It is telling that the agreement

itself provides that Mr. Scott will act as a trustee for Miss Freebairn by holding the purchase money and disbursing it according to general terms which are outlined in the agreement. The Earnest Money Agreement may, indeed, satisfy the requirements for forming an inter vivos trust set forth in the Utah case of Sundquist v. Sundquist, 639 P.2d 181 at 183 (Utah 1981).

Whether or not the Earnest Money Agreement actually created a trust, it clearly demonstrates Mr. Scott's intention to assume the role of a fiduciary from the very outset of the disputed transaction.

Defendants criticize the authority cited by plaintiff in support of her position that the parties occupied a confidential relationship.^{3/} They suggest that the leading case of Blodgett v. Martsch, 590 P.2d 298 (Utah 1978), is no longer good authority because it was criticized in Estate of Jones v. Jones, 759 P.2d 345 (Utah 1988). However, the Jones court's only criticism of the Blodgett decision was directed to its dicta implication that the parent/child relationship is one which the law automatically presumes to be a confidential relationship. Id. at 348. That subject however is not in issue here, as Jones does not criticize that guardians and wards are in a fiduciary relationship.

The inescapable fact is that Mr. Scott and Miss Freebairn occupied a confidential relationship throughout the time during which the disputed transactions occurred.

Without having squarely decided whether Miss Freebairn and Mr. Scott were parties to a confidential relationship, the trial court reached the following conclusion:

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.

(Memorandum Decision and Judgment, Conclusion ¶ 3).

^{3/} The case of Berrett v. Stevens, 690 P.2d 553 (Utah 1984) was, in fact, cited by mistake; that case begins on the last page of Utah Supreme Court's decision in Cunningham v. Cunningham, 690 P.2d 549 (Utah 1984) which was referred to earlier in Plaintiff's Opening Brief.

It being beyond dispute, however, that as they were parties to a confidential relationship, it was incumbent upon the court to evaluate the transaction by the standards which apply to fiduciaries. As the Supreme Court of Utah has repeatedly held, the burden is upon the superior party to convince the court by a preponderance of the evidence that the transaction was fair. See Bradbury v. Rasmussen, 16 Utah 2d 378, 401 P.2d 710 at 713 (1965). And, " . . . if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party." Blodgett, 590 P.2d at 302.

When all the evidence which relates to the fairness of the transaction is considered, it is obvious that the defendant did not carry his burden of proof. Leaving aside for the moment the fact that Miss Freebairn was actually paid \$57,000 for her property on account of "deductions" from the purchase, the claimed sales price of \$65,000 for approximately 25 acres of land should be considered first. This price amounts to \$2,600 per acre, and one searches the record in vain for evidence that \$2,600 an acre was a fair price for the property in January, 1971.

Using the market data approach, plaintiff's expert property appraiser, after giving due consideration to the differences between the comparable sales he relied on and the subject property, expressed the view that the disputed property was worth \$5,500 in January, 1971 (Tr. 445). Using the market data approach, the defendants' expert concluded that the property was worth \$3,100 an acre (Tr. 597-600), and this range in values is the one which the court found pertinent in its Memorandum Decision. (Memorandum Decision and Judgment, Finding of Fact, ¶ 24).

However, defendants' expert went on to say that if the trust agreement between Mary Jean Freebairn and her brother, which included an option to purchase the entire acreage at \$3,000 an acre, was treated as a comparable sale, the market value would be "lower" since her brother's \$3,000 an acre over 13 years would have to be

reduced to present value. (Tr. 599–600). Actually, this option agreement was only in effect for two years, and the actual price paid for the acreage purchased by Sam Freebairn was a genuine \$3,000 per acre. Furthermore, the transaction was not an arms-length transaction, and included consideration other than the lot release price. (Ex. 32P, Appendix B in Plaintiff's Opening Brief).

The only way the defendants' expert could justify the actual sales price was to rely on inadmissible evidence (which the judge himself said he would not consider (Tr. 607–608)) after which he struggled to the conclusion that \$2,600 an acre was "within the range of fair market appraisal" for the property (Tr. 614).

If this were the only evidence on the subject of market value, it would be difficult to conclude that the defendant had carried his burden of proof. However, in addition to this expert testimony, is the evidence that in the early 1960's Mr. Scott purchased fifteen acres from the same parcel of Miss Freebairn's property for \$3,000 an acre. And, most importantly, in January, 1972 in the four way trade arranged by Mr. Burton, the very same property was sold to a seasoned real estate developer for \$6,000 an acre, more than twice what Mr. Scott claims to have paid. (Tr. 123–128).

A finding that the transaction is free from unfairness given this evidence is further belied by the fact that Miss Freebairn was not paid \$2,600 an acre for the property, but was actually paid \$2,360 per acre since Mr. Scott allowed himself a credit of \$6,000 from the purchase price for the cost of installing a water line which Sam Freebairn expressly agreed to pay for as part of his option agreement with his sister. (Exhibit 32P; See also Plaintiff's Opening Brief, p. 46, and Statement of Facts Therein, ¶¶ 9, 10 and 11).

