

1954

Margaret Jardine et al v. Archulius Archibald et al : Brief of Appellants

Utah Supreme Court

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L. Delos Daines; George C. Heinrich; Attorneys for Appellants;

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In the Supreme Court of the State of Utah

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MARGARET JARDINE, MELVIN H. BUTTARS, MABELL GRIFFITHS, MAURICE BUTTARS, GALE BUTTARS, ARLEN BUTTARS, GUY BUTTARS, VERL G. BUTTARS, DeVAL BUTTARS, CLEO B. BUTTARS, COLEEN B. SHEPHERD, ARLENE B. ROBINSON, THERALD IRA BUTTARS,

Appellants,

vs.

ARCHULIUS ARCHIBALD, GOVER BUTTARS, HATTIE HODGE, WALLACE BUTTARS, ORMAS BUTTARS, VILLA BRONSON, ELMA MILNE, VADA SMITH, OMAR BUTTARS, WENDELL BUTTARS, TED BUTTARS, SHERWIN BUTTARS and ROLAND BUTTARS.

Respondents.

Case No. 8177

MARGARET JARDINE, MELVIN H. BUTTARS, MABELL GRIFFITHS, MAURICE BUTTARS, GALE BUTTARS, ARLEN BUTTARS, GUY BUTTARS, VERL G. BUTTARS, DeVAL BUTTARS, CLEO B. BUTTARS, COLEEN B. SHEPHERD, ARLENE B. ROBINSON, THERALD IRA BUTTARS,

Appellants,

vs.

WALLACE BUTTARS, ARLEN BUTTARS, his wife, GOVER BUTTARS, HATTIE HODGE, ARCHULIUS ARCHIBALD, ORMAS BUTTARS, VILLA BRONSON, ELMA MILNE, VADA SMITH, OMAR BUTTARS, WENDELL BUTTARS, TED BUTTARS, SHERWIN BUTTARS, and ROLAND BUTTARS,

Respondents.

Case No. 8178

BRIEF OF APPELLANTS

L. DELOS DAINES
GEORGE C. HEINRICH,
Attorneys for Appellants.

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Respondents.

Case No. 8178

BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

Appellants filed two actions in the District Court of Cache County, Utah, to set aside and vacate the transfer of certain realty and personalty to a sister, Archulius Archibald, and a brother, Wallace Buttars, made by their mother Emma G. Buttars, deceased. The cases were numbered Civil Case No. 7605 and Civil Case No. 7607.

In case 7605 the appellants were the plaintiffs and Archulius Archibald was the principal defendant. It was to her in that case the transfer of the property was made or attempted to be made. The other defendants were joined as heirs of Emma G. Buttars, deceased, because they did not desire to be joined as parties plaintiff.

In case No. 7607 Appellants were the plaintiffs and Wallace Buttars was the principal defendant. It was to him the transfers of the estate and personal property were made. The other defendants were joined for the same reason as mentioned in Civil Case No. 7605.

In both cases the plaintiffs and defendants constituted the heirs at law of Emma G. Buttars, deceased. She was the grantor and donor.

In each case the appellants charged that there existed a confidential relationship between Emma G. Buttars, the grantor, and the grantees, her children, and that the transfers were made while the grantor was incompetent or mentally and physically infirm and that they were induced by undue influence, that the personal property was not delivered in the lifetime of the donor.

On stipulation the cases were consolidated and tried together.

Separate findings of fact, conclusions of law and decrees were entered in each case.

Subsequent to the death of Emma G. Buttars some of her grandchildren contested the admitting of her will to probate. It was entitled Probate file No. 5167. The case was appealed to the Supreme Court, your file No. 1945, and this Court sustained the District Court's action in setting aside the verdict of the jury who had held that Emma G. Buttars was incompetent to make a will.

In the interest of economy and time it was stipulated that all of the proceedings, the evidence and exhibits of the will contest was admitted in evidence in the trial of the consolidated cases subject to its materiality and admissability, and that each of the parties could introduce such evidence as they desired except no further evidence would be offered on the question of Emma G. Buttars' incompetency except as it was incidental to the evidence being presented. (RR 56, 57).

In Civil Case No. 7605 wherein Archulius Archibald was the principal defendant the trial court entered judgment refusing to vacate the two deeds, U. S. Government bonds in question. However, it decreed that the bank stock in question had not been delivered and that it was the property of the appellants and respondents subject to probate under the terms of the last will and testament of Emma G. Buttars. (RR 30-41).

In Civil Case No. 7607 wherein Wallace Buttars was the principal defendant the court refused to vacate the

two deeds and government bonds in question. However, it decreed that a joint savings account in the names of Wallace Buttars and Emma G. Buttars in the First Security Bank of Logan in the sum of \$5,000.00 plus interest was the sole property of the defendant subject to the payment of the funeral and last illness expenses of Emma G. Buttars.

In the will contest case the numbering of the record was not changed. The proceedings, pleadings and transcript of the consolidated cases began with page 1. In the will contest case the pages were numbered 1 to 400 and in the pleadings and evidence in the two consolidated cases are numbered 1 to 239. For the purpose of identification when referring to that part of the record made in the will contest case we will identify it as R and the subsequent record as RR Civil Case No. 7605 is Case No. 8177 and Case No. 7607 is Case No. 8178, in this Court.

STATEMENT OF FACTS

FACTS PERTAINING TO BOTH CASES

Appellants and respondents are the children and grandchildren of Daniel Buttars and Emma G. Buttars, deceased. All of their married lives they were residents of Clarkston, a small farming community in Cache County. They reared a large family, ten children, and accumulated extensive farming interests. Daniel Buttars died in Clarkston, January 10, 1916 and at the time his children were of the following ages: Daniel, 33 years;

Margaret, 29 years; Melvin H., 27 years; Orson M., 24 years; Mabell, 22 years; Gover, 20 years; Ira, 17 years; Hattie, 15 years; Archulius, principal defendant, 12 years, and Wallace, the other principal defendant, 9 years. (Ex. 27.)

Sometime prior to his death the father, Daniel Buttars, gave and sold to his eldest sons certain lands as follows: to Daniel he gave 80 acres and sold him 80 acres; to Melvin he gave 80 acres and sold him 80 acres; to Orson he gave 80 acres and sold him 80 acres; to Gover he gave 60 acres; and to Ira he gave 60 acres. (RR 118, 122).

He gave no land to any of the *daughters* in his lifetime and none was given to the defendant Wallace Buttars, the youngest son. There was a good reason for the land gifts to the elder sons. In each instance, except Wallace, they had worked with their parents and helped accumulate the property. The boys were not paid wages, only given their food, clothing and spending money. The land was given when they married and left home except as to Ira and his was given just before his father's death. (RR 118, 122).

The estate of Daniel Buttars was probated, the widow, Emma G. Buttars received her statutory one-third and the children each received their distributive share. Decree of Distribution was entered March 10, 1917. Daniel, Melvin and Emma G. Buttars were the administrators. (Ex. 27).

Emma G. Buttars never re-married and she and her sons Ira and Gover operated the farm for some

years. Ira later married, sold his 60 acres to his bother Gover and moved to Burley, Idaho. Gover then operated the farm until 1930 when he also moved to Burley and he then sold his 120 acres to his mother, thus adding this acreage to her holdings. From 1930 to the date of his mother's death on July 1, 1952, Wallace operated the farm for her on a lease basis. (R 173, 176, 177, 331).

Emma G. Buttars was 51 years of age when widowed in 1916. She never had any serious illness until 1940, when she was 75 years of age. All the testimony is to the effect that at all times when she enjoyed good health she was self-reliant, frugal, determined and had a firm will of her own. (R 223). Was inclined to be close or even stingy and believed everyone should work and earn what they got, (R 201, 215, 226, 292) and, in fact, she kept her own holdings intact and added thereto until the conveyances and transfers hereinafter mentioned and which were made by her after she was 80 years of age and six days after she made her will in which she stated she desired to treat all of her children equally. (R 219).

Advancing years made their impact on her health. In 1940 she had her first serious illness (R 145). She was then hospitalized in the Cache Valley Hospital, Logan, Utah. She suffered from high blood pressure, hardening of the arteries, heart ailment, pneumonia, kidney trouble and thereafter suffered terrible headaches. (R. 145, 201, 226). Thereafter she was never the same, physically or mentally. This was the testimony of her grandchildren who had seen her more or less frequently, (R 293) and according to her own children who waited

upon her and saw her almost daily or at short intervals. (R 168, 201). After this illness from which she never fully recovered she continued to deteriorate physically and mentally. (R 185, 186, 201, 203) and in 1944 she was again seriously ill and hospitalized. (R 203).

