

1988

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARY JEAN FREEBAIRN,

Plaintiff and
Appellant,

VS.

J. RUSSELL SCOTT and
Le R BURTON,

Defendants and Respondents.

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

BRIEF OF DEFENDANTS/RESPONDENTS
J. RUSSELL SCOTT AND LE R BURTON

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

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COURT OF APPEALS

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JURISDICTION AND NATURE OF PROCEEDINGS

This court has appellate jurisdiction over this case, which was transferred to it by the Utah Supreme Court, pursuant to Utah Code Ann. § 78-2a-3(2)(j), 1953 as amended.

This appeal arises from an action for the recovery of the value of real property which plaintiff, Mary Jean Freebairn, sold in 1971 (the "property") to defendant J. Russell Scott. Plaintiff's appeal is from a decision of no cause of action.

STATEMENT OF THE ISSUES

1. Is plaintiff entitled to annul the 1971 sale of her property to Mr. Scott, as a matter of law, for the reason that: (a) after the sale of the property Mr. Scott was appointed guardian over plaintiff; (b) Mr. Scott did not obtain judicial approval, as guardian for plaintiff, of plaintiff's signing a deed for property which she had conveyed before the guardianship proceedings were initiated; and (c) plaintiff signed the deed to the property after a guardian was appointed, although she executed the Earnest Money Agreement and closed the sale of the property before the guardianship proceedings?

2. Is there sufficient evidence to support the trial court's findings of fact that: (a) plaintiff had the capacity to contract and convey her property when she sold it to Mr. Scott; and (b) the sale to Mr. Scott was fair and defendants did not exercise fraud or undue influence over plaintiff?

3. Can this court impose a constructive trust on the proceeds of Mr. Scott's sale of the property he purchased from plaintiff where there are no findings by the trial court, or evidence in support thereof, pertaining to the elements for a constructive trust?

CODIFIED LAW REQUIRING INTERPRETATION

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation would be determinative of any issue, legal or factual, presently before this court.

STATEMENT OF THE FACTS

1. Mary Jean Freebairn, plaintiff, and defendant J. Russell Scott are first cousins who separately inherited real property from their uncle near the cottonwood canyons. (Memorandum Decision & Judgement ("Judgment"), Findings of Fact ¶ 1; Brief of Plaintiff/Appellant Mary Jean Freebairn ("Appellant's Brief") pp. 6-7, and Appendix I.)

2. During the 1960's, plaintiff sold 15 acres of her property to Mr. Scott in order to obtain money to pay her debts. (Judgment, Findings of Fact ¶ 3; Reporter's Transcript on Appeal ("Record") pp. 10-15; Appellant's Brief pp. 9-10.)

3. In 1968, plaintiff entered into a trust agreement with her brother Samuel Freebairn and his wife, Agnes Freebairn, for the purpose of developing plaintiff's property. Under the terms of the trust agreement, Samuel and Agnes Freebairn agreed to purchase the remainder of plaintiff's property, with the property subject to a trust agreement with Security Title Comany, and with payments made on a "lot release" basis. (Judgment, Findings of Fact ¶¶ 4, 7; Record pp. 27-28, 213-14, 520-24, Exhibit 32-P; Appellant's Brief pp. 10-11.)

4. Samuel and Agnes Freebairn encumbered the land by a mortgage in order to obtain money to finance the development of the property. Samuel Freebairn, however, died shortly thereafter in 1969, and Agnes Freebairn was unable to develop the property or make the payments on the mortgage. (Judgment, Findings of Fact ¶¶ 5-6; Record pp. 522-25; Appellant's Brief p. 13.)

5. Plaintiff and Agnes Freebairn, facing the risk of losing the property, agreed to sell the property, and both contacted Le R Burton, a real estate agent, to have the property offered for sale. (Judgment, Findings of Fact ¶¶ 10-11; Record pp. 525-27, 676-80; Appellant's Brief p. 14.)

6. Plaintiff and Agnes Freebairn established an asking price for the property and had Mr. Burton list the

property for sale in the multiple listing book and advertise it by sign and in a newspaper of state-wide circulation. (Judgment, Findings of Fact ¶¶ 11-12; Record pp. 525-33, 680-91.)

7. After the property was unsuccessfully offered for sale for a period of time, plaintiff sought out Mr. Scott to purchase the property. Mr. Scott initially rejected the offer, but later agreed to purchase the property to help plaintiff and Agnes Freebairn with their financial problems. On January 13, 1971, after no other buyers could be found, plaintiff had Mr. Burton prepare an earnest money agreement for the sale and purchase of the property. Mr. Scott signed the agreement, agreeing to pay plaintiff's asking price. The agreement also provided that the proceeds from the sale would be placed in a "protective trust" for the purpose of safeguarding the assets and welfare of plaintiff. (Judgment, Findings of Fact ¶¶ 13, 15-16; Record pp. 68-88, 527-33, 682-97, Exhibit 12-P.)

8. Prior to the closing of the sale, plaintiff and Mr. Scott consulted with LaMar Duncan, an attorney, regarding the creation of a trust for the sale proceeds. Mr. Duncan, however, recommended that instead of a trust, a guardianship be created. Both plaintiff and Mr. Scott relied on Mr. Duncan's representations concerning the creation of a guardianship in lieu of a trust. (Judgment, Findings of Fact ¶¶ 16,30; Record pp. 90-94, 698-700, 784-86.)

9. The closing for the sale of the property took place on March 1, 1971 which was before the guardianship proceedings were initiated. At the closing, plaintiff did not execute a deed because the property was still subject to the 1968 trust agreement with Security Title Company. (Judgment, Findings of Fact ¶¶ 17, 32-33; Record pp. 106-11; Appellant's Brief p. 17.)