The Earnest Money Agreement is riddled with other peculiarities as well. Unlike any conventional purchase agreement, the one in question provided that the seller

would have no security interest in the property she was selling, even though the purchase price was to be paid in monthly installments. While it is true that all the payments were made, the result was that when Mr. Scott himself was partially cashed out of the property (through his second trade in November, 1974), Miss Freebairn did not receive in a lump sum the balance owing on the purchase price, as would an ordinary seller who held a mortgage, but was left with her meager monthly sum while Mr. Scott enjoyed the profit earned in the transactions. Furthermore, the various deductions for sums owing to Mr. Scott and others as described in the Earnest Money Agreement and the closing statement (Ex. 12P, Ex 16P) do not coincide, leaving questions about the actual obligations owing between the parties.

It is critical that there was no one at any point during the negotiation or consummation of the deal who was able to provide independent advice to the plaintiff. Mr. Scott, who assumed the role of her "trustee" in the Earnest Money Agreement, and was her guardian at the time of the conveyance, was the very party whose interests were adverse to her own. The realtor who supposedly represented Miss Freebairn as the seller was an officer in the purchaser corporation and a friend and associate of the actual purchaser.

Finally, despite the finding of the trial court that "La Mar Duncan acted as attorney for plaintiff and defendant", the evidence was that the plaintiff never met him prior to signing the Earnest Money Agreement (Memorandum Decision and Judgment, Finding of Fact ¶ 16; Tr. 235-236), that Mr. Duncan billed Mr. Scott personally for his legal services in the matter, (although Mr. Scott elected to pay the bill out of his ward's estate) (Tr. 184-185, Ex. 29P), and that Mr. Duncan appeared as attorney for Mr. Scott, rather than Miss Freebairn, not only on the pleadings in the original guardianship proceeding, but in this very action where the interests of the parties are as adverse as they could be. (R. 24-26). It is absurd to think that Mr. Duncan was ever in a position to offer this transaction to Miss Freebairn.

This court has observed that

Undue influence need not be exerted with bad intentions, or self-interest in mind, but may well be an honest overzealousness engendered by good motives.

Brinkerhoff at 101.

It may well be, as Mr. Scott contends, that he entered into this transaction reluctantly, and in order to help his unfortunate cousin. The problem arises however when in the process of helping her, he decided to help himself. This very conflict of interest between parties to a confidential relationship is the basis for avoiding a transaction which unfairly benefits the superior party. Considering the evidence as a whole, Mr. Scott did not carry his burden of proving that the transaction was free from unfairness, and the evidence weighs heavily in favor of the contrary conclusion that he obtained an unfair advantage from it.

POINT V

MR. SCOTT SHOULD BE REQUIRED TO RETURN TO THE PLAINTIFF THE PROFIT HE EARNED FROM DEALING WITH HER PROPERTY

If this court is persuaded to reverse the decision of the trial court, the question of what remedy should be afforded to the plaintiff must be reached. The evidence clearly establishes the plaintiff's right to the imposition of a constructive trust upon the profit Mr. Scott earned from the subsequent sale of the plaintiff's property.

It is undisputed that nine months after the conveyance of the disputed property by the plaintiff to the defendant, the defendant struck a deal to trade that property as part of a four party transaction. Mr. Scott took the plaintiff's twenty-five acres, combined them with the five acres he acquired from her in the early sixties, and traded them for the land under his Salt Lake City office building which he had previously leased.

The closing of that four way transaction occurred in January, 1972, and Mr. Jerry Scott paid \$6,000 an acre to obtain plaintiff's property. (Tr. 123-128)^{4/}

Mr. Scott held the property he traded for plaintiff's property until November, 1974, at which time he sold his office building and the land under it in a single package. Because he held the building in the name of the Scott Corporation, and the land under it in his own name, Mr. Scott distinguished the portion of the purchase price attributable to the land from the portion attributable to the building, assigning 27% of the \$777,909.68 purchase price to the land. A portion of the purchase price was tendered as a down payment and the remainder financed by Mr. Scott (Tr. 123-136).

Regardless of the grounds upon which the trial court's ruling is reversed, the imposition of a constructive trust is the proper remedy. The Restatement of the Law of Restitution, provides that:

Where a person in a fiduciary relation to another acquires property, and the acquisition or retention of the property is in violation of his duty as a fiduciary, he holds it upon a constructive trust for the other. . . .
Where a fiduciary holds property upon a constructive trust for the beneficiary under the rule stated in this Section and exchanges the property for other property, the beneficiary is entitled to enforce a constructive trust or equitable lien upon the property so acquired in exchange . . .

Restatement of the Law of Restitution, § 190 (1937) and Comment c thereto. See also the authorities cited for this proposition in Plaintiff's Opening Brief at pages 50-54.

If the court concludes that the deed from Miss Freebairn to Mr. Scott should be cancelled on account of her lack of mental capacity, the remedy is the same; any dealings with the property by Mr. Scott are deemed to be for Miss Freebairn's benefit.

