

1981

Laverne Robertson, Darlene Olsen and Eldon M. Johnson v. Thora J. Campbell : Brief of Plaintiffs-Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsAnn L. Wassermann adn Mike Emery; Attorneys for Defendant-RespondentGEORGE K. FADEL; Attorney for Plaintiffs-Appellants

Recommended Citation

Brief of Appellant, *Robertson v. Campbell*, No. 17504 (Utah Supreme Court, 1981).
https://digitalcommons.law.byu.edu/uofu_sc2/2534

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE
STATE OF UTAH

LAVERNE ROBERTSON,)	
DARLENE OLSEN and)	
ELDON M. JOHNSON,)	Case No. 17504
Plaintiffs-Appellants,)	
vs.)	
THORA J. CAMPBELL,)	
Defendant-Respondent.)	

BRIEF OF PLAINTIFFS-APPELLANTS

GEORGE K. FADEL
Attorney for Plaintiffs-
Appellants
170 West Fourth South
Bountiful, Utah 84010

ANN L. WASSERMANN
MIKE EMERY
Attorneys for Defendant-
Respondent
Suite 1600
50 South Main Street
Salt Lake City, Utah 84144

FILED

MAY 13 1981

IN THE SUPREME COURT
OF THE
STATE OF UTAH

LAVERNE ROBERTSON,)
DARLENE OLSEN and)
ELDON M. JOHNSON,)

Case No. 17504

Plaintiffs-Appellants,)

vs.)

THORA J. CAMPBELL,)

Defendant-Respondent.)

BRIEF OF PLAINTIFFS-APPELLANTS

GEORGE K. FADEL
Attorney for Plaintiffs-
Appellants
170 West Fourth South
Bountiful, Utah 84010

ANN L. WASSERMANN
MIKE EMERY
Attorneys for Defendant-
Respondent
Suite 1600
50 South Main Street
Salt Lake City, Utah 84144

TABLE OF CONTENTS

	<u>Page</u>
Nature of the Case	1
Relief Sought on Appeal	2
Statement of Facts	2
Argument	20
POINT I A CONFIDENTIAL RELATIONSHIP EXISTED	20
BETWEEN THORA CAMPBELL AND HER FATHER	
WHICH PLACED THE BURDEN OF PROOF UPON	
THORA TO PRESENT A PREPONDERANCE OF	
EVIDENCE THAT THE ARRANGEMENTS WERE	
FAIR.	
WHAT IS "FAIR"	24
POINT II SINCE THE TRUST OF MARCH 5, 1971	25
WAS BASED UPON DECISIONS MADE IN	
CONNECTION WITH THE WILL OF JANU-	
ARY, 1971, THE FINDING OF THE JURY	
AND TRIAL COURT IN THE PROBATE	
ACTION THAT IT WAS BORNE OF UNDUE	
INFLUENCE SHOULD BE DISPOSITIVE OF	
THE QUESTION OF UNDUE INFLUENCE IN	
CREATION OF THE TRUST.	
POINT III THE FINDINGS OF THE COURT AND	28
JUDGMENT ARE NOT SUPPORTED BY	
THE EVIDENCE.	
Conclusion	31

CASES CITED

Blodgett v. Martsch, 590 P.2d 298 (Utah 1978)	20
Estate of Orris, 622 P.2d 337 (Utah 1980)	25
Johnson v. Johnson, 9 Utah 2d 40, 337 P.2d 420 (1959)	20
Lawrence v. Bamberger Railroad Co., 3 Utah 2d 247,	29
282 P. 2d 335	

IN THE SUPREME COURT
OF THE
STATE OF UTAH

LAVERNE ROBERTSON,)	
DARLENE OLSEN and)	BRIEF OF PLAINTIFFS-APPELLANTS
ELDON M. JOHNSON,)	
Plaintiffs-Appellants,)	
vs.)	Case No. 17504
THORA J. CAMPBELL,)	
Defendant-Respondent.)	

NATURE OF THE CASE

This was an action by three children of Marinus Johnson, deceased, against the fourth child, Thora J. Campbell, to set aside a Trust Agreement which was executed the same day as a Will, March 5, 1971, both of which documents, the Trust and the Will, favored Thora Campbell. This civil action to set aside the Trust was preceded by a will contest in the Third District Court, Probate No. 62967 which set aside the Will of March 5, 1971 in favor of a Will of May 5, 1969 which divided the estate equally among the four children. The probate decision was appealed by Thora J. Campbell, Case No. 15798, in which case briefs were deferred until conclusion of the trust litigation.

The Court is requested to consider appeals simultaneously. It is expected that Thora J. Campbell will file her brief as appellant from the probate proceedings contemporaneously with her brief as respondent herein.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment of dismissal of their Complaint to set aside the Trust Agreement by reason of undue influence and affirming the jury verdict and judgment for probate of this will of May 5, 1969 in Case No. 15798.