9. On March 22, 1971, the guardianship was created, with Mr. Scott named as guardian. On March 23, 1971, the 1968 trust was terminated, and plaintiff executed a deed to the property. (Judgment, Findings of Fact ¶¶ 9, 18-19, 34; Record pp. 110-12, 393-97.)

10. Plaintiff received all the payments from Mr. Scott which she was owed for the sale of her property. (Judgment, Findings of Fact ¶ 29; Record pp. 772-84.)

11. During the time period immediately after plaintiff sold her property, real estate values in the area increased dramatically. (Judgment, Findings of Fact ¶ 23; Record pp. 420-23, 650-52; Complaint.)

12. The trial court found, in rejecting plaintiff's cause of action to have the sale annulled, that the sales price paid by Mr. Scott was fair and consistent with the fair market

value at the time; that plaintiff was intelligent and educated; that she factually understood the consequences of the sale of her property; that she was competent to enter into a binding, legal contract and to sell her property; and that defendants did not take advantage of plaintiff, exercise undue influence over her or perpetrate a fraud upon her by purchasing her property. (Judgment, Findings of Fact ¶¶ 24-25, 27, Conclusions ¶¶ 1, 3-4, 6; Record pp. 68-94, 481-97, 525-33, 614, 666-99.)

SUMMARY OF ARGUMENTS

1. In Point I of Appellant's Brief, plaintiff raises three issues of law. Each of these issues, and consequently plaintiff's arguments in support thereof, are immaterial for the reason that they are based on the faulty premise that plaintiff sold her property when she signed the deed after a guardian had been appointed. Plaintiff does not challenge the fact that she executed the Earnest Money Agreement and closed the sale of her property before guardianship proceedings were initiated. Consequently, the sale was completed and the property was conveyed before a guardian was appointed. Each of plaintiff's arguments, therefore, must fail. Moreover, plaintiff's arguments fail to correctly state or apply Utah law. A sale of property by a ward to her guardian, or the

ward's signing of a deed, does not render the transaction void as a matter of law. Plaintiff, therefore, has failed to provide any relevant reason why the trial court's judgment should not be affirmed.

2. Plaintiff challenges certain findings of fact in Points II and III of Appellant's Brief. Plaintiff ignores the complete record and only cites her own evidence, arguing that the trial court should have found in her favor. In addition to her failure to apply the appropriate standard of appellate review to the trial court's findings of fact, plaintiff is unable to successfully argue that the findings are in error because substantial evidence was presented at trial upon which the trial court relied. There are no grounds, therefore, for disturbing the findings of the trial court.

3. Finally, plaintiff argues in Point IV of Appellant's Brief that this court should impose the remedy of a constructive trust against the benefits Mr. Scott received from later selling the property he purchased from plaintiff. Not only has plaintiff failed to show how she is entitled to such relief, either before this court or the court below, but there are no findings to support such a judgment, nor has plaintiff pointed to sufficient evidence to support a finding that the necessary elements for this remedy exist. It is inappropriate for plaintiff to seek relief from this court when there is no

factual basis for the relief sought. Plaintiff's request for a constructive trust, therefore, should be rejected.

ARGUMENT

POINT I

PLAINTIFF SOLD HER PROPERTY BEFORE A GUARDIAN WAS APPOINTED OVER HER; THEREFORE, SHE HAS FAILED TO RAISE A MATERIAL ISSUE OF LAW THAT WOULD JUSTIFY ANY RELIEF SHE MAY BE SEEKING.

A. MR. SCOTT PURCHASED PLAINTIFF'S PROPERTY BEFORE HE WAS APPOINTED TO BE PLAINTIFF'S GUARDIAN, AND EVEN IF HE HAD BEEN HER GUARDIAN, UTAH LAW WOULD NOT VOID THE SALE AS A MATTER OF LAW.

Plaintiff first argues that the sale of her real property to Mr. Scott is void, as a matter of law, because he was plaintiff's guardian when the sale took place. This argument is erroneous for two reasons. First, Mr. Scott was not plaintiff's guardian when plaintiff sold him the property, and second, Utah law would not render the sale void even if Mr. Scott had been her guardian at the time of the sale.

The trial court found that plaintiff entered a valid and legally binding contract to sell her property when she executed the Earnest Money Agreement and when she in fact closed the sale of the property before the guardianship proceedings were initiated. The only element of the entire transaction which followed the institution of the guardianship proceedings was the execution of the deed. This act was only a formality arising out of the binding obligation already created

by the Earnest Money Agreement and the Closing Statement.
(Record pp. 68, 105-06; Exhibits 12-P, 16-P.)

In Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987),
the court stated that:

Under an installment land sale contract . . .
the vendee is treated as the owner of the
land . . . The doctrine of equitable
conversion characterizes the seller's
interest as an interest in personalty and not
as one in realty, whereas the vendee's
interest under the executory contract is
deemed an interest in realty. [Citations
omitted.]

Id. at 1254-55. This court entered a similar holding in Lach
v. Deseret Bank, 746 P.2d 802 (Utah App. 1987), wherein the
court stated that an earnest money agreement is a legally
binding executory contract under which the purchaser acquires
an interest in the property at the moment it is created, and
after which the purchaser is treated as the owner of the land.
Id. at 805.

The fact that the sale and conveyance occurred when
plaintiff executed her Earnest Money Agreement is further
supported by Utah Code Ann. § 57-1-1 (1953), which was in
effect during the time period critical to the transaction at
issue, which reads:

The term "conveyance" as used in this title
shall be construed to embrace every
instrument in writing by which any real
estate, or interest in real estate, is
created, aliened, mortgaged, encumbered or

assigned, except wills and leases for a term not exceeding one year.