^{4/} The trial court's finding that this sale occurred "two years later" is simply wrong; the undisputed evidence is that the purchase by Mr. Young was in January, 1972, less than a year after the conveyance to Scott.

The plaintiff is entitled to recover from the defendant approximately 83% of the proceeds from the sale of the land under the office building, plus interest, less a credit for sums paid by him pursuant to the Earnest Money Agreement. It may be necessary to remand the case for an accounting between the parties, but it is critical that this court make a decision about the proper remedy in this matter, to avoid the possibility of another appeal.

CONCLUSION

The plaintiff is only asking that Mr. Scott be held to his own representations in his petition for appointment as Miss Freebairn's guardian, and that the law provide her with the protection which guardianship is supposed to afford to the mentally disabled. The Third District Court accepted Mr. Scott's assertion that Miss Freebairn was unable to manage her own property and was likely to be imposed upon by others. To permit the enforcement of a contract entered into with the guardian just a few weeks before the petition, by which almost all her property was transferred to him, would make a mockery of the purposes of guardianship.

Even if this Court is not persuaded that the transaction is invalid as a matter of law, a review of the evidence will reveal that the trial court was simply wrong in its conclusions that Miss Freebairn was competent to contract and that the transaction was fair. Mr. Scott himself has sworn that she was unable to understand the meaning of a contract and the evidence proved him right. If there were any doubt, it is removed by Exhibit 41P, a rare contemporaneous record of the plaintiff's mental state, which tells the whole story of her delusion, her misunderstanding of the transactions, and the internal compulsion which led her to sign it.


Furthermore, Mr. Scott never proved the transaction was fair. To accept his position, one would have to conclude that between 1964, when Mr. Scott paid Miss Freebairn \$3,000 an acre for property from the same parcel, and 1971, her land

decreased in value by at least \$400 an acre, but that less than a year afterwards, it miraculously increased in value to more than twice that amount.

Finally, the remedy sought is nothing more than the return of the profit which Mr. Scott earned by dealing with Miss Freebairn's property for his own benefit, when he should have been acting for her benefit. For these reasons, the trial court's judgment should be reversed.

DATED this 24th day of April, 1989.

JONES, WALDO, HOLBROOK &
McDONOUGH

By 
Timothy C. Houpt
Barry G. Lawrence

CERTIFICATE OF SERVICE

I hereby certify that on this the 24th day of April, 1989, I caused to be hand-delivered, a true and correct copy of the foregoing Reply Brief of Plaintiff/Appellant Mary Jane Freebairn, to the following:

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bgl 145/vb

APPENDIX A

1 MET MR. LAMAR DUNCAN?

2 A IT WAS -- I HAD GONE TO RUSSELL'S OFFICE ON THE
3 13TH OF JANUARY AND MR. BURTON HAD DRAWN UP THIS -- WHAT
4 DO THEY CALL THAT?

5 Q WAS THAT THE EARNEST MONEY AGREEMENT?

6 A EARNEST MONEY AGREEMENT.

7 Q LET ME STOP YOU THERE, MISS FREEBAIRN, BEFORE WE
8 TALK ABOUT THAT.

9 BEFORE JANUARY 13TH THE DAY YOU WENT UP TO SEE
10 ABOUT THE EARNEST MONEY AGREEMENT, HAD YOU EVER MET
11 MR. LAMAR DUNCAN?

12 A NO. BUT I WAS NOT UNACQUAINTED WITH HIS NAME
13 BECAUSE HIS NAME APPEARED ON SOME OF THOSE THINGS COMING
14 IN LIKE THAT --

15 Q DO YOU REMEMBER A MATTER RELATING TO ROYAL
16 FURNITURE?

17 A THAT WAS IT. IT WAS THIS THING IN COURT OVER
18 THE ROYAL FURNITURE.

19 Q NOW, DID YOU KNOW HE REPRESENTED YOU IN THAT?

20 A I CAN REMEMBER WHAT MR. LAMAR DUNCAN DID, AND I
21 GOT IT SECOND-HAND FROM RUSSELL. HE PUT A HOMESTEAD
22 SOMETHING ON MY HOUSE. HE PUT A PHONY MORTGAGE ON MY
23 HOUSE AND -- BUT I HAD NEVER SEEN HIM OR SPOKEN TO HIM.