After her first illness in 1940, a serious and obvious change came over Emma G. Buttars — her mind continued to deteriorate. (R 146, 185, 203). She could not remember, particularly recent events, even from morning until later in the day, (R 31, 43, 150, 146, 147, 201, 203) nor remember her eldest grandson, whom she knew best, (R 31, 33, 34, 42, 53) nor their wives. She did not realize that her eldest son, Dan, was dead, his death occurring February 21, 1945 (R 30-37, 42). A few days over a month before the transfers hereinafter mentioned were commenced, she worried over finances, (R 202, 204, 190); her mind was confused as to whether she had enough to live on when in fact she was well fixed (R 167, 190); she disliked people for no apparent reason, would repeat, asking the same thing over and over again, (R 168, 203); was incoherent and could not stick to a subject, (R 228, 157); hid silverware in her bed, (R 202, 227); accused some of her children of borrowing money from her when they did not (R 227, 229); hid money, couldn't distinguish between her own property and others and claimed her son's turkeys as her own (R 158); stayed in all of the time (R 228-30). Even the family did not want her condition generally known. She did not know what she had possessed in the way of property, (R 204-205, 208), or what she had done or signed away and

couldn't handle any amount of money (R 204, 211, 222, 223, 228); purchased a dress to go to the funeral of her son Ira, who died in 1949, and then forgot he had died. (R 109, 212). She did not know pursuant to arrangements that her son, Wallace, was handling her finances, writing her checks, etc. (R 213, 344-50); did not know, pursuant to arrangements, that her own daughters were being paid by her son Wallace, from her money, for taking turns in caring for her. (R 215).

On July 1, 1918, Dan borrowed \$1500.00 from his mother on his note payable on or before five years after date, and at the same time gave her a mortgage as security therefor, which was never recorded. (Con. Exs. 2 and 3). Dan's cancelled check dated January 17, 1923, payable to the deceased and upon which she had written "Paid in full" was produced. (Con. Ex. 1). No one ever heard her say Dan owed her money (R 211). She filed no claim against Dan's estate. She was always affectionate toward Dan, her eldest son, yet one month before drawing her will she showed no emotion at his passing. (R 211). In her will she said she wanted to treat all of her children alike, then omitted her son Dan's children because she had forgotten he had repaid the loan. She said he owed her more than his share of the estate would amount to. (Ex. A).

In 1944, Wallace and Archulius, the principal defendants, called the family together and a meeting was held at Margaret's place. Margaret, Gover, Melvin, Archulius and Wallace were present. It was there reported by Archulius and Wallace that their mother was not in

a condition, physically or mentally, to be left alone. Melvin suggested appointment of a guardian. It was opposed particularly by Wallace who said that he could take care of his mother's affairs and that no guardian was needed. (R 181, 182, 216, 225, 389, RR 86, 88, 89).

In 1950 another meeting was called by Wallace and Archulius again regarding their mother and at this meeting it was decided the girls would take turns caring for their mother, be paid for it, and thereafter Wallace would write and sign the checks for the payment of all of his mother's obligations. (RR 90-92).

On March 28, 1945, six days after she made her will, in direct contradiction to its express provisions that she was treating her family equally, she deeded 60 acres of land worth \$12,000.00 to Wallace reserving a life estate. The conveyance was without consideration. (Def. Ex. 21; RR 127, 137, 138).

Again on January 28, 1947, without consideration Mrs. Buttars deeded 48 acres of land to Archulius worth approximately \$9,600.00, reserving a life estate. (Cont. Ex. 22; RR 136, 137, 145).

On the same date, January 29, 1947, she transferred \$5,000.00 from her account in the First Security Bank at Logan to the First National Bank of Logan and opened a joint savings account, without consideration, with Wallace. (R 366, 367; Con. Ex. 13, Ex. 11).

On March 3, 1948, she sold to Archulius land worth \$2,000.00 for \$500.00 (Con. Ex. 22; RR 136; R 99, 198).

Again on May 6, 1948, she gave Wallace, without

consideration, another 60 acre tract of land worth \$12,000.00. (Con. Ex. 24; RR 127, 137, 138).

On the date Mrs. Buttars made her will she had about 330 acres of land worth approximately \$66,400.00 and on the date of her death she had about 160 acres of land worth about \$33,600.00. This included her home at Clarkston. The value of the property on the date of making her will and the date of the transfers was the same at the date of her death. (R 194; RR 136, 139).

When her safety deposit box was opened in the First Security Bank at Logan, it contained several instruments including U. S. Savings bonds and stock certificates. Of the contents of the box she attempted to make the following gifts: to Archulius \$1000.00 maturity value U. S. Savings bond dated April, 1948, and 22 shares of First Security Corporation stock (since split 4 to 1) worth approximately \$880.00. Attached to the savings bond and stock certificate was a statement signed by Mrs. Buttars dated April 9, 1945, which said she was making this gift because the Clarkston Mill Stock Archulius received from her father's estate had become valueless. To her also was three \$500.00 maturity value U. S. Savings Bonds dated April, 1948. (Ex. 7, RR 62; Pl. Ex. 1-A, RR 72).

To Hattie, a sister, a \$1000.00 maturity value U. S. Savings bond dated April, 1948, and 22 shares of First Security Corporation stock (since split 4 to 1) worth approximately \$880.00. Attached to the savings bond and stock certificate was a statement signed by Mrs. Buttars dated April 9, 1945, which said she was making this gift

because the Clarkston Mill stock Hattie received from her father's estate had become valueless. To her also was three \$500.00 maturity value U. S. Savings bonds dated April, 1948. (RR 63, 64; Pl. Ex. 9-A; Ex. 7).

When their father's estate was probated both Archulius and Hattie, sisters, were decreed stock in the Clarkston-Trenton Mill which, although valuable at the time worth approximately \$2,640.00 to each, it later became valueless. (RR 107).

To Wallace one \$100.00 maturity value U. S. Savings Bond dated December, 1944, one \$1,000.00 maturity value U. S. Savings Bond dated April, 1948, and a \$25.00 maturity value U. S. Savings Bond dated April, 1948. (RR 63, Ex. 7).

To a grandson, Milton Buttars, she gave a \$500.00 maturity value and one \$50.00 maturity value Savings Bonds dated April, 1948. (Cont. Ex. 7).

All of these savings bonds were made payable to Mrs. Buttars and a joint payee, as the case may be.

On the date of her death Mrs. Buttars had a \$9,437.58 savings account in the First Security Bank at Logan and a checking account in the sum of \$2,093.64. (R 391).

To Wallace she had given or attempted to give property worth approximately \$30,125.00. (Ex. 7; R. 366, 367; Con. Ex. 13; Ex. 11, 127, 138, 137, 136, 145).

To Archulius she gave or attempted to give property worth approximately \$12,980.00. (Ex. 7, 1-A; RR 62, 72).

To Hattie she gave or attempted to give property

worth approximately \$3,380.00. (RR 63, 64; Pl. Ex. 9-A, Ex. 7).

She made no gifts to any of her other children in her lifetime.

Had her estate been left intact as intended by the will on her death it would have been worth approximately \$97,166.22. Instead it had a value of approximately \$45,131.22.

Although Mrs. Buttars gave approximately 48 acres of land worth about \$9,600.00 to Archulius she gave no land or other property except that which was found in the safety deposit box aforementioned to Hattie. (RR 97).

The execution and delivery of the deeds to both Wallace and Archulius and the \$5,000.00 savings account were made without the knowledge of the other brothers and sisters and the family did not learn of the deeds to Wallace and the savings account until the fall of 1950. (R 192, 216, 217, 239; RR 92, 93, 94, 95, 102). However, one of the sisters learned of the deeds to Archulius about a year after they were made. (RR 102). Just when Archulius and Wallace learned of the transfer to each other is not known.

In 1951 and 1952, Mrs. Buttars was worried over what she had done with her property and asked her daughters to straighten out her affairs. (R 237, 238, 255).

After her husband's death Mrs. Buttars always had one of her sons, Gover, Ira or Wallace with her to help her transact her business. (R 175, 176, 177).

The family had complete confidence in Archulius and

Wallace in their handling of their mother's affairs until 1950. (R 216, 217).

Mrs. Buttars' will was drafted on March 22, 1945, by Newel G. Daines, an attorney at Logan, Utah, who was recommended to her by Wallace. She was taken to his office by him for this purpose although he denied he knew she was going to make a will or that she had made one. The will was made and executed with the advice of the lawyer. (R 381, 382).

All of appellants' witnesses and the defendant Wallace who stated that they never ever heard their mother express any dissatisfaction with the terms of the said Final Decree of Distribution and Partition.

FACTS PERTAINING PRIMARILY TO ARCHULIUS

Archulius, after her father's death, when she was 12 years of age, lived with her mother until her marriage in 1921. After that she lived across the street from her. (RR 77, 78).