The Utah Supreme Court said of this broad statute that "real property may be conveyed without the use of a deed. Stucki v. Ellis, 114 Utah 486, 493, 201 P.2d 486, 490 (1949). Accord, Bunnel v. Bills, 13 Utah 2d 83, 85, 368 P.2d 597, 599 (1962).

Pursuant to the above authorities, plaintiff legally conveyed title to her property when she executed the Earnest Money Agreement and closed the sale. The fact that plaintiff sold her property to defendant before the guardianship proceedings were initiated renders plaintiff's argument immaterial since Mr. Scott was not plaintiff's guardian when he purchased her property.

Plaintiff has not challenged the trial court's finding that, "[t]he appointment of a guardian following the sale was not in and of itself a basis for voiding the sale." (Judgment, Conclusions ¶ 2.) Plaintiff's argument ignores this finding. Consequently, the question of law raised in plaintiff's argument is meaningless. Plaintiff's faulty presumption that the sale took place during the guardianship, rather than before it, carries over into plaintiff's other arguments as well, also rendering them meritless.

In addition, even if Mr. Scott had been plaintiff's guardian when she sold him her property, there is no Utah law

to support plaintiff's contention that the sale would be void. In Farley v. Farley, 19 Utah 2d 301, 431 P.2d 133 (1967), which was the only Utah authority cited in support of plaintiff's argument, the court held that the plaintiff was acting as trustee for her minor children in asserting a quiet title claim to property that was the subject of a divorce decree. This case clearly speaks of trustees who deal with the res of the trust, and is distinguishable from the facts before this court. Most of plaintiff's other authorities are distinguished for the same reason; they apply only to a trustee's sale of trust property to the trustee. No Utah law has been found that holds a ward's sale of property to his guardian to be void.

A guardian's purchase of property sold by the ward is merely voidable. See In re Howard's Estate, 133 Cal. 2d 535, 284 P.2d 966, 970 (1955) (citing 25 Am. Jur. 131, § 210). Plaintiff miscites this case to support her argument that such sales are void. 39 C.J.S. Guardian & Ward § 99 n. 68 (1976). Moreover, additional text of this section of C.J.S., of which plaintiff cites only a portion, reads that cases hold "that such a purchase is not as a rule to be deemed void, but merely voidable." Other courts have likewise found transactions between wards and guardians to be merely voidable, and not void as a matter of law. Matter of Conservatorship of Spindle, 733

P.2d 388, 390 (Okl. 1987) ("a transaction may be voidable, but it is not automatically void"); In re Guardianship of Chandas, 18 Ariz. App. 583, 504 P.2d 524, 527 (1972) (de facto guardian had burden to show that transaction was fair and free from undue influence).

Although there is no Utah case law on the precise issue raised by plaintiff, Utah law would follow the approach expressed in the above-cited authorities. Where a ward transacts business with another, the Utah Supreme Court has stated that there is prima facie evidence of the incompetency of the ward, which may be rebutted by evidence that the ward was competent to transact the business. Home Town Finance Corp. v. Frank, 13 Utah 2d 26, 31, 368 P.2d 72, 76 (1962). (See also infra Point IC.) Hence if the ward transacts business with his guardian, the transaction would be merely voidable depending on whether the guardian could overcome the presumption of incompetence.

Mr. Scott was not plaintiff's guardian at the time plaintiff sold him her property. In fact, guardianship proceedings had not even been initiated when the sale closed. Plaintiff's argument that the sale is void as a matter of law, therefore, is without merit. Yet even if the facts were otherwise, Utah law would not render the transaction void.

B. PLAINTIFF SOLD HER PROPERTY BEFORE THE
GUARDIANSHIP PROCEEDINGS, RENDERING
JUDICIAL AUTHORIZATION OF THE EXECUTION
OF THE DEED UNNECESSARY.

Plaintiff argues next that the deed plaintiff executed on March 23, 1971, after a guardian was appointed, was void for lack of judicial authorization. Again, this argument is meritless for the reason that plaintiff sold her property before a guardian had been appointed over her. Moreover, the ruling of the trial court below has the effect of authorizing the sale and rendering this argument moot.

Each of the statutes cited by plaintiff deals with "sales" of the ward's property. Former Section 75-13-32 read that a guardian must not "make any sale of [the ward's] property without the order of the court." [Emphasis added.] Section 75-13-33 continued that "the guardian may sell . . . real estate, upon obtaining an order of the court." [Emphasis added.] Sections 75-13-41; 75-10-2 and 75-10-3 were similar.

Plaintiff sold her property to Mr. Scott on January 13, 1971, when plaintiff prepared the Earnest Money Agreement and had Mr. Scott sign it. The sale was closed on March 1, 1971. Because the property was subject to a trust agreement that had not yet been terminated, plaintiff could not deliver the deed at closing. On the very day the trust agreement was terminated, however, plaintiff executed the deed. Only the

execution of the deed occurred after a guardian was appointed. Pursuant to the authorities cited in subsection A of this Point, the sale and conveyance of plaintiff's property occurred before plaintiff had a guardian; hence, there was no sale to be judicially authorized when plaintiff signed the deed.

The trial court found that, "[t]he failure to obtain court approval for the execution of a deed after the guardian was appointed did not void the deed." (Judgment, Conclusions ¶ 5.) Plaintiff has not contested the court's findings that the property was sold before she executed the deed. Therefore, plaintiff is unable to successfully argue that the sale occurred when the deed was executed and that the act of signing the deed needed judicial approval under the probate code.