24 Q IF YOU HAD NEVER SPOKEN TO HIM, HOW DID HE COME
25 TO DO THOSE THINGS?

1 A BECAUSE RUSSELL WAS A MEMBER OF THE TABERNACLE
2 CHOIR WITH MR. DUNCAN AND A FRIEND, AND BESIDES I THINK HE
3 EMPLOYED HIM AS A LAWYER. AND SO ALL THAT TOOK PLACE
4 BEFORE THIS THING WAS EVER GONE UP -- THE FIRST TIME I
5 WENT TO SEE MR. DUNCAN WAS THAT DAY AFTER THE 13TH OF
6 JANUARY WHEN I --

7 Q LET ME STOP YOU THERE. SO, BEFORE THE 13TH OF
8 JANUARY YOU KNEW THAT HE HAD HANDLED SOME THINGS RELATING
9 TO YOU?

10 A THE HOMESTEAD THING AND --

11 Q THE ONES YOU MENTIONED?

12 A AND THE MORTGAGE.

13 Q YOU NEVER MET HIM OR TALKED TO HIM ABOUT THESE
14 THINGS?

15 A I HAD NEVER SEEN HIM, NO.

16 Q YOU DIDN'T KNOW MR. LAMAR DUNCAN SO SOMEONE ELSE
17 ARRANGED FOR HIM TO DO THESE THINGS?

18 A YES, THAT WAS RIGHT.

19 Q NOW, WHAT IS YOUR RECOLLECTION OF THE DAY
20 JANUARY 13TH, 1971, THAT YOU BEGAN TO DESCRIBE? WHAT
21 HAPPENED ON THAT DAY?

22 A WELL, I WENT INTO RUSSELL'S OFFICE AND THEY WERE
23 BUSY. THEY ALSO EXPRESSED SOME CONCERN ABOUT THE PROPERTY.
24 THEY HAD SAID THEY NEEDED MY SIGNATURE TO GET SOMETHING
25 GOING THERE, AND I SAID, "WELL, I DIDN'T COME HERE PREPARED

1 TO DISCUSS ANYTHING ABOUT MY PROPERTY. AND I SAID, "IF I
2 GIVE YOU MY SIGNATURE," I SAID, "IT WOULD ONLY BE ON THE
3 PROVISION THAT YOU HAVE SOME LAWYER LOOK AT IT AFTERWARD."

4 AND SO LER TYPES UP THIS EARNEST MONEY AGREEMENT
5 AND I REALIZED AFTER I LEFT THERE THAT DAY THAT I DIDN'T
6 EVEN HAVE IT IN MY POSSESSION, BUT I WAS --

7 Q YOU DIDN'T HAVE WHAT IN YOUR POSSESSION?

8 A THE COPY. I WOULD HAVE PREFERRED TO TAKE IT TO
9 SOMEONE ENTIRELY DIFFERENT THAN MR. DUNCAN BECAUSE HE WAS
10 RUSSELL'S LAWYER, BUT I DIDN'T HAVE A COPY, AND I THOUGHT
11 WHAT HAVE I DONE, YOU KNOW.

12 SO, I WAS REALLY CLAMMY. I CAN'T TELL YOU HOW
13 SICK I FELT BECAUSE SOME OF THOSE FIGURES ON THERE, \$57,000
14 -- IS THAT WHAT IT SAYS ON THAT EARNEST MONEY AGREEMENT
15 THERE?

16 Q YOU MAY LOOK AT EXHIBIT 12-P.

17 A I WAS TRYING TO RECALL WHAT WAS ON THERE.

18 THE TOTAL PURCHASE PRICE OF \$57,200. WELL, THAT
19 JUST HIT ME, YOU KNOW, LIKE I HAD BEEN KNOCKED OVER BY A
20 CAR BECAUSE I THOUGHT, WHAT ARE THOSE GUYS TALKING ABOUT?
21 YOU KNOW, SAM HAD JUST SOLD LIKE TWO LOTS AND I HAD
22 RECEIVED \$14,000 FROM HIM AND HE STILL OWED ME -- IT'S
23 RIGHT HERE -- \$96,990. THE PURCHASE PRICE, \$14,000 PAID
24 TO ME FROM HIM -- \$82,990, BALANCE DUE, FOUR LOTS. LET'S
25 SEE. NO. EXCUSE ME. I'M GOING TO MESS YOU UP. LOT

1 RELEASE PRICE \$1,202.82. FOUR LOTS HAD BEEN RELEASED AND
2 THE BUYER IS ENTITLED TO GET SEVEN ADDITIONAL LOTS.

3 Q NOW, LET ME JUST TELL YOU THAT WE'LL HAVE A
4 CHANCE TO ASK MR. HALLIDAY ABOUT THOSE LATER.

5 NOW, YOU WERE TALKING ABOUT YOUR REACTION TO THE
6 FIGURES TO THE EARNEST MONEY AGREEMENT ON JANUARY 13.

7 A OH, I SEE. IN OTHER WORDS, THIS CAME LATER, BUT
8 THAT WAS MY RECOLLECTION IN MY OWN MIND ABOUT WHAT I OWNED,
9 AND I THOUGHT WHAT ARE THOSE GUYS TALKING ABOUT HERE,
10 \$57,000.