After 1944 she helped her mother with the keeping of the family record book, the buying of necessities, groceries, etc., her mother entrusted her in the cashing of checks and checks signed by her mother in blank. (RR 81, 82). Her mother also entrusted her with the \$5,000.00 savings deposit book. (RR 85).

When Mrs. Buttars' safety deposit box was opened after her death, there was found a statement therein dated April 9, 1945, signed by her to which was attached a \$5,000.00 maturity value U. S. Savings Bond and 22

shares of First Security Corporation stock (now 88 shares) worth \$880.00. The statement said her mother was giving her the bond and stock because the Clarkston-Trenton Mill stock which Archulius received from her father's estate turned out to be valueless. (R 62, Ex. 1-A). There were also in the deposit box three \$500.00 maturity value U. S. Savings Bonds in favor of Archulius. (Ex. 7). In the safety deposit box there was also found the same amount of stock and bonds for Hattie together with a statement to the same effect as that attached to Archulius' stock. (Ex. 7; RR 63; Pl. Ex. 9-9-A).

On January 29, 1947, Archulius said she took her mother to the office of O. S. Crockett at which time her mother executed a deed giving her approximately 48 acres of land worth \$9,600.00. (RR 98; Ex. 22; RR 136, 137, 145).

Her explanation for this gift was that her mother told her she was giving it to her because her Clarkston-Trenton Mill stock became valueless. (R 191, 192; RR 92, 94).

Both Archulius and her sister Hattie received the same amount of mill stock from their father's estate and in both cases it became worthless. At the time of the distribution it was worth \$2,640.00 to each. Hattie was not given any land or other property by her mother, except the stocks and bonds mentioned. (RR 97).

On March 3, 1948, Archulius *purchased* from her mother 10.25 acres of land worth \$2,000.00 for \$500.00. She took her mother to the office of O. S. Crockett,

abstracter and notary public, who prepared the deeds. (Con. Ex. 21, RR 136, 99, 198).

After her mother had transferred \$5,000.00 from the First Security Bank of Logan to the First National Bank of Logan and created a joint savings account with Wallace, Archulius had her mother eliminate Wallace's name from the account and took her to Logan to the First National Bank for this purpose, supervising the act. (R 192, 213, 239; RR 93, 94). Subsequently, as hereinafter appears, Wallace again triumphed and had his mother reinstate his name to the account.

Archulius said her mother did not read the deed to the 48 acres before signing it and that she might just as well have had the City Creek property. This consisted of about 160 acres and worth \$27,800.00. (R 191; RR 136, 139)

Archulius never told any member of the family that her mother was giving her the 48 acres or selling her the 10.25 acres prior to or at the time the transfers were made and they did not learn of it until the fall of 1950, except that one sister, Maybell, was told of it about a year after. (R 216, 217; RR 92).

When Archulius and Maybell were asked by their mother to straighten out the mess she was in regarding her affairs Archulius said to Maybell, "Let's not bother her about them." (R 238).

Archulius and Wallace in 1944 called the family together to consider the care of their mother and the management of her affairs. When her brother Melvin suggested the appointment of a guardian to take care

of her mother's finances and affairs she and Wallace joined with the others in opposing it. (R 181, 182, 216, 225, 389; RR 86, 88, 89).

Margaret testified that her mother told her, while looking through the window toward the Archibald's that she wished they would quit hounding her about her property. (RR 211, 212).

FACTS PERTAINING PRIMARILY TO WALLACE BUTTARS

Wallace after his marriage lived next door to his mother and talked with her twice a day. (R. 368) He began to manage and operate her property, approximately 300 acres, on a lease basis, in 1930, and to take care of her financial affairs. (R 173, 175, 177, 331, 378).

He advised her what checks to sign, bills to pay, and she consulted him regarding her financial affairs. (R. 354, 379, 386).

They binned their wheat separately until they started to get government loans on it and then they binned it together and secured their loans jointly. (R 354).

He made bank deposits for her and with the assistance of Darrell Crockett made out her income tax returns, and kept in his possession her cancelled checks from 1946 on. He said he didn't keep checks prior to 1946. (R 366, RR 216).

He testified that she relied on him in the management of her affairs and that she had implicit confidence in him. (R 379, 380).

He advised with her regarding certain legal instruments and recommended that she consult with Newel G. Daines, a Logan attorney, regarding her affairs and took her to his office for this purpose. However, he denied that he knew she made a will and of its provisions that she intended to treat her family equally. (R 366, 381, 382, 387, 399).

On March 28, 1945, six days after she made her will, he took her to Logan to the office of A. B. Crockett, a notary public and abstractor, for the making of the deed to him of the 60 acres of land worth \$12,000.00. (R 127, 137, 138; Con. Ex. 24; Def. Ex. 21). He said his mother gave him this property because he did not get anything like the rest of them got when his dad was alive. (R 383, 384).

He claimed that he did not know that his mother had created a joint savings account covering \$5,000.00 on January 28, 1947, with him until she told him on the way home. However, in reply to a letter from the bank to his mother requesting clarification of its records as to whether the account was originally intended to be a joint account with his mother he wrote for her signature, such was the case, (Con. Ex. 19; R 386, 387, 395, 396), and he gave no reason for the \$5,000.00 gift.

His sister Archulius persuaded her mother to take his name off the \$5,000.00 savings account which she did and after learning of this he had his mother again include his name on the account. (R 191, 213, 239; RR 93, 94).

On May 6, 1948, he again took his mother to the

office of the Crocketts and O. S. Crockett, abstracter and notary public, made the deed to the second 60 acre tract of land from his mother. He said his mother gave him this because the others got sixty or eighty when they were 20 to 22 years old. (R 385).

The defendant Wallace Buttars was 9 years of age when his father died. He had not helped accumulate any property and he was not given any by his father. (RR 123). However, after his father's death, his mother, Emma G. Buttars, was appointed guardian and from the income from the property he received from his father's estate, she, as his guardian, purchased for him a tract of 40 acres and a one-half interest in another tract of 120 acres. (RR 129, 130, 131).

He and his sister Archulius called a family meeting in 1944 regarding their mother's health and financial affairs and when his brother Melvin suggested the appointment of a guardian to take care of his mother's financial affairs he and other members of the family including Archulius opposed it and he said he could take care of her financial affairs and no guardian was needed. (R. 389, 182). And he did manage her financial affairs until her death. He said he never did anything on his mother's farm or regarding it for which he was not paid. (R 341).

The Buttars family had confidence in Wallace's management of their mother's affairs up until the fall of 1950. (R 379, 380, 216, 217).

He did not tell any of his brothers or sisters that his mother was going to give him either of the two tracts

of land or the \$5,000.00 savings account. And, except for Archulius, they did not learn of it until the fall of 1950. (R. 192, 216, 217, 239; RR 92, 93, 94, 95, 102, 211).

The \$5,000.00 savings pass book was not produced nor found in the home. (RR 212 to 217). Archulius had the keys to her mother's home and after her death when the will was read she gave the key to Wallace. (RR 230).

ERRORS RELIED ON FOR REVERSAL

Case No. 8177

The Court erred in failing to find that the grantor was enfeebled in mind and body; that there existed a confidential relationship between her and the defendant Archulius Archibald and that Archulius exercised undue influence in procuring the deeds and personal property in question and in failing to order an accounting of the rents and profits; and in entering judgment in favor of the defendant Archulius Archibald and against the plaintiffs; and in decreeing that the defendant Archulius Archibald was the owner in fee simple of the land covered by the two deeds to her in question and in awarding her the United States Government Bonds.

Case No. 8178

That the court erred in failing to find that the grantor was enfeebled in mind and body; that there existed a confidential relationship between her and the defendant Wallace Buttars and that the deeds in question, the \$5,000.00 savings bank account and the government bonds

were procured by the defendant Wallace Buttars by undue influence, and in failing to order an accounting of the rents and profits, and in entering judgment in favor of the defendant Wallace Buttars and against the plaintiffs and awarding to the defendant Wallace Buttars the property covered by the two deeds in question, and any interest whatsoever in the \$5000.00 savings account together with interest.

QUESTIONS TO BE CONSIDERED

1. Was the grantor Emma G. Buttars enfeebled in mind and body at the time of the transactions in question?
2. Did there exist between the grantor and the defendants Archulius Archibald and Wallace Buttars a confidential relationship?
3. Were the gifts the result of undue influence and did the grantees discharge their burden of proof and establish that the transactions were free from overreaching and undue influence?

PREFACE TO ARGUMENT

By way of preface we want it understood that we are not here to rehash, criticize or attack the decision of this Court In Re: Buttars's Estate 261 P. 2d, 171, the Will contest case. The only question presented in that case was whether Emma G. Buttars had the requisite mental capacity to make a will where in this case the real question is whether in light of all the facts and circumstances, did Archulius and Wallace procure the property in question from their mother by undue influence and overreaching.