STATEMENT OF FACTS

Plaintiffs appeal from a final order and judgment of the District Court for Salt Lake County, Utah, the Honorable Ernest F. Baldwin, Jr., District Judge, dismissing with prejudice the Complaint of plaintiffs to set aside the Trust Agreement of March 5, 1971. Marinus Johnson, deceased, was the father of plaintiffs and defendant. Marinus made a will on May 5, 1969, wherein he left his estate to his four children equally, at which time he owned several hundred acres of land in Millard and Juab counties (Exhibit 47), a duplex and residence in Salt Lake County and substantial receivables from contracts of sale of land. In 1970 Thora Campbell made arrangements for Marinus to go to a firm of attorneys not known to Marinus but known to her and her husband, and execute a new will on January 19, 1971, wherein the beneficiaries' interests were changed to give his

second wife, Alta, \$500.00; his son Eldon \$2,500.00; the defendant all of the real and personal property in Juab County with machinery; and the residue, one-half to the defendant, one-fourth to LaVerne Robertson, and one-fourth to Darlene Olsen, his other daughter.

On March 5, 1971, Marinus executed another will with essentially the same bequests except that the will of March 5, 1971 incorporated a trust of even date with Thora Campbell as trustee to divide essentially as per the January 19, 1971 and March 5, 1971 wills.

A will contest in the Third Judicial District Court in Probate No. 62967 was tried before Honorable Bryant Croft sitting with a jury. The jury found the wills of January 19, 1971 and March 5, 1971 to be void by reason of undue influence by Thora Campbell and the Court entered judgment admitting the will of May 5, 1969 to probate. A substantial part of the assets had been transferred to Thora Campbell as trustee under the trust of March 5, 1971 and the Probate Court deferred appointing an administrator pending determination of the validity of the trust and the extent of assets available for probate.

A civil action was commenced by plaintiffs to set aside the trust of March 5, 1971 for reasons among others of undue influence exercised by Thora Campbell over the trust. The evidence was not disputed that the trust was developed as a part of and in furtherance of the January 19, 1971 and March 5,

1971 wills and was executed during the same one-half hour conference as the will of March 5, 1971 which was found previously to have been void because of undue influence of Thora Campbell. In this civil action the trial court granted a motion of the defendant to dismiss which was made at the close of plaintiffs' case and the court indicated there would be no findings of fact (R-320). Subsequently, without prior notice to plaintiffs, the Court signed "Findings of Fact" prepared by defendant's counsel. The relevant "findings" (which appear to be conclusions of law) are:

- "4. Defendant did not stand in a fiduciary capacity as to Marinus Johnson.
5. There was nothing inherently unfair in the creation and terms of the subject trust agreement and conveyances made in connection therewith.:

The plaintiffs' evidence in the civil action to set aside the trust of March 5, 1971 was essentially the same as that presented to the jury and court in Probate No. 62967 wherein the wills of January 19, 1971 and March 5, 1971 were found void for undue influence.

We review herein only the record of the civil action at this time.

Thora J. Campbell was called by plaintiffs as an adverse witness and testified that she was the daughter of Marinus Johnson. That Marinus was born in 1896 and died on December 29, 1975 at the age of 79 years; that the children surviving him in order of age were LaVerne, Thora, Eldon and

Darlene (R-156); that her mother, Katie, died on July 27, 1968, and Marinus married Alta Jeffs November 7, 1968 (R-175) whom he continued to live with until a few months before his death; that the will of May 5, 1969 (Exhibit 16) was written by Attorney Fred L. Finlanson and provided for equal division of his estate among his four children and named Thora as executrix with Tracy Collins Trust Company as alternate (R-177); and that Thora had not seen the will of May 5, 1969 until the summer of 1970 when her father went to Fabian & Clendenin. Thora said he went to Fabian & Clendenin because, "He wanted to get his stuff taken care of so his burdens would be lightened", although he had not known anyone at Fabian & Clendenin before this (R-179). She said that Marinus had employed Fred Finlanson since 1953; that her husband introduced Marinus to Fabian & Clendenin (R-180), the husband having known Fabian & Clendenin through his employment with KALL radio. Thora denied going to Fabian & Clendenin with her father until the signing of a will of January 19, 1971 or discussing with them the terms of the wills of January 19, 1971, March 5, 1971 or the trust of March 5, 1971 (R-183). Since Thora's testimony is in direct contrast with that of Attorneys Melling and Vogel on the matters relating to her involvement in preparation of the wills and trust, we quote her testimony from R-183:

Q Prior to January 19, 1971, you did not discuss with any attorneys at Fabian and Clendenin the terms of the will?

A No, sir.

Q Did you discuss with them the terms of the will of March 5, 1971 at any time prior to March 5, 1971?

A No, sir.

Q Did you discuss with them the terms of the trust of March 5, 1971 at any time before March 5, 1971?

A No, sir.

Q Did you have any discussion with the attorneys who prepared the will of January 19, 1971 or March 5, 1971 or the trust of March 5, 1971 prior to the time that they were prepared?