Moreover, the validity of the transaction between plaintiff and Mr. Scott was certainly confirmed by the trial court below. Consequently, title has now passed and plaintiff is unable to claim the deed to be void. See Utah Code Ann. § 75-10-3, as cited by plaintiff. Plaintiff, therefore, is not entitled to relief on the ground that the deed she executed was void.

C. PLAINTIFF DID NOT CONVEY TITLE TO HER PROPERTY AFTER A GUARDIAN WAS APPOINTED, AND EVEN IF SHE HAD, UTAH LAW MERELY CREATES A REBUTTABLE PRESUMPTION OF INCOMPETENCY WHEN A WARD CONVEYS REAL PROPERTY.

Plaintiff also argues that she lacked the legal capacity to convey title to her property because she signed the deed after a guardian had been appointed for her. Once again, the fallacy of this argument lies in the erroneous premise that the conveyance did not occur until the deed was signed. Plaintiff conveyed title to her property when she executed the Earnest Money Agreement and closed the sale, all of which occurred before guardianship proceedings were initiated. (See supra subsection A.) The question of whether a ward can legally convey real property after the guardianship appointment is not even at issue on the facts of this case.

Even if plaintiff's performing the formality of signing the deed after the sale was closed were to be construed as the conveyance of the real property, the fact that a guardian was appointed at that time would merely create a presumption of incompetency; it would not render the conveyance void as plaintiff suggests. Plaintiff has not cited any Utah authority for her argument that the conveyance would be void, and she cannot because Utah law is expressly to the contrary.

The Utah Supreme Court has clearly held that the appointment of a guardian is only prima facie evidence of incompetency to contract and may be rebutted. In Home Town Finance Corp. v. Frank, 13 Utah 2d 26, 31, 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) (construing Utah law). In Brisacher, the court held that a person may meet the statutory definition of the mental condition necessary to establish a guardianship and nevertheless be competent to contract. The court stated that "the 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. In addition, the Utah Supreme Court has held that "the test as to the capacity to execute a will, or trust deed, or enter into other transactions, is quite different from the requirements of Utah Code Ann. § 75-13-20 (1953), relating to the appointment of a guardian." Cornia v. Cornia, 546 P.2d 890, 893 (Utah 1976) (followed in Matter of Estate of Kesler, 702 P.2d 86, 96 (Utah 1985)).

The most plaintiff can gain by arguing that a guardian was appointed when she conveyed her property is that defendants would be required to prove she was competent at the time of the

conveyance. (See infra Point IIA.) Hence, even if plaintiff were held to have conveyed her property at the time she performed the formality of signing the deed, which was after the guardianship appointment, the conveyance would not be void as a matter of law. This issue, nevertheless, remains immaterial since plaintiff conveyed ownership to the property before guardianship proceedings were even initiated.

POINT II

PLAINTIFF HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS, AND SHE IS UNABLE TO DO SO FOR THE REASON THAT SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS.

In Points II and III of Appellant's Brief, plaintiff presents questions of fact. Namely, did she have the mental capacity to sell her property? and did Mr. Scott unfairly benefit from the sale? Plaintiff argues before this court that the trial court was clearly erroneous in finding that plaintiff was competent to contract at the time she sold the property, and that the sale was fair and without fraud or undue influence. Plaintiff, however, fails to apply this standard of review, and her arguments merely recite evidence in her favor.

It is not the function of this court to hear reargument on how the evidence should have been construed at trial. Neither will this court second guess the trial court's findings and decision. Cf. City Electric v. Industrial

Indemnity Co., 683 P.2d 1053, 1059-60 (Utah 1984) (evidence is construed in a light most favorable to the judgment of the trial court). In fact, this court will affirm a trial court's decision whenever it can do so on a proper ground. Bill Nay & Sons Excavating v. Neeley Construction Co., 677 P.2d 1120, 1123 (Utah 1984).

In light of these principles, this court has stated, with respect to its review of findings of fact, that:

In order to challenge the trial court's findings of fact, an appellant must first "marshal all the evidence in support of the trial court's finding and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings." [Citation omitted.]

Henderson v. For-Shor Co., 757 P.2d 465, 468 (Utah App. 1988). The Utah Supreme Court, in Ashton v. Ashton, 733 P.2d 147 (Utah 1987), previously expressed the same standard of appellate review to be applied to findings of fact. In Ashton, the court stated:

The court begins its analysis with the trial court's findings of fact, not with an appellant's view of the way he or she believes the facts should have been found. [Appellants] have not even begun to seriously discuss the trial court's findings that dispute their version of the facts. In Scharf v. BMG Corp., we explained the duty incumbent upon an appellant to mount a successful challenge to a trial court's findings of fact. An appellant must marshal all of the evidence in support of the trial

court's findings. Only then can we consider whether those findings are "clearly erroneous." Because [appellants] have failed to make such a showing, the trial court's findings will not be disturbed.

Id. at 150.

After mounting all the evidence in support of the trial court's findings, plaintiff must also demonstrate how the challenged findings, which are based on that evidence, are clearly erroneous. In Horton v. Horton, 695 P.2d 102 (Utah 1984), the court stated:

[T]he standard of appellate review in equity cases, even where the level of proof from the trial court is clear and convincing evidence, is that of clear preponderance. Therefore, where the evidence is in conflict, this court will not upset the findings in the trial court unless the evidence so clearly preponderates against them that this court is convinced that a manifest injustice has been done.

Id. at 105. In applying this standard, the court has stated that it is mindful of the advantaged position of the trial judge who sees and hears the witnesses. Jensen v. Brown, 639 P.2d 150, 152 (Utah 1981). Hence, there is not only indulged a presumption of correctness of the findings and judgment of the trial judge, but the findings and judgment will not be reversed where there is merely conflicting evidence. Dang v. Cox Corp., 655 P.2d 658, 660 (Utah 1982); Ovard v. Cannon, 600 P.2d 1246, 1248 (Utah 1979).