ARGUMENT

I.

The law is that where a grantor is enfeebled in mind and body or a confidential relationship exists a presumption of invalidity arises that the burden of proof shifts and the grantee or donee, must show by clear and convincing proof that the transactions were fair, voluntarily and free of fraud, undue influence or over-reaching and that the grantor had the required mental capacity.

It is our position that at the time of the conveyances and transfers in question Mrs. Buttars was enfeebled in mind and body, that there existed between her and the grantees, Archulius and Wallace, a confidential relationship. That they took advantage of her condition and this relationship and by undue influence persuaded their mother to convey to them the property, both real and personal, in question.

MENTAL CONDITION

At the time of the death of her husband in 1916, Emma G. Buttars was 51 years old. Certain of her children, Dan, Margaret, Melvin, Maybell, Gover and Orson were all married, while Ira, Hattie, Archulius and Wallace were still at home. Emma G. Buttars, Dan and Melvin were appointed administrators of the estate of Daniel Buttars, deceased, and on March 10, 1917, Decree of Final Distribution and Partition was entered by the District Court of Cache County in which the Court adopted the plan proposed by the three administrators. After the death of the father Mrs. Buttars, Gover and Ira took over

the active management and operation of the farm. Ira later married, sold his 60 acres to Gover and moved to Burley, Idaho. Gover operated the farm until 1930 when he moved to Burley, Idaho, and sold his 120 acres to his mother, thus increasing her holdings by this acreage. From 1930 to the date of the death of his mother, Wallace has operated the farm pursuant to the terms of certain leases.

Gover and Ira remained in Burley, where Ira died in 1949. Melvin lived at Cornish and Dan at Lewiston, Utah. Both of them always made frequent trips to Clarkston to visit their mother. Melvin's wife was a Clarkston girl, so he made frequent trips to see his mother-in-law and mother, also. Hattie married, moved to Burley and later to Garland. Wallace married and built a home just a few rods from where his mother lived. Archulius lived across the street. Maybell and Margaret both lived in Clarkston, close to their mother's home. Family ties were strong and they all visited back and forth frequently. The record shows that the grandchildren, the children of Dan, also upon occasion more or less frequently, visited with their grandmother.

All of the evidence is also to the effect that Emma G. Buttars was a lady of resolute will, inclined to be very frugal and saving in her disposition, and habits, and that she enjoyed good health until the year 1940 and that from the time of the death of her husband in 1916 until the many conveyances and transfers made by her beginning with the year 1945, she not only made none but that she increased her holdings by purchasing an additional 120

acre tract of land from her son Gover, besides the money in the banks, the bonds herein mentioned and the First Security Bank Stock. The record is also clear that up until the year 1940 the deceased always enjoyed good health and that thereafter she was never the same strong and healthy individual nor did she transact any business. The Buttars family was a united one until the fall of 1950. The children visited with their mother and Wallace continued to operate her farm on a share basis. No one interfered. The record is silent as to any quarrel ever between the mother and any of her children.

In 1940 Emma G. Buttars was 75 years old. She became seriously ill and thereafter was never the same. About everything was wrong with her. She suffered from hardening of the arteries, high blood pressure, heart ailment, kidney trouble, and terrific headaches. Deterioration had set in. Every indication of senility was and remained apparent. She couldn't remember recent events, from morning until later in the day. She didn't recognize some of her eldest grandsons, nor their wives. One month before she made her will, she didn't realize her son, Dan, had died nor could she remember or carry on coherent conversations. She worried over finances when she in fact had plenty. Her mind was confused over finances and property particularly and she constantly worried about having enough to live on. She was forgetful, particularly as to recent events, disliked people for no reason at all, would repeat, ask the same thing over and over again, hide silverware in bed, accuse some of her children of borrowing from her when they had not, hide

money, couldn't distinguish between her own property and that of her sons. She didn't know what she had or possessed in the way of property or what she had done or signed away. There was no doubt mental deterioration had taken place. Her condition became so bad that the family didn't want her condition generally known. Long before 1945 deceased failed to attend to any of her own business affairs. All she did was to sign checks and follow Wallace or be led around by him. (Tr. 360).

In late summer or early fall of 1944 Wallace and Archulius called the family together and it was there reported that their mother was not physically or mentally in a condition to be left alone. The appointment of a guardian was suggested. Before her will was made she did not know that pursuant to an arrangement Wallace was caring for her finances, nor that thereafter in 1951 and 1952, her daughters were taking turns in caring for her and were being paid therefor. After returning from the hospital following her first illness her daughters cared for her without pay. She also had a second serious illness in 1944. Such is the positive testimony of appellants and respondents.

Those of the appellants' witnesses who testified are all **grown** persons, 40 years of age or thereabouts, all of whom were intimately acquainted with the deceased during her lifetime, knew of her physical and mental condition earlier in her life, and each of them visited with their grandmother at different intervals after her illness in 1940, and so were competent witnesses.

When she made her will she declared that she was

treating all of her children equally, and then omitted her deceased son Dan's children upon the mistaken belief that he had not repaid a loan, while he had, several years before, and then sold property worth \$2,000.00 for \$500.00 to Archulius.

We contend that in view of the foregoing facts the grantor was enfeebled in body and in mind and the burden was upon the grantees to show mental condition and that the transaction was fair and free of undue influence.

Less degree of proof is required to establish mental incapacity and undue influence in the case of an enfeebled grantor.

In *Kadogan v. Booker*, 66 SE 2d 297, 302 (W. Va.) the court said:

"Less evidence is required to establish incompetency when a grantor is aged and enfeebled in mind and body."

And when a grantor sells property for an inadequacy of consideration, although not conclusive evidence of incompetency, it is persuasive.

Here we have a sale by Mrs. Buttars of land worth \$2,000.00 for \$500.00.

In *26 C.J.S. Deeds*, Sec. 54, page 268, it says:

"Inadequacy of consideration is persuasive, although not conclusive, evidence of mental incapacity, and where mental weakness and inadequacy of consideration co-exist they may together furnish ground for invalidating a deed."

And where a grantor is enfeebled in mind and body a presumption of invalidity arises and the grantees must overcome the presumption and show that the transaction

was fair and free of undue influence and that the grantor had the requisite mental capacity.

In *Johnson v. Reese*, 249 SW 2d 538, (Ky.) the grantor when 87 years old executed a deed in favor of his daughter and her husband who were living with him. He was enfeebled and needed someone to take care of him. Shortly before the grantees moved in with him some of his children consulted an attorney regarding having a committee appointed to handle his estate. The daughter knew this. The court said:

“In view of the relationship between the parties, the age and physical condition of the grantor, we think the burden was upon appellants to prove the transaction was voluntarily entered into and fully comprehended by him.”

In *Morris v. Williams-Garrison*, 128 S.E. 78, 99 W. Va. 140, the grantor was 63 years old, sub-normal, a moron, and someone always helped him manage his affairs. The court said:

“The defendant has signally failed to overcome the presumption of incapacity, which arises from the mental weakness of the grantor, the absence of consideration for the conveyance, and the other circumstances of this case.”

In *Johnson v. Johnson*, 191 N.W. 353, 196, Iowa, 343, the grantor executed a deed in favor of his wife on September 29, 1919, while in the hospital, he was 80 years old, had been taken to the hospital on the 1st of September in a coma, was operated on on September 6. There was a dispute as to his mental condition after the operation, plaintiffs claiming he did not change and the defendants'

witnesses claiming that it cleared up. As to the burden of proof the court said:

“In view of the undisputed mental incapacity of the decedent at a stage of his illness prior to the execution of the deed, the plaintiffs made a prima facie case and the burden was thereby cast upon the defendant to show the restoration prior to September 29; and, in view of the decedent’s undoubted weakened condition, both mental and physical, and of his own helplessness and utter dependence upon his wife to provide for him, she must be deemed as the dominant personality and as fiduciary at least for the time being. The burden was therefore cast upon the defendant to show, not only the mental capacity of decedent, but also that the execution of the deed was not the result of the stress of undue influence exercised upon him in his helplessness.”

The supreme court of New Mexico in *Morgan v. Thompson*, 127 P. 2d 1037, states the rule thus:

“Finally, in the case of a real mental weakness, a presumption arises against the validity of the transaction, and the burden of proof rests upon the party claiming the benefit of the conveyance or contract to show its perfect fairness and the capacity of the other party.”

II.

CONFIDENTIAL RELATIONSHIP

The evidence is conclusive that there existed a confidential relationship between Emma G. Buttars and her children Archulius and Wallace, at the time the transfers or attempted transfers were made.