11 Q WAS \$57,000 A FIGURE THAT YOU HAD GIVEN TO
12 MR. BURTON OR TO MR. SCOTT?

13 A NO. BUT IT WAS SOMETHING THAT I HAD SEEN THAT
14 DAY, SEE.

15 Q NOW, DID YOU EVER TELL MR. BURTON OR MR. SCOTT
16 THAT YOU WANTED TO SELL THE PROPERTY FOR \$57,000?

17 A NO. I WAS ABSOLUTELY ILL.

18 Q DID YOU EVER TELL THEM THAT YOU WANTED TO SELL
19 THE PROPERTY FOR \$65,000?

20 A OH, THAT FIGURE, TOO, WAS OUTRAGEOUS TO ME, YES.

21 Q BUT YOU SAW IT ON THE DOCUMENT THAT DAY?

22 A I SAW IT ON THE DOCUMENT AND I THOUGHT, I DON'T
23 SEE HOW THIS CAN BENEFIT AGNES. IT'S JUST SOMETHING I
24 DON'T UNDERSTAND AT ALL.

25 Q DO YOU RECALL A PARAGRAPH IN THE DOCUMENT THAT

1 TALKED ABOUT A TRUST? YOU MAY REFRESH YOUR RECOLLECTION
2 BY READING IT, IF YOU WOULD LIKE.

3 A WELL, THIS WENT BACK TO MY -- I HAD PNEUMONIA,
4 TO MY HAVING HAD PNEUMONIA AT COTTONWOOD HOSPITAL.

5 Q WAS THIS BEFORE JANUARY 13, 1971?

6 A IT WAS LIKE THE VERY SAME TIME OF YEAR IN '69.
7 AND I HOPE IT WAS -- LET'S SEE. MY LITTLE NIECE IS JUST
8 20 --

9 Q THAT'S CLOSE ENOUGH. BUT WHAT DOES COTTONWOOD
10 HOSPITAL HAVE TO DO WITH THAT?

11 A I WAS OUT THERE WITH PNEUMONIA AND RUSSELL HAD
12 AGREED WITH THE HOSPITAL TO ADMIT ME. YOU KNOW, THEY
13 AGREED TO ADMIT ME ON THE BASIS OF HIS SAYING HE WOULD
14 COVER THESE EXPENSES. AND, BOY, BELIEVE ME THEY WOULDN'T
15 ADMIT YOU OTHERWISE EVEN THOUGH YOU'RE DYING OF PNEUMONIA.
16 BUT THE DOCTOR WANTED TO KNOW WHERE I -- HE TOLD ME, HE
17 SAYS, "GEE," HE SAYS, "THESE X-RAYS ARE SO EXTRAORDINARY."
18 HE SAID, "WE NEVER SEEN SUCH A CASE OF PNEUMONIA." HE
19 SAYS, "THEY'RE GOING TO BE IN THE MEDICAL CENTER." HE
20 SAYS, "THE ONLY REASON YOU SURVIVED PNEUMONIA WAS BECAUSE
21 OF YOUR EXCELLENT HEALTH."

22 I HAVE ALWAYS HAD EXCELLENT HEALTH, BUT I'M
23 AFRAID I NEVER HAD EMOTIONAL HEALTH. BUT ANYWAY, HERE I
24 WAS JUST -- AND THEN THE DOCTOR SAID, "HAVE YOU BEEN ANY
25 OTHER PLACE? I HAVE NEVER SEEN THIS GERM."

1 I SAID, "YES. I WAS IN THE EAST AND I WENT THERE
2 TO SEE THE F.B.I. AND I WANTED TO CONTACT A LAWYER THAT WAS
3 BEYOND THE REACH OF THE DESERET NEWS OR THE L.D.S. CHURCH."

4 Q WHAT DID YOU WANT TO TALK TO THE F.B.I. ABOUT?

5 A WELL, BECAUSE UP TO THAT POINT I FELT I HAD
6 REALLY BEEN TREATED OUTRAGEOUSLY AND I WANTED THEM TO
7 UNDERSTAND WHAT I WAS HAVING TO PUT UP WITH.

8 Q SO, YOU TOLD THE DOCTOR THAT?

9 A YES, I DID. AND SO HE TOLD RUSSELL, HE TOLD MY
10 BROTHER SAM, I THINK HE TOLD THEM TOGETHER OR IN TURN,
11 BECAUSE SAM CAME TO VISIT ME EVERY NIGHT THAT I WAS IN
12 THE HOSPITAL.

13 Q WHAT DID THE DOCTOR TELL THEM?

14 A HE SAID, "I'M AFRAID YOUR SISTER --"

15 MR. JORDAN: YOUR HONOR, I'M GOING TO OBJECT AT
16 THIS POINT, HEARSAY TESTIMONY.

17 MR. HOUP: IT'S NOT OFFERED FOR THE TRUTH OF
18 THE MATTER, BUT IT GOES TO THE STATE OF MIND OF THE WITNESS
19 HERE, HOW IT AFFECTS HER VIEW. I DON'T OFFER THIS FOR
20 ANYTHING OF THE TRUTH.