The clearly erroneous standard has been codified through the recent amendment to Rule 52 of the Utah Rules of Civil Procedure. See Adams v. Gubler, 731 P.2d 494, 496 n. 3 (Utah 1986). Rule 52(a) reads, in pertinent part, that:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard should be given to the appointment of the trial court to judge the credibility of the witnesses.

The court has interpreted this language as follows:

[T]he content of Rule 52(a)'s "clearly erroneous" standard . . . requires that if the findings . . . are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and confirm conviction that a mistake has been made, the findings . . . will be set aside.

State in Interest of T.E. v. S.E., 761 P.2d 956, 957 (Utah App. 1988) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

Due to the plaintiff's failure to cite the evidence in support of the trial court's findings of fact, plaintiff is now unable to provide any argument showing how the findings are erroneous. Plaintiff has only cited to her own evidence, and she merely reargues how her evidence would support a finding in her favor. This court, therefore, is unable to consider whether the trial court's findings are based on sufficient evidence. As in Ashton, the trial court's findings should be

affirmed, since plaintiff has failed to make the necessary showing.

Even though plaintiff cannot have the findings of the trial court set aside because of her failure to consider and meet the appropriate standard of appellate review, the findings of the trial court should not be disturbed for the additional reason that they are amply supported by evidence presented at trial. Hence, plaintiff would be unable to show that the trial court's findings are clearly erroneous even if she would have tried to properly make such a showing.

A. THE EVIDENCE SUPPORTS THE FINDING THAT
PLAINTIFF WAS COMPETENT TO CONTRACT.

Plaintiff's arguments on the issue of her competency to contract, made in Point II of Appellant's Brief, are meritless. First, she argues that defendants had the burden to prove her competency because she was appointed a guardian at the time she signed the deed, thereby creating a presumption of incompetency. However, as discussed under Point I, supra, there is no dispute that she entered into a binding contract to sell the property, which effectively transferred title and ownership, before the guardianship proceedings were initiated. Since she did not have a guardian at the time she actually conveyed her property, the burden does not shift to defendants to prove her competency to sell the property. The rest of

plaintiff's arguments rely on this faulty premise and must, therefore, also fail.

Although defendants did not have the burden to prove that plaintiff was competent to contract, the trial court found, that in the event the defendants did have this burden because of the subsequent guardianship appointment, the evidence sufficiently showed that the plaintiff was in fact competent to contract at the time she sold her property and signed the deed. (Judgment, Law I.)

Even assuming that defendants did have the burden to prove plaintiff's competency to contract, plaintiff is also wrong in construing Utah law to require them to prove she also had the ability to make a "rational decision." The test for determining the mental capacity to contract in Utah, as set forth in Anderson v. Thomas, 108 Utah 252, 260, 159 P.2d 142, 146 (1945) which was cited by plaintiff, states as follows:

Were the mental faculties 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.

Plaintiff relies on Restatement (Second) of Contracts, § 15, to claim that the test of incompetency consists of a second part that relates to the ability to make a rational decision. No Utah case authority, however, is cited

to show that Utah accepts the bifurcated approach advocated by plaintiff or that the Utah test goes beyond the ability to understand or act with discretion in relation to one's understanding.

The test enunciated by the court in Anderson v. Thomas was again relied upon by the court in Peterson v. Carter, 579 P.2d 329 (Utah 1978). After reciting the test as set forth in Anderson, the court analyzed the evidence as follows:

Mr. Harmon testified that after having talked with Mrs. Peterson [the plaintiff], and after her various questions about the effect of the sale had been answered, "there was no question in my mind that she knew what she was doing and she wanted the home to go to Mr. and Mrs. Carter [the defendants]." After this meeting and before the actual conveyance, Mr. Harmon contacted one Anna Broadhead, Mrs. Peterson's closest living relative, to inform her of the plans to sell the property and to ask if there were any objections. Mrs. Broadhead said she thought it would be best to sell the property. Although other testimony might show Mrs. Peterson's incompetence, we are inclined to defer to the trial court's decision due to his proximity to the situation and his ability to observe the witnesses and their demeanor. [Emphasis added.]

Id. at 331. No analysis of Mrs. Peterson's ability to make a "rational decision" was made by the court. The obvious absence of a rational decision analysis was again apparent in the only

other Utah case that has relied on this test. In Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App. 1988), the court merely stated in its analysis "there is no evidence that [the plaintiff] was unable to understand the nature of the proceedings or was unable to transact business." Id. at 100.

The test repeatedly used in determining the competency of a person to contract in Utah has not been construed to include a second part that requires a showing of inability to make a "rational decision" in addition to lack of understanding. Assuming, therefore, that defendant had the burden to prove plaintiff's competency to contract, defendant was not required under Utah law to present evidence that plaintiff was also able to make a "rational decision."

In addition, plaintiff's challenge of Le R Burton's and Agnes Freebairn's testimony that she was in fact competent and knew what she was doing at the time she sold her property is insufficient to disturb this finding. The trial judge is in the best position to judge the credibility of these witnesses' statements. Jensen v. Brown, 639 P.2d 150, 152 (Utah 1981). Likewise, plaintiff's inferences, drawn from Herbert Halliday's testimony, is no support for rejecting the trial court's finding that any presumption of incompetency was overcome by the evidence. It is the trial court's prerogative, not plaintiff's, to draw or reject inferences, and its conclusions

will not be disturbed on appeal. Movie Films, Inc. v. First Security Bank of Utah, 22 Utah 2d 1, 5, 447 P.2d 38, 40 (1968).