ARCHULIUS ARCHIBALD

Archulius was the ninth child of Emma G. Buttars, 12 years of age when her father died in 1916, and she lived with her mother until she married in 1921, after which she lived across the street. She talked with her mother daily, was in her mother's home or her mother was in her home each day, except when she was away for a few days at a time.

After her mother became seriously ill for the second time in 1944 (the first time was 1940) she helped her mother with her sewing, with the family record book, bought her mother's groceries and necessities and helped manage her home generally. Her mother entrusted her with checks signed in blank and in the cashing of checks and the custody of a \$5000.00 savings deposit book.

She exercised such influence and dominance over her mother that she persuaded her to remove Wallace's name from the \$5000 savings account, took her mother to Logan where she supervised the removal of his name from the account only to be defeated in this when Wallace again persuaded his mother to reinstate him; and her mother reposed such implicit confidence in her and she exercised such dominance over her mother that her mother sold her land worth \$2000 for \$500.

Archulius agreed that all of the foregoing facts were true except that she would have us believe that she did not advise with her mother in regard to the removal of Wallace's name from the savings account although she does admit she took her mother to Logan to accomplish this purpose and was present with her mother at the

bank when it was done.

These facts under the authorities establish that a confidential relationship existed between them; particularly is this true in the light of her mother's physical and mental condition.

WALLACE BUTTARS

Wallace Buttars was the tenth and last child of Emma G. Buttars. He was nine years of age when his father died. He lived with her until his marriage and then next door.

After Mrs. Buttars' husband's death in 1916, Gover and Ira rented her farm and one of them always assisted her in the conduct of her affairs. In 1930 Wallace began to operate her farm on a lease basis. Thereafter he assisted her in the management of her affairs until her death. Over the years he talked with her twice daily. She advised with him and he says relied upon him explicitly, advised with her on practically all matters pertaining to financial affairs, made out her income tax returns, told her of financial obligations and what bills to pay, commingled his grain with hers and secured joint government loans, advised her as to what lawyer she should consult, his lawyer, regarding her affairs.

In 1944 at a family meeting which he and Archulius called to consider their mother's condition and affairs, he objected to his brother Melvin's suggestion that a guardian be appointed to look after his mother's financial affairs, saying that he could and would look after them and that a guardian was not needed.

Under these facts can there be any question but that a confidential relationship existed between Emma Butters and Wallace during the time of the transactions in question?

There is no question but that both Archulius and Wallace occupied a confidential relationship with their mother—that her physical and mental condition required in the later years of her life she confide and advise with someone. These two were the natural persons to assume such relationship.

Appellants sustained their burden and established such a relationship as a matter of fact and law.

In determining whether a confidential relationship exists the Court, among other things, takes into consideration the experience and business affairs of the grantor, her age, physical and mental condition, whether there exists a disparity in the mental qualities of the grantor and grantee, and the confidence reposed. The relationship need not be legal, may be either moral, social, domestic or merely personal.

In *Fisher v. Burgiel*, 46 NE 2d, 380, 385 (Ill.) the grantor was 77 years old, mentally ill, he had been friendly with Mary Burgiel, for 35 years, they lived next door for about 22 years. Anthony Burgiel did odd jobs for her. About a year before the deeds were made she spent part of her time with them in their home for which they were paid. From January 1938 to August, 1939, she made withdrawals from bank with checks written in Mrs. Burgiel's handwriting and signed by her. The Court said:

“It is settled law that Courts of equity will

not set any bounds to the facts and circumstances out of which a fiduciary relationship may spring. A fiduciary relationship with its legal incidents includes not only all legal and technical relations such as guardian, and ward, attorney and client, principal and agent, and the like, but it extends to every possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other. * * * The relationship need not be legal but it may be either moral, social, domestic, or merely personal."

In *Mead v. Gilbert*, 185 A. 668, 693, (Maryland) the grantor was between 70 and 80 years old, seriously ill when the deeds were made. Son took over and had been managing his mother's affairs. The Court said:

"The question comes finally to this that where a conveyance from a parent to a child is attacked, the existence of a confidential relationship between the parties is a fact to be shown, as in any other case where it is not presumed as a matter of law. (*Upman v. Thomey*, *Supra*), and that in such an inquiry advanced age, physical debility, and mental feebleness are all facts, not one of which is necessary conclusive, but any one of which may have weight in determining whether the relationship as a fact existed."

In *Woolwine v. Bryant*, 54 N.W. 2nd 759 (Iowa) the grantor turned to the grantee when her husband died, the grantee accompanied her when she left home, ran her errands, purchased her supplies, collected the rentals from the farm and deposited them in the bank, cared for the leasing of her farm and had a right to write checks on her account. The court said:

“That equity takes cognizance of transactions between parties occupying a fiduciary or confidential relationship, and will grant relief where such relationship has been abused, is well recognized. A confidential relationship is said to exist where one has gained the confidence of another and purports to act or advise with the other’s interest in mind. Where such a confidential relationship is found to exist between a grantor and a grantee a presumption against the validity.”

In *Longmire v. Kruger*, 251 P. 692, (Calif.) the Court said:

“Unquestionably this is the rule of equity, and a deed of conveyance from a parent to a child is not presumed to be invalid. Indeed, without further facts, just the contrary is true, and such a deed is presumed to be valid. 3 Thompson on Real property, 1052, sec. 2886; 2 Pomeroy’s Equity Jur. (4th Ed.) 2076, sec. 962. But when the parent is aged, infirm, or otherwise in a condition of dependency upon the child, who exercises authority over him, a presumption arises which places the burden upon the beneficiary of the gift conveyance, to show the transaction was fair and free from fraud. Equity will scrutinize such a transaction with great care, and, under such circumstances, slight evidence will suffice upon which to base a finding of undue influence and set aside the deed.”

And your Court in *Omega Investment Company v. Woolley, et al*, 72 Utah 474, 271 P. 797, quotes with approval the following language from 2 Pomeroy, Equity Jurisprudence, Sec. 956, as follows:

“Wherever two persons stand in such a relation that, while it continues, confidence is neces-

sarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed. Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such manner that other and perhaps new cases might be excluded. *It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.*" (Italics added.)

III.

And where there exists a confidential relationship, such as existed here, a presumption arises that the transactions were invalid and the burden shifts to the grantee to overcome the presumption and show that the transactions were fair and free of overreaching or undue influence; and the grantor's mental capacity.

The rule is well stated in *Omega Investment Company v. Woolley, et al*, 72 U. 474, 488, 271 P. 797, the court said:

"Thus, in transactions between persons occupying such relations, in which the stronger or superior party obtains a benefit or advantage,

fraud is presumed, and the burden is cast upon the superior party to show fairness, adequacy, and equity in the transaction." *Peterson v. Budge*, 35 U. 695, 102 P. 211.

And the burden is upon the grantee to show by clear and convincing proof that the transactions were fair and free of fraud or undue influence, and that the grantor had the necessary mental capacity.

The rule is stated in *Hayes v. Thornsborough, et al*, 69 P. 2d 664, 667, 180 Okl. 357. The court said:

"The defendant occupied the dominant position in the relation, and once it is established, the transaction in which he obtained a deed from plaintiff is presumptively fraudulent. The defendant is, therefore, under the burden of showing by clear and convincing evidence that there has been no abuse of the confidence, and that he has acted in good faith and that the transaction was perfectly fair and supported by adequate consideration."

In the case of *Fuson, et al v. Fuson*, 57 S.W. 2d 42, 43, 247 Ky. 380, the court said:

"But where the parties involved occupy a confidential relationship toward each other, and the consideration is not fixed in amount, but is wholly undetermined, dependent upon future events rendering its efficacy problematical, then the burden is cast upon the beneficiaries of the contract (grantees in a deed) to show by clear and convincing proof that the transaction was fair and free from the taint of any undue influence, overreaching or fraud."

IV.

LACK OF INDEPENDENT ADVICE

Although there is authority that the lack of independent advice, where a confidential relationship exists, or the grantor is mentally infirm in and of itself is not grounds to set aside a conveyance, but is to be considered with all other circumstances, the better rule is and the one adhered to by this court that where the grantor did not have independent advice, this lacking if fatal to the transaction and the transfers both real and personal will be set aside.

There is no evidence whatsoever that the grantor, Mrs. Buttars, even though she was 80 years of age and more, and if not mentally incompetent, was both mentally and physically enfeebled, had any independent advice regarding the transactions in question. In contrast to this when she made her will she was closeted with an attorney alone, received independent advice and exercised her free will and as a result attempted to provide in her will her intention that all of her children and the children of her deceased children should be treated equally. Wallace and Archulius both maintain that they did not know of this provision in their mother's will and Archulius that she did not know that her mother had attempted to give her stocks and bonds to recompense her for the mill stock received from her father's estate, which became valueless. This is unworthy of belief. Wallace took his mother to a lawyer of his choice in the making of her will. He and Archulius were their mother's advisers and they talked with her daily. Then, instead

of taking their mother to a lawyer or other person where she might get independent advice and exercise her free will they took her to abstractors and notary publics to have her legal papers executed, the deeds, where they could supervise the transactions, see that it was done in keeping with their wishes and under their influence and dominance and not in the free exercise of her will.