21 THE COURT: IT CAN BE ADMITTED ON THAT BASIS.
22 AS IT'S NOT A JURY TRIAL I WILL LET IT IN.

23 THE WITNESS: BUT THE DOCTOR TOLD RUSSELL AND
24 RUSSELL IN TURN TOLD MOST OF THE MEMBERS OF MY FAMILY
25 THAT THE DOCTOR THOUGHT, YOU KNOW, THAT I WAS MENTALLY

1 ILL BECAUSE I WAS FEARFUL OF THOSE INVISIBLE INFLUENCES
2 AND I HAD GONE TO SEE THE F.B.I. AND I HAD GONE SO FAR
3 FROM HOME.

4 Q (BY MR. HOUP) NOW, LET ME STOP YOU THERE AND
5 ASK YOU AGAIN TO THINK ABOUT THE DOCUMENT, THE EARNEST
6 MONEY AGREEMENT.

7 A DOWN HERE?

8 Q YES. NOW, YOU SAID THAT MR. BURTON TYPED THE
9 AGREEMENT UP WHILE YOU WERE THERE.

10 A HE DID. THIS WAS HIS TYPING.

11 Q NOW, YOU SEE THAT PROVISION IN THERE THAT TALKS
12 ABOUT A TRUST BEING SET UP WITH MR. SCOTT, THAT MR. SCOTT
13 WAS TO SERVE AS TRUSTEE? DO YOU SEE THAT PROVISION?

14 A THE PURCHASE OF THIS PROPERTY IS BY AGREEMENT
15 TO BUYER AND SELLER AND THE DEED IS TO BE GIVEN ON
16 POSSESSION DATE WITHOUT ANY OF THE SUBJECT PROPERTY ACTING
17 AS SECURITY FOR FUTURE PAYMENTS, AND ALL OF THE RIGHTS AND
18 BENEFITS TO SELLER ARISING AS PART OF THIS AGREEMENT ARE
19 TO BE PLACED IN A PROTECTIVE TRUST FOR THE PURPOSE OF
20 SAFEGUARDING THE ASSETS AND WELFARE OF THE SELLER TO THE
21 EXTENT THAT THE INCOME SHE NEEDS FOR PERSONAL WELFARE
22 CANNOT BE PRAYED UPON BY OTHERS AND -- AND YOU SHOULD
23 HAVE HEARD THOSE ATTORNEYS HOWL AFTER I SHOWED THAT TO SOME
24 LATER ATTORNEYS.

25 Q NO. I WANT YOU NOW TO FOCUS BACK TO

1 JANUARY 13TH OF '71.

2 NOW, AFTER MR. BURTON TYPED UP THE DOCUMENT, THAT
3 PARAGRAPH WAS THERE.

4 A OH, IT WAS, VERY DEFINITELY.

5 Q NOW, DID YOU SUGGEST TO MR. BURTON THAT THIS
6 TRUST BE SET UP?

7 A BUT RUSSELL SAID IF HE WAS GOING TO HELP ME
8 ANYTIME AFTER THAT DOSE OF PNEUMONIA THAT HE WOULD LIKE
9 TO DO IT ON THAT BASIS.

10 Q ON WHAT BASIS?

11 A OF HIM BEING IN A GUARDIANSHIP POSITION.

12 I HAD NEVER HEARD OF A GUARDIANSHIP, YOU KNOW,
13 AND THAT WAS KIND OF A NEW CONCEPT TO ME, BUT THAT WAS
14 SOMETHING THAT --

15 Q NOW, THAT IS YOUR SIGNATURE ON THE DOCUMENT;
16 ISN'T IT?

17 A THAT IS. AND I WAS VERY RELUCTANT TO GIVE IT
18 THAT DAY BECAUSE I JUST HADN'T HAD MY DOCUMENTS WITH ME
19 AND THAT FIGURE, \$57,000, YOU KNOW, JUST MADE ME SICK.

20 Q IF THE FIGURE OF \$57,000 MADE YOU SICK, WHY
21 DID YOU SIGN THE DOCUMENT?

22 A BECAUSE THEY SAID -- IT SAID, I THINK EVEN HERE,
23 SOMETHING THAT IT WOULD BE REFERRED TO A LAWYER. I DON'T
24 KNOW WHERE IT IS IN HERE, BUT IT MADE THAT PROVISION.

25 Q WHAT WAS YOUR UNDERSTANDING OF THE PROVISION?

1 A IF A LAWYER FOUND ANYTHING TO DISPUTE, THAT HE
2 WOULD DISREGARD THE SIGNATURE. I MEAN THAT SIGNATURE
3 WOULDN'T STAND FOR HIM, BUT THEY HAD SAID, "WELL, WE'LL
4 NEED YOUR SIGNATURE TO GET GOING." IT WAS WHAT THEY SAID
5 TO ME.

6 Q WELL, IF YOU WERE UNSURE ABOUT IT AND DIDN'T
7 HAVE YOU DOCUMENTS AND YOU WERE UNHAPPY ABOUT THE FIGURE,
8 WHY DID YOU SIGN IT, THEN AND NOT SAY, "I'M GOING TO TALK
9 TO A LAWYER," AND THEN TALK TO ONE?