Plaintiff's final argument that the trial court's finding cannot stand because Mr. Scott took a different position in a prior proceeding is also erroneous. Defendants' present position, and the trial court's finding, is that plaintiff was competent to contract at the time she sold her property in 1971. The prior proceeding plaintiff now refers to is Weinstocks v. Mary Jean Freebairn,¹ wherein Mr. Scott asserted the defense of incompetency to contract, on behalf of plaintiff, against a claim that plaintiff contracted for goods in 1981.² Certainly the issue of competency to contract in 1971 is not the same as competency in 1981. Moreover, plaintiff's reasoning that defendant cannot now claim plaintiff was competent to contract in 1971 is faulty because she

¹The Answer attached as Appendix F to Appellant's Brief, from which plaintiff argues that Mr. Scott is taking a position which is different from an earlier position raised in a judicial proceeding, is not a part of the record below, and cannot now be brought before this court and used by plaintiff. In order to clarify the record, however, defendants are attaching as the Addendum the Complaint to which the Answer responded.

² Id. The Complaint alleges at paragraph 2 that goods were sold and delivered between January 1, 1981 and December 31, 1981.

misconstrues the court's statement in Condas v. Condas, 618 P.2d 491, 496 (Utah 1980) which she cites in support of this claim. The rule that a party cannot take a different position in a subsequent judicial proceeding applies only where the party previously obtained relief on the basis of the prior position. Id.; see also Blonquist v. Frandsen, 694 P.2d 595, 596 (Utah 1984). Plaintiff has not shown, or even argued, that defendant obtained relief on the basis of the defense asserted in the Weinstock's action.³

Plaintiff's arguments, which fail to show how the court's findings are erroneous, also fail to provide any viable reason for finding plaintiff to be incompetent to contract when she agreed to sell her property in 1971. Substantial evidence, on the other hand, supports the trial court's findings that plaintiff was competent to contract.

Defendants presented the testimony of Dr. John L. Malouff, a clinical psychologist, who stated that he tested plaintiff's "verbal intelligence." Dr. Malouff testified that this test dealt with plaintiff's "ability to reason," among

³ Although this issue is not properly before this court, defendants further inform the court, in order to clarify the baseless nature of plaintiff's argument, that Mr. Scott in fact paid Weinstock's on this claim. Hence, no relief was obtained upon the defense that plaintiff was incompetent to contract in 1981.

other things. (Record pp. 481-82.) Plaintiff received a high enough score on this test to put her the ninety-nine plus percentile. (Record p. 483.) When asked his opinion as to plaintiff's ability, in the 1970-71 time period, to transact business, Dr. Malouff stated that plaintiff "would have adequate knowledge to know if she was selling something, what she was selling, what she was receiving for it, those sorts of specifics." (Record p. 497.)

Agnes Freebairn, plaintiff's sister-in-law, also testified that plaintiff had accumulated bills, and that plaintiff told her that she needed the money from selling the property to pay her debts. (Record pp. 525-26, 533.) Both Agnes Freebairn and plaintiff, consequently, then went to Le R Burton to have the property offered for sale. (Id.) Mr. Burton testified that plaintiff set the actual purchase price. (Record p. 690.) Mr. Burton further testified that he had been involved in several prior transactions, during 1967 to 1970, wherein plaintiff sold real property in order to obtain money to pay her financial obligations. (Record pp. 666-75.) He also stated that plaintiff conducted herself like other sellers he had been involved with, except that she was more demanding as to detailed information. (Record p. 666.) Agnes Freebairn also testified that plaintiff handled their discussions with Mr. Burton and that plaintiff acted very business-like. (Record pp. 529, 532.)

When the property did not sell, it was plaintiff's idea to ask Mr. Scott to purchase the property, which offer Mr. Scott initially refused. (Record p. 527.) Mr. Burton also testified that it was plaintiff's idea to put the proceeds from the sale into a trust, and that plaintiff worked out the details with her attorney, LaMar Duncan. (Record pp. 695-99.) Moreover, both Agnes Freebairn and Mr. Burton testified that plaintiff did not discuss matters reflecting her paranoia during their meetings pertaining to the sale of the property. (Record pp. 532-33, 666, 670, 675, 687.)

This evidence is sufficient to support the trial court's findings that plaintiff had the capacity to enter into a binding contract. Even if defendants had the burden of proof, therefore, the trial court's finding that they met the burden is supported by substantial evidence and should not be disturbed.

B. THE EVIDENCE ALSO SUPPORTS THE FINDING
THAT DEFENDANTS DID NOT EXERCISE FRAUD
OR UNDUE INFLUENCE OVER PLAINTIFF.

Plaintiff's arguments, made in Point III of Appellant's Brief, are also unfounded and insufficient to upset the trial court's findings. Specifically, plaintiff claims that a presumption of undue influence exists, which defendants had the burden of rebutting, because of the "confidential relationship" arising out of Mr. Scott's appointment as her

guardian.⁴ Plaintiff's entire argument, consequently, is predicated on the existence of a confidential relationship. Plaintiff, however, was unable to prove that a confidential relationship existed.

While ignoring that the guardianship proceedings did not occur until after plaintiff had entered into a binding contract to sell her property, as discussed under Point I, supra, plaintiff argues that the guardian-ward relationship creates a confidential relationship as a matter of law.

In support of this argument, plaintiff cites Blodgett v. Martsch, 590 P.2d 298, 302 (Utah 1978). This case was criticized, however, in Estate of Jones v. Jones, 759 P.2d 345, 348 (Utah 1988) on the very language upon which plaintiff relies. Moreover, neither Blodgett or any other Utah case supports the specific proposition that a guardian-ward relationship is a confidential relationship, as a matter of law, for purposes of analyzing undue influence over contracting parties.