The Supreme Court of this State in *Omega Investment Company v. Woolley, et al*, 72 U. 474, 490, 271 P. 797, laid down the rule that it was the duty of the person accepting the conveyance to see that the grantor had disinterested advice and full information. The Court said:

“Whenever there exists between parties confidence on the one hand and influence on the other, from whatever cause they may spring, equity requires in all dealings between them the highest degree of good faith on the part of him in whom the confidence is reposed. If a conveyance is executed by the other in his favor, the burden rests upon him to prove that it was not procured by means of such confidence and influence. It is his duty, before accepting the conveyance, to see that the grantor has disinterested advice and full information.”

In *Ham v. Ham*, 110 So. 583, 146 Miss. 161, the court said:

“The usual method of proving independent consent and action in such cases, and probably the only way it can be clearly proven, is by showing that in making the deed the grantor acted on the advice of a competent person, disconnected from the grantee and devoted wholly to the grantor’s interest.”

And in *Beals v. Ares*, 185 P. 780, 795, (N.M.) the Supreme Court of New Mexico, in a case involving a confidential relationship said:

“I take it to be a well-established principle of this court that persons standing in confidential relations towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or the capacity of the person conferring the benefit or the nature of the benefit conferred affects the principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply; but I think they are but of little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence.”

Thus on this principle alone, independent of the other evidence in the case which shows the exercise of undue influence and overreaching on the part of Wallace Butters and Archulius, the court should set aside the transactions in question, the two deeds, \$5,000.00 savings account and the bonds to Wallace and the 2 deeds and the U. S. Savings bonds to Archulius.

V.

The evidence established that the transfers and gifts of personalty were the results of over-reaching and undue influence.

We contend that because the grantor-donor did not have any independent advice regarding the conveyances and gifts of personalty in question they should be set aside and vacated. However, it is not necessary that we stop here, for the evidence unquestionably establishes that both Wallace and Archulius secured their deeds and the personal property by overreaching and undue influence and in any event they did not overcome the presumption of invalidity and establish by clear and convincing proof that the transfers were fair and not the result of undue influence.

Undue influence can rarely be proved by direct evidence and usually it is shown by circumstantial evidence. In determining whether overreaching or undue influence existed, or when the burden of proof shifts, the lack of undue influence, the courts, among other things, take into consideration the age, mental and physical condition of the grantor, opportunity for overreaching, the activity and interest of the grantee in bringing about the execution of the instruments, the secrecys surrounding them, divergence of the results normally to be expected, previous declarations of the grantor inconsistent with the results accomplished, improbability of the reason given for the transfers and lack of independent advice. All of these landmarks and others are present here.

The evidence proved, and we shall not set it forth

again, that the grantor was enfeebled in mind and body and in such a condition that she could easily be imposed upon not only because of her enfeebled condition but as there existed a confidential relationship between her and Wallace and Archulius. They had the opportunity to overreach her. They were her confidants and advisors, and as such they talked with her daily.

WALLACE

It is undisputed that in 1944 Wallace and Archulius called a family meeting because of their mother's condition to discuss and decide what should be done with regard to her, and, although it was recognized that she needed help, they and others opposed the appointment of a guardian. It was this decision that laid the foundation of what was to follow.

On March 22, 1945, Mrs. Buttars made her will by an attorney recommended by Wallace and with the aid of independent advice and in the exercise of her free will solemnly declared that it was her intention to treat all of her children and the children of her deceased children equally, and this would have been accomplished except that because of her mental condition she had forgotten that her son Dan had repaid the money that he had borrowed from her several years before.

In direct contradiction of this provision in her will six days later she began to deed her property away and to prefer Wallace for on March 28, 1945, she deeded him 60 acres of land worth about \$12,000.00. Wallace maintains that he did not know that his mother had made a

will, or that in it she provided for her children equally, although he said he knew of the intended execution of the deeds and he recommended that she go to the lawyer who made the will and took her to his office and then called for her after the will was made. Is this to be believed? It is revealing that instead of taking the grant or back to the lawyer who drafted the will six days before or some other attorney or other person where she could and would receive independent advice regarding the advisability of the transfer, Wallace took her to an abstractor and notary public who drafted the deed for her signature.

Wallace says his mother told him the reason for this gift was that he didn't get what his brothers got when his father was alive. How does this square with the facts? It is true that prior to his father's death in consideration of his elder sons working on the farm and helping him acquire his holdings, that he gave either 60 or 80 acres of land to them. He also permitted three of them to buy other lands. The gifts were given on the boys' marriages except as to Ira, who received his when 17 years old as his father did not expect to live long. There was a good reason for his father and mother not giving any land to Wallace. He was only 9 years of age when his father died and had in no way helped his father and mother in creating the estate and Wallace was, at the age of 9, to inherit from his father property which, unlike the others, he had not helped accumulate. There is no merit to this alleged reason and it is further borne out by the undisputed facts that his mother as his guardian

with money earned from the property he had inherited at the age of 9 purchased 40 acres of wheat land and a one-half interest in 120 acre tract of land, part of which was subsequently broken up and became wheat producing. Wallace, by the time he married had property equal to or in excess of that given to his brothers plus that inherited by them.

Thus no inequities existed that required his mother to give him 60 acres of land. This is further borne out when you take into consideration that since 1930 Wallace had the use and benefit on a lease basis of 300 acres of his mother's land. So, the reason he gives for this gift must fall of its own weight when considering the light of these facts and circumstances

This property was deeded without the knowledge of his brothers and sisters in secrecy. He did not tell any of them of the intended transfers and, except as to Archulius, they did not learn of it until 1950 at which time he says the family lost confidence in him.

The next gift to Wallace is the \$5000.00 joint savings account on January 29, 1947. This was the same day that his mother gave Archulius her 48 acres of land.

It would thus appear that when Archulius learned of the conveyance of the 60 acres of land to Wallace (the first 60 to Wallace) she concluded that if Wallace was to be preferred by her mother she could likewise benefit and she put into execution her plan to persuade her mother to give her property, and in doing this she would work with Wallace when her interest *profited* by it, and Wallace accepted her as a joint conspirator when it was

to his interests. It is not entirely clear who took Mrs. Buttars to Logan when the deed of the 48 acres of land to Archulius and the \$5,000.00 joint tenancy savings account was created, as Archulius says she took her there and Wallace says he took her home. In regards to the \$5,000.00 savings account Wallace says he did not know that his mother was going to make him this gift until she told him on the way home. Wallace gave no reason for this gift. Apparently, there was none, he could not justify it and the only conclusion that can be reached is that it was due to overreaching and undue influence.

It is apparent that Wallace and Archulius not only worked together when it served their interests but they worked separately and at times attempted to nullify each others efforts. This is a fair inference from the evidence. She was to get the 48 acres and in so doing he was to increase his holdings by the \$5,000.00 savings account. In accomplishing their purpose they were prepared to work together and then repent at leisure. So Archulius, after getting her gift of the 48 acres, persuaded her mother to take Wallace's name off the joint savings account, took her to Logan and supervised the accomplishment of this only to be defeated when Wallace learned of it and he again had his mother create a joint tenancy in the savings account. These transactions were also secret and not known to the rest of the family until the fall of 1950 except that Maybell learned of Archulius' gift about a year after it was made. In the light of these facts were not these gifts the result of overreaching and undue influence?

That Wallace was overreaching his aged and enfeebled mother according to a plan is borne out by the fact that again on May 6, 1948, he had his mother deed him another 60 acres worth about \$12,000.00. Again this was done without the knowledge of the family and he took his mother to an abstractor and notary public at Logan who made the deeds, not to an attorney or other person where she could get independent advice. Now listen to the reason for this conveyance—his mother gave it to him because the other boys were given 60 or 80 acres when they were 20 or 22 years old and they were permitted to buy another 60 or 80. This, like the reason given for the first 60 must fall of its own weight, for the reasons heretofore mentioned in discussing Wallace's attempted justification for his mother giving him the first 60 acres, and for the further reason that neither Gover or Ira had the opportunity to purchase any land, and none of the other boys except Ira and Gover were permitted for over 20 years to lease 300 acres of their mother's land. If this is reason to be believed we ask why did not his mother convey him this 60 acres when she conveyed the first on March 28, 1945. If the reason existed in 1948 it likewise existed in 1945. Why didn't she give him both sixties on March 28, 1945? Why wait? We submit that this is fabrication pure and simple and is not entitled to any serious consideration.