10 A BECAUSE, AS YOU WILL SEE, I THINK IT'S --
11 ANYBODY STUDYING MY LIFE WOULD BE IMPRESSED WITH A COUPLE
12 OF THINGS, AND THAT IS THE STEADFASTNESS IN WHICH I CAN
13 STICK TO AN AGREEMENT LIKE. YOU KNOW, THESE FELLOWS HAD
14 COME TO ME, ROBERT RUSSELL AND RUSSELL SCOTT, AND THEY
15 SAID, "IF YOU'RE GOING TO DO ANYTHING ABOUT YOUR PROPERTY
16 AND YOU'RE GOING TO HAVE SOME EXPENSES THAT YOU CAN'T
17 MEET, YOU KNOW, IF YOU SELL ANY OF IT," THEY SAID, "SELL
18 IT TO US BECAUSE EITHER THAT PLACE IS GOING TO BE
19 DEVELOPED ACCORDING TO, YOU KNOW, A MASTER PLAN OR IT'S
20 GOING TO BE DEVELOPED BY PIECEMEAL AND IT WILL BE RUINED."

21 AND SO I WAS VERY STEADFASTLY LOYAL TO THAT
22 AGREEMENT TO DO THAT BECAUSE THERE WAS A FELLOW THAT HAD
23 BEEN IN THE EASTERN STATES MISSION AND CAME HOME AND WENT
24 INTO BANKING, AND HIS NAME WAS -- WAS JUST A YOUNG
25 MISSIONARY WHEN I MET HIM, AND HE WAS THERE CRANKING OUT

1 THE WARD BULLETIN AND I GOT HOME HERE AND RAN INTO HIM ON
2 THE STREET, AND HE WAS NOT UNACQUAINTED WITH MY PROPERTY
3 AND HE TALKED TO ME ABOUT MY PROPERTY. I WAS SO
4 SURPRISED AND HE SAID THAT HE WOULD LIKE TO MAKE AN OFFER
5 ON THAT PROPERTY AND I THINK IF YOU WERE TO CONTACT HIM
6 HE WOULD TELL YOU THAT HE OFFERED ME FOUR THOUSAND FOR
7 IT. AND I TOLD HIM AT THE TIME, I SAID, "WELL, I'M JUST
8 DEALING WITH RELATIVES."

9 MR. JORDAN: OBJECTION, YOUR HONOR.

10 THE COURT: SUSTAINED.

11 MR. JORDAN: HEARSAY. AND I MOVE THAT THE LAST
12 REMARKS BE STRICKEN AS UNRESPONSIVE.

13 THE COURT: THEY WILL BE STRICKEN.

14 Q (BY MR. HOUP) WHY DID YOU SIGN THE AGREEMENT,
15 THAT'S THE QUESTION I'M ASKING.

16 A BECAUSE I WAS TRUSTING THAT THOSE FOLKS WOULD
17 DO WHAT I STIPULATED, I SAID VERBALLY, AND AGREED TO IT
18 VERBALLY THAT THEY WOULD -- REFERRING IT TO AN ATTORNEY.
19 AND I SAID, "I JUST DON'T COME HERE, YOU KNOW, PREPARED
20 TO DISCUSS MY PROPERTY," AND I SAID, "AND ANYTHING THAT
21 TAKES PLACE HERE WILL HAVE TO BE REVIEWED BY AN ATTORNEY,"
22 AND I DON'T KNOW IF THIS SAYS, "SUBJECT TO THE APPROVAL
23 OF AN ATTORNEY," OR NOT. I HAVEN'T REVIEWED IT THAT
24 RECENTLY.

25 Q WHAT DID YOU DO THEN WHEN YOU LEFT THE OFFICE

1 THAT DAY?

2 A WELL, TWO WHOLE WEEKS WENT BY AND IF I HAD
3 THAT AGREEMENT I WOULD HAVE TAKEN IT TO MY OWN -- OR A
4 LAWYER INDEPENDENT OF -- BECAUSE THAT WAS RUSSELL'S
5 LAWYER AND I WANTED TO SHOW -- I WAS JUST SICK. I
6 CAN'T TELL YOU HOW SICK I FELT ABOUT IT. AND I WENT
7 OVER TO MR. DUNCAN AND I SAYS THEY HADN'T BEEN THERE,
8 AND I SAYS BUT HE COULD CALL THEM IN. SO, I WENT BACK
9 AND I SAW HIM -- I THINK I EITHER SAW HIM AGAIN
10 INDIVIDUALLY BECAUSE BEFORE WE ALL MET TOGETHER, OR JUST
11 BEFORE WE ALL MET TOGETHER HE SAID, "YOU EXCHANGED YOUR
12 REAL PROPERTY FOR AN UNSECURED NOTE," AND THEN THAT WAS
13 WHEN HE STARTED TO SCHOOL ME ON THE SUBJECT OF A
14 GUARDIANSHIP.