⁴It should be pointed out that plaintiff miscites Berrett v. Stevens, 690 P.2d 553 (Utah 1984) for the proposition that a rebuttable presumption of undue influence exists over transactions between those in a confidential relationship. Although defendants do not refute this principle of law, the Berrett case is totally inapplicable and adds no support to plaintiff's arguments.

The court, in Bradbury v. Rasmussen, 16 Utah 2d 378, 401 P.2d 710 (Utah 1965), which is also relied upon by plaintiff, is quite clear in defining what is necessary for a confidential relationship. The Bradbury Court stated that there must be "that degree of confidence in the other party which largely results in the substitution of the will of the later for that of the former in the material matters involved in the transaction." Bradbury, 401 P.2d at 713. In Bradbury, the court reversed the finding of a confidential relationship where the evidence revealed that each party was free to act on their own independent volition and will. Id. at 714. Furthermore, this holding was in light of the court's finding that there was "sincere affection, trust and confidence" between the parties. Id. at 713.

The only specific evidence plaintiff relies on in support of her claim that there was a confidential relationship is found on page 45 of Appellant's Brief. There is no doubt that the most plaintiff has shown is that she trusted defendant, and because of that trust she sold him her property and later entered into a guardian-ward relationship. Plaintiff, therefore, has clearly failed to show how she substituted Mr. Scott's will for that of her own. Hence, plaintiff did not meet her burden of establishing the existence of a confidential relationship, and defendants were not

required to rebutt any presumption of undue influence. The trial court's refusal to find for plaintiff on this issue, therefore, should not be disturbed.

Although the trial court did not find that a confidential relationship existed, it did find that if there was a confidential relationship, and hence, a presumption of undue influence, that defendants successfully rebutted the presumption. (Judgment, Law II and Conclusion ¶ 3.) Plaintiff challenges this finding on the grounds that the transaction was "unfair." In essence, plaintiff claims that the trial court's findings should be set aside because the sales price for plaintiff's property should have been higher.

The narrow issue pertaining to the value of the property does not affect the trial court's overall finding that defendants did not exercise fraud or undue influence over plaintiff. Moreover, the trial court found that the property was valued at \$3,100 to \$5,500. (Judgment, Findings of Fact ¶ 24.) Plaintiff's own expert appraised it at \$5,000. (Record pp. 597-600; Appellant's Brief p. 46.) Hence, the trial court's findings are consistent with plaintiff's own evidence.

In addition, plaintiff's claims as to the inadmissibility of certain evidence pertaining to the value of the property are not well grounded since the trial court was apparently not adversely influenced. Also, plaintiff cannot

successfully challenge the trial court's findings on the grounds that evidence was wrongfully admitted, because evidentiary issues are not criticized in trials to a judge as they are in trials to a jury. In Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811 (1972), the court stated:

When the trial is to the court, the rulings upon admissibility of evidence are not required to be so strict, nor are they of such critical importance as where the trial is to the jury. This is so because it is assumed that the trial judge has superior knowledge as to the competency and effect which should be given evidence, and that he will make his findings and decision in conformity therewith.

Id., 495 P.2d at 814. Plaintiff, therefore, is not entitled to have the trial court's findings regarding lack of fraud or undue influence set aside based on the trial court's admission of certain evidence pertaining to the limited issue of the proper value of plaintiff's property.

In addition to the specific evidence discussed under subsection A of this Point, there is evidence to establish that plaintiff approached Mr. Burton to sell her property, and in fact the property was advertised for sale before Mr. Scott knew anything of plaintiff's need for money and desire to sell the property. (Record pp. 526-28, 676-690.) Moreover, plaintiff established the price for which the property was sold, without any counter-offer by Mr. Scott. (Record pp. 690-92.) Plaintiff also realized that Mr. Scott did not want to purchase her property and asked Mr. Burton to continue to advertise the

property in the multiple real estate listings, on signs, and in newspapers for three additional months before she had the Earnest Money Agreement prepared for Mr. Scott's signature. (Record pp. 680-92.) Only one other offer to purchase was made to plaintiff, which she rejected because the purchase price was too low. (Record p. 682.)

Defendants' evidence is clearly sufficient to support the trial court's findings that plaintiff made up her own mind to sell the property; that she affirmatively acted to contact Mr. Burton and did all she could to have the property sold; that she established the sales price; that she sought out Mr. Scott to purchase the property; and that the sales price was fair and consistent with the market value at the time. (Judgment, Findings of Fact ¶¶ 10-12, 23-24, 31.) The trial court's conclusion that defendants did not take advantage of plaintiff, perpetrate a fraud upon her or exercise undue influence over her by purchasing her property, and that defendants rebutted any presumption of undue influence, should be affirmed.

POINT III

PLAINTIFF IS NOT ENTITLED TO OBTAIN RELIEF
FROM THIS COURT UNDER A CONSTRUCTIVE TRUST
THEORY.

Plaintiff's final argument is that this court should impose a constructive trust on the proceeds of Mr. Scott's sale

of the land which he received in trade for the property he purchased from plaintiff. This argument must be rejected for several reasons, as stated below.

For her statement of Utah law pertaining to constructive trusts, plaintiff relies on Parks v. Zions First National Bank, 673 P.2d 590, 599 (Utah 1983). Plaintiff, however, merely cites dicta. The analysis used by the Parks Court in determining whether a constructive trust should be imposed in a particular situation, which plaintiff did not discuss in her brief, was whether the defendant would be "unjustly enriched" by retaining sole ownership over the property, which in turn depended on whether the plaintiff had an "equitable interest" in the property. Id. at 600; accord Close v. Adams, 657 P.2d 1351, 1352-53 (Utah 1983) (a constructive trust is an equitable remedy to prevent unjust enrichment). Plaintiff has failed to argue, or even recognize, these essential elements for a constructive trust.