In addition to the three gifts above mentioned totaling approximately \$29,000.00 his mother also attempted to give him \$1125.00 maturity value in government bonds. These were found when the safety deposit box was open-

ed. Wallace claimed he had no knowledge that these gifts were made or intended. To this we merely say that in view of all of the facts in this case and considering that he was his mother's adviser, talked with her twice a day and then stated to Maybell that when his mother's safety box was opened "there'd be hell a-poppin," is this to be believed?

It is readily apparent that Mrs. Buttars' physical and mental condition was enfeebled and that she was in a condition to be taken advantage of by her children regardless of whether they occupied a position of trust and confidence and that two of them on recognizing this fact, that is Archulius and Wallace, did so; that she was imposed upon is further borne out by the fact that sometime between 1950 and her death she told her daughter Margaret and on other occasions her daughters Maybell and Archulius her affairs were in a mess, she didn't know what she had done with her property and asked that they straighten them out.

The mere fact that the deeds contained the retention of a life estate is of no particular significance, as if Mrs. Buttars intended to prefer Wallace and Archulius, she could have done so in her will.

It is also of some significance that Wallace knew before the execution of his deeds that they were to be made, that he disclaims any knowledge whatsoever that he knew his mother was going to make a will or that she had made one.

If Wallace was not overreaching his aged and enfeebled mother why all the secrecy surrounding the trans-

actions? Why did he not take the rest of the family in his confidence or at least make arrangements for her to get independent advice from some person who had her interests in mind.

It was established by clear and convincing proof that Wallace overreached and secured the gifts in question from the exercise of undue influence and in any event he did not discharge his burden of proof, overcome the presumption of invalidity, and show by clear and convincing proof that the gifts were not the results of unfairness, overreaching or undue influence.

ARCHULIUS

It should be kept in mind that Emma G. Buttars and her husband did not treat their daughters the same as they did their sons. When Mr. Buttars was alive, upon the marriage of his sons, as mentioned before, he gave each of them 60 or 80 acres of land, but none to his daughters. There were four girls in the family. Margaret and Maybell married prior to their father's death.

Among the assets of their father's estate were several shares of Clarkston-Trenton Mill Stock, some of which was distributed to Archulius and Hattie, having a value of \$2640.00 to each. This stock at this time was considered a good investment. However, within a few years it became valueless.

When the safety deposit box was opened besides the \$1125.00 maturity value bonds to Wallace and \$550.00 maturity value bonds to a grandson, there was found that Mrs. Buttars had attempted to give one \$1,000.00 ma-

turity value and three \$500.00 maturity value bonds and 22 shares of First Security Corporation stock to Archulius and the same to Hattie. Attached to the \$1,000.00 bonds and stock certificates in each instance was a statement that because the Clarkston-Trenton Mill stock had become worthless this gift was being made to them. The statement was dated April 9, 1945, or 16 days after the date of the will.

Archulius maintained that she didn't know of these attempted gifts nor the reason therefor until the safety deposit box was opened. Is this to be believed if her statement is true that every year her mother said she was going to make it up to her because the stock had become worthless?

On January 29, 1947, Archulius said she took her mother to Logan; this was the same date of the alleged \$5,000.00 joint tenancy gift in favor of Wallace, and to the office of an abstractor and notary public who prepared the deed for her mother's signature giving her 48 acres of land worth about \$9600.00. The deed was given without the knowledge of the other members of the family except, undoubtedly, Wallace, and they did not learn of it until the fall of 1950 at the service station meeting. However, there is some evidence that Maybell learned of it about a year after it was made.

Archulius said her mother gave her this property, the 48 acres, because the Clarkston-Trenton Mill Stock became worthless. This was the same reason her mother gave in 1945 for giving her and her sister Hattie each a

\$1,000.00 bond and 22 shares of First Security Bank stock.

Now let's examine this reason and see if it be believed in the light of all the facts and circumstances.

We have before pointed out that this gift of 48 acres was accomplished the same day as the gift of the \$5,000.00 savings account to Wallace and although Archulius says she took her to Logan to the office of Mr. Crockett, an abstractor and notary public, who prepared the deed, it would appear from the evidence that she was either accompanied by Wallace or met him in town, as he says he took his mother home on January 29, 1947, and then first learned of the \$5,000.00 gift. It must be concluded then that they were engaged in a common purpose, that is, she was to get the 48 acres provided Wallace got the \$5,000.00 gift.

In all likelihood Archulius learned that Wallace had secured the 60 acres from his mother and she decided that if he was to so benefit, she would likewise prevail upon her mother and secure a preference for herself. Thus, she enlisted the help of Wallace (probably under the threat of exposure) and he joined with her in accomplishing this purpose with the understanding that in so doing he was to get the \$5000.00 savings account. This concession she was willing to give and she either acquiesced in it without reservation, or she decided at a later date that Wallace was and had secured a disproportionate amount from her mother. In line with this she prevailed upon her mother to terminate the joint tenancy, only to have Wallace at a later date again have

his name reinstated on the savings account as a joint tenant. Does this point to anything except that they were overreaching their mother and using her as pawn to be moved about as they willed?

Then when confronted by her brothers and sisters regarding her taking advantage of her mother, she had to have some reason and the only one she could think of that might have some basis was that it was given to her because of the mill stock. In so doing she could explain this away by saying that she didn't know that her mother had theretofore made an attempt to reimburse her for this loss. An additional fallacy in this, and one which clearly shows the falseness of her reason, is that she and her sister Hattie had both received the same amount of mill stock. Hattie's likewise became worthless and yet her mother did not give her 48 acres or any other properties except, of course, the bond and shares of stock which Archulius had likewise received. If her mother believed any inequities existed that should be remedied with reference to the mill stock, she had already taken care of this and Hattie was included in the program. If she was to get 48 acres because of the mill stock this reason existed on April 9, 1945, when her mother gave the stock and bonds for the same reason. Why not transfer then or a provision made in the will?

In line with this it should be kept in mind that the grantor realized that she had been taken advantage of. However, she did not know how, as sometime between 1950 and her death she asked her daughter Margaret and again her daughters Maybell and Archulius to straighten

out the mess she was in at which time Archulius said, "Let's not bother her." What didn't Archulius want brought to light? And again Archulius told her sister Maybell that her mother did not even read the deed and she just as well had the City Creek property. The City Creek property was 160 acres.

That Archulius was, as well as Wallace, pursuing a program of taking advantage of their aged and enfeebled mother is further borne out by the fact that she purchased from her mother a tract of land worth \$2,000.00 for \$500.00. Her mother relied upon her in the fairness of the transaction.

If Archulius was not taking advantage of her mother why all the secrecy concerning the transactions? Why did she not take her other brothers and sisters into confidence and advise them that her mother was making these conveyances to her? The least she could have done was to see that her mother secured independent advice regarding the advisability regarding them.

The record is free from any evidence that would justify Wallace and Archulius in their course of conduct and in procuring over forty percent of their mother's estate to the detriment of their brothers and sisters and the children of their deceased brothers.

Another factor to be considered is that while Mrs. Buttars was well physically and mentally she kept her estate intact and it was not until she had deteriorated both physically and mentally that these two children were able to secure these preferences. Not only this, but as we have pointed out had their mother intended

to make a preference she could have done so in her will.

In view of the foregoing we contend that the evidence established by clear and convincing proof that Wallace and Archulius secured the gifts in question upon the exercise of undue influence and in any event neither of them discharged their burden of proof overcoming the presumption of invalidity.

We have before pointed out that although some courts hold that the lack of independent advice is a factor to be considered in the light of all the evidence that courts have held and such appears to be the holding of this Court in *Omega Investment Company v. Woolley, et al*, 72 U. 474, 271 P. 797, that the only way that presumption of invalidity can be overcome is by showing that the grantor had independent advice.

We recognize that each case must stand upon its own facts, that rarely will the facts of one case be the same as another. However, we believe that the following cases should be helpful to the Court in determining whether the transactions were the result of overreaching and undue influence and whether Wallace and Archulius discharged the burden of proof in overcoming invalidity of the gifts.