15 NOW, I HADN'T BROUGHT IT UP AND HE HAD ALL
16 THESE BOOKS READY TO REFER TO, AND THAT'S WHY IN THE
17 DEPOSITION OVER THERE I SAID I LEFT FEELING LIKE I HAD
18 BEEN CLUBBED OVER THE HEAD, BECAUSE IT WAS SO HUMILIATING
19 TO THINK SOMEBODY THOUGHT I HAD TWO LEFT FEET AND NEEDED
20 A GUARDIAN. BUT HE HAD FULLY DIVULGED THE CONCEPT FOR ME
21 TO CONSIDER.

22 Q NOW, BASED ON YOUR DISCUSSION WITH MR. DUNCAN
23 WHEN YOU WENT TO SEE HIM AFTER SIGNING THIS, DID YOU COME
24 AWAY, THEN, WITH THE UNDERSTANDING THAT IT WAS TOO LATE
25 TO GET OUT OF THE AGREEMENT?

1 A I SURE DIDN'T WANT IT. HERE I WAS DEALING WITH
2 AN INVISIBLE INFLUENCE, BUT --

3 Q WHAT INVISIBLE INFLUENCE?

4 A MR. UDALL.

5 Q WHAT DID THAT HAVE TO DO WITH THIS?

6 A OKAY. I WAS ABSOLUTELY 100 PERCENT INFALLIBLY
7 SURE HE WAS IN THE CITY, AND IF THERE WAS SOME WAY TO
8 COME FACE-TO-FACE WITH HIM, BECAUSE HE WAS NOT UNACQUAINTED
9 WITH MY PROPERTY IN THAT HE HAD EVEN WRITTEN ME A LITTLE
10 LETTER THAT SAID: GEE, I REALLY ADMIRE, YOU KNOW, YOUR
11 -- YOU KNOW, THE WAY YOU HAVE GONE ABOUT ALL THIS AND
12 BROUGHT ALL THIS ABOUT, ALL THOSE PLANS AND EVERYTHING.
13 AND SO I THOUGHT, GEE, IF MR. UDALL -- YOU KNOW, IF I COULD
14 JUST SEE HIM FACE-TO-FACE I WOULDN'T HAVE TO GO THROUGH
15 WITH THIS AT ALL.

16 Q NOW, WHY WOULD SEEING MR. UDALL HAVE KEPT YOU
17 FROM HAVING TO GO THROUGH WITH THIS DEAL?

18 A BECAUSE ACCORDING TO MY UNDERSTANDING HE WAS
19 SPENDING MONEY LIKE IT WAS RUNNING OUT OF THE TAP. HE
20 HAD PLANES COMING OVER MY HOUSE. HE HAD PLANES -- HE HAD
21 VERY EXPENSIVE CARS COMING DOWN MY STREET. HE HAD JEEPS
22 COMING AROUND THE CORNER. HE WAS SPENDING MONEY, MONEY,
23 MONEY. I THOUGHT IF I HAD THE PRICE OF ONE OF THOSE --
24 YOU KNOW, MY BROTHER TOOK FLYING LESSONS, AND I THINK I
25 EVEN LOOKED INTO THIS AT ONE TIME, BUT TO BRING A PIPER

1 CUB JUST OVER OUR HOUSE, THE PRICE OF THAT WOULD HAVE BEEN
2 \$25. HERE HE HAD THOSE PLANES OVER HERE EVERY HOUR AND
3 NOT JUST THE PIPER CUB, BUT HUGE, GIANT PLANES, YOU KNOW,
4 AND I THOUGHT, MAN, THIS MAN IS JUST -- YOU KNOW, I THOUGHT
5 MR. UDALL COULD DO, YOU KNOW, ANYTHING. AND SO THAT'S WHY
6 I THOUGHT IF I COULD JUST SOMEHOW, JUST GET TO THIS
7 MR. UDALL --

8 Q WERE YOU ABLE TO GET TO MR. UDALL?

9 A NO. I ASKED SEVERAL TIMES TO MEET HIM AND HE
10 HAS NEVER COME FORTH.

11 BUT I WOULD ALSO GIVE MY -- I DON'T KNOW HOW YOU
12 COULD TALK OR EXPECT THEM TO BELIEVE YOU, BUT THEY MAKE
13 THESE SOUNDS INTO MY HOUSE AND THERE'S A CONVERSATION THAT
14 GOES BACK-AND-FORTH.

15 Q IN YOUR HOUSE?

16 A YES.

17 Q BUT WHO ARE THE PARTIES TO THE CONVERSATION?

18 A I PERCEIVE THAT IS MR. UDALL AND HE'S GUARDING
19 MY HOUSE.

20 NOW, I JUST WANT TO SAY THIS, THAT WHEN, YOU
21 KNOW -- WHEN MR. -- OH, WHEN THE COURT DECIDED THAT
22 MR. SCOTT -- REMEMBER JUDGE FISHLER SAID, "YOU HAVE GOT
23 TO GET A CONSERVATOR." AT THAT TIME I WAS EQUALLY SURE
24 THAT MR. UDALL WOULD ACCEPT THE POSITION. SO, I HAD --

25 Q THAT'S A MATTER OF RECORD AND PROBABLY NOT