

1954

## Margaret Jardine et al v. Archulius Archibald et al : Petition for Rehearing

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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MARGARET JARDINE, et al,  
*Appellants,*

vs

ARCHULIUS ARCHIBALD,  
et al,

*Respondents,*

MARGARET JARDINE, et al,  
*Appellants,*

vs

WALLACE BUTTARS, et al,  
*Respondents.*

CASE NO. 8177  
AND  
CASE NO. 8178

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PETITION FOR RE-HEARING

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L. DELOS DAINES  
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*Attorneys for Appellants*

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# In the Supreme Court of the State of Utah

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MARGARET JARDINE, et al,  
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## PETITION FOR RE-HEARING

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Comes now the Appellants and move the Court to grant a re-hearing of the above entitled cases on the following grounds:

1. That the Court erred in ruling that the transfers in question were not the results of undue influence by Respondents.

2. That the Court erred in setting forth in its opinion that the trial Court found that the transfers "were made because decedent believed the recipients of her gifts had not received a share equal to the other children

from their father's estate and she desired to equalize what she considered to have been an unfair distribution of that estate."

3. The Court erred in failing to discuss the evidence in support of Appellants' contention as contemplated by the constitution of the State of Utah.

4. The Court erred in failing to give its reasons, as provided for in the constitution of the State of Utah, in finding that the sale of the 10.25 acres of land to Respondent Archilius Archibald for \$500.00, where the undisputed evidence was that it was worth \$2,000.00, was not the result of undue influence, overreaching, or fraud, and in finding that the transfer was not the result of undue influence, over-reaching and fraud.

WHEREFORE, your Petitioners pray that this Petition for re-hearing be granted; that the errors above mentioned be corrected and the Court vacate its decision and sustain Appellants' contention that the transfers in question were the result of undue influence, overreaching and fraud.

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GEORGE C. HEINRICH  
Logan, Utah

Attorneys for Appellants

L. Delos Daines hereby certifies that he is one of the attorneys for Appellants in the above entitled cases and that in his opinion there is merit to this Petition and it is not filed for the purpose of delay.

L. Delos Daines

### ARGUMENT

We are mindful that in the great majority of cases after the Court has considered the cause no useful purpose can be accomplished by re-argument of the matters decided by the Court. However, we believe that in view of the matters presented that the Court will give serious consideration to a re-consideration of these cases.

The Court in its opinion alleges that the Trial Court found that the transfers “were made because decedent believed the recipients of her gifts had not received a share equal to the other children from their father’s estate and she desired to equalize to what she considered to be an unfair distribution of that estate.”

In this respect we call the Court’s attention to the Findings of Fact and we believe that after reading the same it will agree with us that the Court made no such finding. (See findings of Fact)

We also call the Court’s attention to the fact that it set forth in its opinion that the Trial Court found that there existed a confidential relationship between Mrs. Buttars and Archilius Archibald and Wallace Buttars. In this respect the Respondents requested that the Trial Court find that there was not a confidential rela-

tionship, the Trial Court refused to do and struck it from the findings. In line with this action Appellants then moved that the Court should find that a confidential relationship existed. The Court, however, refused to so find. However it did set forth that there existed by Mrs. Buttars and the Respondents a close and intimate relationship. (See Findings of Fact — Motion to Modify findings.) Thus, we did not believe, when we prepared our brief, that it would be acting in good faith had we have taken the position that the Trial Court made a finding of confidential relationship although it would have been in our favor to have done so. Furthermore, it was unnecessary as the undisputed evidence unquestionably established this fact. We do not believe that the word “intimate” relationship is the same thing as a “confidential” relationship. The word “intimate” is generic subject to various meanings and is not limited to that of a confidential relationship. There may exist a confidential relationship without intimacy and there may be an intimate relationship without it being confidential.

Further the trial court found that the relationship of closeness and intimacy existed between Mrs. Buttars and all of her children, and in so doing it it could not have found or intended to find that a confidential relation existed between Mrs. Buttars and all of her children for the facts did not support such a finding.

Although, the holding by the Court that the Trial Court found a confidential relationship is no prejudicial to the Appellants, we call this error, together with other

error, to the Court's attention, as we believe the Court, irregardless of whether it changes the result of its decision, will desire to correct the misquoting and misinterpretation of the records, and secondly, and equally important, we believe that the Court will understand the reasonableness of our conviction, that if the Trial Court and this Court erred in such Elementary matters that they erred in the more complex problems.

Thus, in view of the Trial Court failing to find that a confidential relationship existed between Mrs. Buttars and her children, Wallace, and Archulius, the Colorado case of Mehlbrandt vs. Hall, 121 Colo. 165, 213 P. (2) 605, referred to by this Court in its opinion, is of no help to Respondents as a presumption of proper finding and application of the law by the Trial Court falls and the presumption is of no help to the Court in weighing the evidence.

The Court in its opinion erroneously took the position that we assigned as error the Trial Court's failure to find that the decedent lacked mental capacity. On pages 20 and 21 of our brief that the question we were presenting was one of undue influence and not lack of mental capacity except as the impairment went to the question of undue influence, over-reaching and fraud.