In *Woolwine v. Bryant*, 54 N.W. 2d 759 (Iowa) the Court said:

“While no actual fraud or direct evidence of undue influence appears in the record, we think the answer to the case is well stated in the words of the late Justice Evans, who in *Johnston v. Johnston*, 196 Iowa 343, 348, 191 NW 353, 355 stated: ‘It is a rare case when the dominant indi-

vidual in a fiduciary relationship can sustain a gift to himself by one who is dependent upon him.' ”

In the case of *Fuson v. Fuson*, 57 EW 2, (Ky.), the father brought an action to cancel a deed to two sons because of undue influence in which he *retained a life estate*. He was 72 years of age, had recently moved in with one of the grantees, was deaf and had impaired vision. He had recently been sick and was depressed over his wife's recent death. His sons were to run the farm and take care of him. In securing their father's signature to the deed, they studiously failed to mention the transaction to any of the grantor's other children. The court said:

“Without further discussion we unhesitatingly conclude, not only that defendants failed to discharge the burden cast upon them by the rule, *supra*, growing out of the confidential relationship to their father, the grantor, but the evidence furthermore convinces us that he was actually overreached and procured to execute the deed in controversy contrary to his oft-expressed desires that all of his children should share equally in his property, and which he would not have done but for the chicanery and undue influence practiced upon him by the defendants. It is true, as we have heretofore intimated, that no one expressly testified to any such influencing facts; but the circumstances detailed in the testimony, the facts gleaned from the statements made by the defendants, plus their evident reluctance by their “not remembering” are all most persuasive that the attached deed was not understandably executed by plaintiff, nor were the result of his free and

untrampled will, all of which is sustained by the testimony.”

In *Bentley vs. Bentley*, 119 A. 253 (Maryland) the grantor when 78 years old gave a deed of trust in favor of her brother Frank *reserving a life estate*. The need of a guardian was discussed by Frank with his brother Ben, who was excluded, but nothing came of it. She was feeble and needed assistance. Did not feel good towards her brother Ben. Frank claimed that his sister called him wanting to know what she could do to keep her brother Ben from disposing of everything on the place. He suggested the appointment of a trustee. Frank claimed he did not know that he was to be the beneficiary until sometime after it was done although he took her to the home of the draftsman for the execution of the deed. He did not disclose to his relatives that his sister had given him the property. The trust deed was set aside. The Court said:

“It is not inconsistent with the exercise of undue influence or artifice that the instrument assailed was executed voluntarily and with a knowledge of its contents.”

“The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed around her as against those who advised her, which from their situation and relation with respect to her, they were bound to exert in her behalf.”

In *Myrick vs. Bruetsch*, 56 P. 2, 591 (Cal.) the court set aside a conveyance wherein the grantor granted a joint tenancy with himself and a daughter. He could

not read or write English, one of the defendants was always present when he did any business. The defendant lived with her father and the conveyance was made shortly after her mother's death, the papers were prepared by a notary public, and the grantor had no independent advice. Defendant said nothing to her other brothers and sisters about the transfer until some time after their father's death. She talked disparagingly about her brothers and sisters and discouraged them from visiting with their father. The father expressed affection for all of his children and could not understand why they did not come often. The grantee went with her father to the notary public on each occasion when anything was done in connection with the making of the conveyance. The father had said he was going to equally divide his property among his children.

In *Overstreet v. Beadles*, 101 P. 2d, 874, the Court set aside two deeds, one made in December, 1927, and the other in October, 1930. After the deeds were made they were placed in the grantor's strong box. In the spring of 1930 or 1931 the grantee went to the bank, the banker brought the two deeds from the bank, went to the home of the grantor, handed her the deeds and in his presence she handed them to her son the grantee, saying that he could do whatever he desired with them. She told him to take them and that this land would be enough to keep him. The Court in setting aside the deeds said:

"The record is completely void of evidence that Mrs. Mary A. Beadles had independent ad-

vice at the time the challenged deeds were dated. Touching the deed to the Overton land, she probably had nothing to do with its making. After that deed had remained in darkness for ten years, it was brought to light just long enough to be recorded, and then it was conveniently 'lost' so that the grantor's signature could not be scrutinized. And in respect to the deed to the Creek land the testimony of the scrivener and of the notary contributed nothing from which it might be deduced that the grantor had the benefit of independent advice in the transaction which led to its execution or to dispense with its necessity.

In *Legler vs. Legler*, 211 P. 2d 233, 247, the Supreme Court of Oregon, in setting aside a deed, said:

"This court has held that more mental capacity is required to engage in a transaction involving the execution and delivery of a deed than to write a will. *Gilliam v. Schoen*, 176 Or. 356, 157 P. 2d. 682, and *Miller v. Jeffery*, 129 Or. 674, 278 P. 946. Generally, a grantor, unlike a testator, must cope with another party to the transaction, that is, with a grantee. He must be able to look out for himself concerning such matters as consideration, warranty and terms of sale. When a deed, like the present one, is testamentary in character, it might seem that no more mental capacity should be required of the grantor than if he executed a will. But deeds, even though testamentary in nature, unlike wills, are not revocable. They afford no opportunity for giving effect to afterthoughts.

And the Court again said:

The deed came forth, in our opinion, from a transaction in which the appellant participated

under circumstances which demanded an explanation. For instance, there was the element of secrecy. So far as we know, there was no ill feeling between the appellant and the respondents, nor was there any ill will of which we are aware between the appellant and Mr. Mattson, the tenant. The secrecy provokes suspicion. The execution of the deed constituted almost a complete about-face from previous plans which Mr. Legler had long entertained and which he had mentioned to people even outside of the family circle. In fact, it involved the disposition of his most valuable asset, not by a will as he had contemplated for many years, but by a deed."

In *Tracey et al vs. Tracey*, 163 At. 80 (Maryland) the court set forth as landmarks of undue influence to be considered in the light of all of the evidence the following:

"Landmarks of undue influence are: Divergence of results accomplished from those which would ordinarily be expected; effect of grant on grantor; substantial and manifest conflict between deed and purpose of grantor; previous declarations of grantor inconsistent with results accomplished; marked activity and interest by beneficiaries in bringing about execution of instrument; and sometimes absence of reasonable opportunity to secure independent advice from disinterested sources."

Also see the following cases:

In Re McConkey's Estate, 92 P. 2d, 456
Longmire v. Kruger, 251 P. 692
O'Grady v. O'Grady, 18 P. 2d 373
Sparks v. Mendoza, 189 P. 2d 43
Brown v. Hilleary, 286 P. 593

Flowers v. Flowers, 221 P. 483

Bank of America Nat. Trust & Savings Ass'n vs. Crawford, 160 P. 2d 169.

As we have pointed out, Archulius in the purchase of 10.25 acres of land on March 3, 1948, paid only the sum of \$500.00 for land worth \$2,000.00. Inadequacy of consideration in itself is evidence of undue influence. In 26 *C. J. S. Deeds*, Sec. 82, p. 294, it says:

“Inadequacy of consideration will be considered on the issue of undue influence and may combine with opportunity for the exercise of undue influence to show such influence invalidating a deed.”

and in 9 *Am. Jur. Cancellation of Instruments*, Sec. 25, p. 371, it says:

“* * * Inadequacy of consideration for a contract or conveyance may, however, be sufficiently gross to be clearly indicative of imposition or undue influence, and where coupled with weakness of mind, from whatever cause produced, or with pecuniary distress, or circumstances of fraud, oppression, or undue influence, affords a proper case for relief in equity.”

In *Halloran-Judge & Trust Company vs. Carr, et al*, 62 U 10, 218 P. 139, the court declared further that where the consideration for a deed is so inadequate as to shock the conscience of the court it will be set aside for this reason alone.

CONCLUSION

In conclusion we respectfully submit:

That the evidence is clear that respondent Archulius Archibald exercised undue influence and overreached her

mother, and wrongfully induced her to convey to her the property described in the two deeds and the government bonds, and that in any event she did not overcome the presumption of their invalidity and establish by clear and convincing proof that they were not the result of undue influence and overreaching; and the trial court erred in refusing to vacate and set aside the deeds and decreeing that the property described therein and the government bonds were the property of appellants and respondents subject to the conditions of the last will and testament of Emma G. Buttars and in failing to direct an accounting of the rents and profits of the lands subject to her right to set-off in the sum of \$500.00 paid by her for the 10.25 acres.

That the evidence is clear that Wallace Buttars exercised undue influence and overreached his mother and wrongfully induced her to convey to him the property described in the two deeds in question, the \$5,000.00 savings account and the \$1125.00 government bonds and that in any event he did not overcome the presumption of invalidity and establish by clear and convincing proof that they were not the result of undue influence and overreaching; and that the trial court erred in refusing to vacate and set aside the deeds and decreeing that the property described therein and the \$5,000.00 savings account and \$1125.00 was the property of appellants and respondents subject to the conditions of the last will and testament of Emma G. Buttars and in failing to direct an account of the rents and profits of the lands subject to

the terms of the leases thereon since the death of his mother on July 1, 1952.

And this court should enter judgment directing correction of the errors above mentioned.

Appellants pray for such other relief as may be just and equitable and costs.

Respectfully submitted,

L. DELOS DAINES
Salt Lake City, Utah

GEORGE C. HEINRICH,
Logan, Utah

Attorneys for Appellants.