The trial court did not enter a finding upon whether a constructive trust should be imposed. The trial court's findings against plaintiff on the issues pertaining to the validity of the sale rendered it unnecessary for the court to enter specific findings on whether plaintiff was entitled to relief on the theory of a constructive trust.

In addition, a constructive trust cannot be imposed by this court because plaintiff has failed to show that the trial

court erred in its findings against plaintiff. Since plaintiff has failed to state sufficient grounds for setting aside the trial court's holding of no cause of action, she is therefore unable to now show entitlement to a constructive trust. Cf. Carnesecca v. Carnesecca, 572 P.2d 708, 710 (Utah 1977) (constructive trusts normally arise out of fraud or breach of fiduciary duty).

Furthermore, a constructive trust cannot be found by this court without findings of fact in support thereof. In Park v. Zions First National Bank, the inverse situation was presented where the defendants' appealed from a judgment holding there to be a constructive trust. The defendants argued on appeal that the trial court did not enter findings with respect to the elements of a constructive trust. Park, 673 P.2d at 601. The trial court stated that under Rule 52(a) of the Utah Rules of Civil Procedure, findings of fact "must resolve all issues of material fact necessary to justify the conclusions of law and judgment entered thereon." Id. Although defendant's argument was considered to be well founded, the court reviewed the findings and held that they in fact supported the judgment. In the case at bar, there are no findings to support the imposition of a constructive trust. Consequently, even if the findings of the trial court pertaining to liability were found to be in error, there would

be no basis in the record for this court to find that all the necessary elements for a constructive trust were proven at trial.

In addition, this court should refrain from making specific findings of fact pertaining to the elements of a constructive trust. The Utah Supreme Court has stated that it will normally refrain from making findings of fact. Bill Nay & Sons Excavating v. Neeley Construction Co., 677 P.2d 1120, 1123 (Utah 1984); see also Gillmor v. Gillmor, 745 P.2d 461, 462 (Utah App. 1987)(it is not the function of an appellate court to make findings of fact because it does not have the advantage of seeing and hearing the witnesses testify). There is no pressing need for this court to enter its own findings of fact and it should refrain, therefore, from second guessing the trial court's review and interpretation of the evidence.

Plaintiff is not entitled to the relief she seeks from this court. Her claim for recovery under a constructive trust theory, therefore, should be rejected.

CONCLUSION

Plaintiff has failed to clearly state the relief she is seeking from this court. To the extent plaintiff seeks to have this court reverse the trial court's judgment or set aside any of its findings, whether to support a reversal or remand, plaintiff has failed to express any viable reason in her

lengthy brief to support such relief. Based upon the foregoing arguments, it is apparent that plaintiff's appeal is not well taken, and she should not be granted any relief thereon.

Defendants request, therefore, that plaintiff be denied any relief she may seek through this appeal, and that the judgment of the trial court below be affirmed.

RESPECTFULLY SUBMITTED this 13th day of March, 1989.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

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CERTIFICATE OF SERVICE

I hereby certify that I caused four (4) true and correct copies of the within and foregoing BRIEF OF DEFENDANTS-RESPONDENTS J. RUSSELL SCOTT AND LE R BURTON to be hand delivered this 14th day of March, 1989, to the following counsel of record:

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ADDENDUM

FILED

JUN 25 1982

8/647

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CLERK OF THE CIRCUIT COURT
SALT LAKE DIVISION

CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

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THE CARTER HAWLEY HALE STORE,	:	
INC., dba WEINSTOCK'S,	:	COMPLAINT
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	Civil No. 82-655
MARY JEAN FREEBAIRN,	:	
	:	
Defendant.	:	

---ooo0ooo---

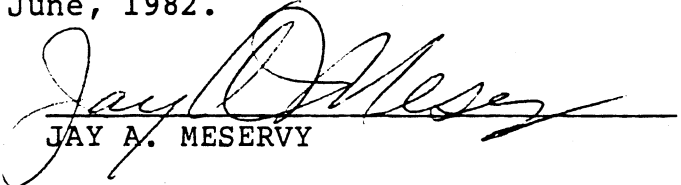
COMES NOW the plaintiff and complains of the defendant and alleges as follows:

1. The defendant is a resident of Salt Lake County, State of Utah.
2. Defendant is indebted to the plaintiff in the sum of One Thousand Five Hundred and Twenty-Six Dollars and Three Cents (\$1,526.03) for goods and materials sold and delivered between the approximate dates of January 1, 1981, and December 31, 1981, together with interest thereon from and after the first day of January, 1982, at the rate of eighteen percent (18%) per annum on the first one thousand dollars and twelve percent (12%) per annum on the balance of the obligation.

3. Pursuant to written agreement, a copy of which is attached hereto and by this reference made a part hereof, the defendant agreed to pay reasonable attorney's fee; a reasonable attorney's fee would be one third of the amount found by the court to be due and owing.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of \$1,526.03, together with interest thereon from and after the first day of January, 1982 at the rate of 18% per annum for the first one thousand dollars and 12% per annum for the amount in excess of one thousand dollars, for attorney's fees equal to one third of the amount found by the court to be due and owing, for costs of court herein incurred, and for general relief.

DATED this 24 day of June, 1982.


JAY A. MESERVY

Plaintiff's address;
1701 Arden Way
Sacramento, California 95815