The Court will recall that with reference to Archulius we not only attacked the gifts but we also attacked the sale to her of 10.25 acres of land for \$500.00. (See page 56 of our brief). The undisputed evidence was to the effect that this property was worth \$2,000.00. Archulius gave no reason for the transfer. Apparently it was a

business transaction at arms length and one where the grantee occupied a confidential relationship. She gave no reason for the inadequacy of consideration. Certainly, this transaction stands on a different footing than that of the gifts and yet this court in its opinion failed to distinguish between them and further failed to give its reasons for sustaining such a transfer. It would be enlightening to say the least, to know why this Court sustained such a transfer and we believe that the constitution of the State requires that the Court should so enlighten us.

The crux of the Court's opinion in finding that the gifts were not the results of undue influence was made upon the false premise that the Trial Court found, as hereinbefore pointed out, that the gifts were made to equalize the distribution of the father's estate.

We recognize there was evidence to this effect although we believed it was questionable and as far as Wallace was concerned we pointed out in our oral argument that there was nothing to equalize as to him by reason of the fact that he inherited from his father when nine years old property which he had not helped to accumulate and which his mother, as guardian, had handled in such a manner, so that when he married he had property in excess of that given to and inherited by his brothers. We believe that this evidence which was undisputed should have carried greater weight with this Court in view of the questionable evidence of the so-called "independent witnesses."



Assuming, however, for purposes of argument, that Mrs. Buttars intended for some reason to equalize the gifts as between her sons, we ask this Court when did such equalization end? As we pointed out in our brief Mrs. Buttars gave Wallace the first 60 acres on March 28, 1945, and that it had a value of approximately \$12,000.00. Now, then, we ask the Court if this transfer did not take care of the equalization? That is, by this transfer had not Mrs. Buttars satisfied her intention, and that any transfer made thereafter, would certainly be the result of undue influence, overreaching and fraud, particularly in view of the fact that if she intended to give Wallace the second 60 acres which took place on May 6, 1948, why the hiatus in time of the gifts if they were given for the same reason? We take it there is no reason and this Court in its opinion certainly did not attempt to justify it. We also call the Court's attention that the same theory would apply with reference to the gift of \$5,000.00 savings account to Wallace which was made on January 28, 1947, the same day that Mrs. Buttars made a transfer of the 48 acres of land to Archulius.

We take it that the same proposition should apply to Archulius. That is, that if there was an attempt of equalization that Mrs. Buttars effected this when she made the gifts which were found in the safety deposit box, the stock and bonds, to which there was attached a statement to the effect that the stock and bonds were given because the mill stock she had inherited from her father's estate had become worthless.

We point out to the Court that the Buttars treated their sons on a different basis than their daughters when it came to the gifts of real property. That is, during the lifetime of their father no gifts of real estate were made to any of the daughters, and none were made to any of the other three daughters by Mrs. Buttars.

It appears to us and we would appreciate it if this Court would give some reason to the contrary why, if there was an intent to equalize the estate as to Archulius, that this intent did not cease when she made the gifts of the bank stock and bonds, found in the safety deposit box, and why any transfers after that were not result of undue influence. We think it is significant that the transfer of the 48 acres of land to Archulius on January 28, 1947, was effected on the same day as the gift of \$5,000.00 savings account to Wallace.

It should be kept in mind as we pointed out in our brief and in oral argument that Archulius and her sister Hattie occupied the same position as to the mill stock which became worthless and that had their mother intended that an equalization required the giving of 48 acres of land to Archulius the same would apply as to her sister Hattie. Hattie received no gifts of real or personal property from her mother other than that found in the savings box along with Archulius'. Further, why was not the transfer of the 48 acres of land made in March, 1945 instead of January, 1947, if that was the intent of her mother that this transfer was to take care of the loss she suffered as a result of the mill stock becoming worth-

less. This was the reason given by Archulius.

With reference to the Omega Investment Company vs. Woolley, 72 U. 474, 271 P. 797, this Court took the position that it was not in point for the reason that in that case there was an attorney-client relationship. In citing the case we recognized this fact. However, we did not believe that the Court's rule would be any different with respect to an attorney-client relationship than that of any other confidential relationship. In other words, if a confidential relationship arising out of attorney-client relation requires independent advice, then independent advice should be necessary in all confidential relationships.

We cannot follow the Court's reasoning in holding that Mrs. Buttars was a woman of firm will and that her mental capacity had not been impaired (but we do not claim incompetency at the time of the transfers in question) particularly in view of the fact that if anyone knew of her mental condition it was her children. From casual conversations mental condition is not readily reflected, and the evidence of the independent witnesses on this respect, was the result of mere occasional conversations and as far as the doctor was concerned he talked to her for only about five minutes. Her children knew her mental condition and with the exception of Wallace those who testified, all testified she had suffered serious mental impairment, and on this respect we point out to the Court that although Archulius was present during the trial of the will contest case she did not take the stand

and contradict the testimony of her two sisters and her brother, which clearly showed without question that their mother was mentally impaired. Apparently the jury in the will contest case recognized that the testimony of the children was more reliable than that of witnesses whose opinions were based upon casual conversations. In line with this we again call the Court's attention to the fact that prior to any of the transfers in question that Archulus and Wallace called the children together, because of the physical and mental condition of their mother, and it was then suggested that a guardian should be appointed. However, this was voted against because the family did not want to offend their mother nor did they want her condition known to the public.

### CONCLUSION

WHEREFORE, Appellants respectfully submit that this Court should re-consider its decision and in so doing grant a re-hearing and hold that the transfers in question were the result of undue influence and fraud.

Respectfully submitted:

L. Delos Daines

George C. Heinrich