A No, sir.

Q Did you have correspondence with any of those attorneys with respect to the terms of those wills or the trust?

THE COURT: The terms of the same.

A Phone calls mostly. They would call to have me bring in certain descriptions, tax notices.

Q But, you didn't discuss with them the contents of any of those documents?

A No, sir.

Q You did not discuss with them the divisions of the estate that your father anticipated making in connection with any of the documents, January 19, 1971, March 5, 1971 or the March 5, 1971 trust?

A No, sir.

Then at line 10, R-192:

A Dad went to the attorneys himself from time to time.

Q The attorneys themselves discussing with your father from time to time?

A Yes.

Paragraph 1 of the Trust Agreement (Exhibit 1) of March 5, 1971 recites that the grantor transfers and delivers to the trustee the property "listed in the schedule attached hereto". Mrs. Campbell testified as follows with respect to this schedule:
(R-193)

Q Mrs. Campbell, Exhibit 1, the trust agreement of the 5th of March says that there is a property listed in the schedule attached hereto. Now, was there any schedule attached to Exhibit 1?

A No, sir.

Q Has there ever been a schedule attached to Exhibit 1 so far as you know?

A Yes.

Q Where is that schedule?

A It was attached in 1976 with all the list of properties.

Q So until 1976 there was no Exhibit A attached - no schedule attached to Exhibit 1, the trust agreement?

A That is right.

Q Now, in 1976 you say there was a schedule attached?

A Yes, sir.

Q That is after your dad died?

A Yes.

Q And who prepared that schedule?

A Fabian and Clendenin mailed it to me. I typed it verbatim because I had to report to my sisters and brother because being the trustee I carried on with my necessary duties.

Q Than your father never saw that schedule during his lifetime?

A No, sir.

Attorney William Vogel, formerly of Fabian & Clendenin, testified that in 1970 he had been with the firm for ten years and for the first time met Marinus. Since the trust of March 5, 1971 was based upon the dispositions established in the will of January 19, 1971, prepared by Mr. Vogel, we quote excerpts of his testimony in contrast to the testimony of Thora Campbell:
(R-206 L-7 to R-207 L-19)

Q In connection with your occupation did you have

- an occasion to meet Marinus Johnson?
- A Yes, I did.
- Q Would you state when you first met him?
- A From my file, the answer is August 31, 1970.
- Q And where did you meet him?
- A In my office.
- Q Was anybody else with him at the time?
- A Thora Campbell was and possibly Ernest Campbell, I am not sure.
- Q Did you know Thora Campbell or Ernest Campbell prior to that date?
- A I knew Ernest Campbell prior to that date.
- Q How did you know him?
- A He was an accountant for KALL Radio and I had done work for KALL Radio and had worked with him in connection with KALL Radio.
- Q Had you known Marinus Johnson before that date?
- A I had not.
- Q What was the purpose of your meeting on that date?
- A It was a conference to talk about estate planning for Mr. Johnson.
- Q And at that time did you have a discussion with Mr. Johnson?
- A Yes.
- Q Did you have a discussion with anybody else relative to his estate planning?
- A Well, Thora Campbell had things to say.
- Q Did she participate in the discussion?
- A I think she did. She was familiar with a number of his properties and -
- Q Can you state whether or not she did more talking than Mr. Johnson on that occasion?
- A I suspect that she did more, yes.
- Q And at that time what was discussed?
- A The nature of his properties, the family situation, who the children were, grandchildren and his marital status and then what he wanted to do with his

property on his death.

- Q Did you make any memoranda at the time to indicate what you were told with respect thereto?
- A No formal memorandum. I just have notes of the conference and then I have a letter forwarding a draft of a trust agreement.

Mr. Vogel identified Exhibit 13, a copy of which is included in the appendix herein, which in Vogel's handwriting notes that when Mr. Johnson dies (he's 74); \$2,500.00 to Marinus Eldon Johnson, San Francisco; remainder 1/3 to LaVerne Robertson, Levittown, Penna.; Darlene Olsen, Salt Lake City; Thora Campbell, SLC; trustee pays trustor's expenses for his life; and shows that Eldon has no children, LaVerne 5, Darlene 5 and Thora 7, totaling 17 grandchildren. When asked if he used the Exhibit 13 memorandum in connection with the documents he prepared, he answered that his recollection was based on his letter of September 4, 1970, Exhibit 14 which he forwarded to Thora along with a proposed living trust agreement (R-208 209). Exhibit 14 was Vogel's letter to Thora as follows:

September 4, 1970

Mrs. Ernest Campbell
1360 Yale Avenue
Salt Lake City, Utah

Dear Mrs. Campbell:

Enclosed is a proposed trust agreement. Note that for simplicity and because I wanted a complete document for you to see, I provided for equal distribution to you and your two sisters. If your father decides on the 7/17, 5/17, 5/17 proportion, or some other, I can make the necessary changes.

Please let me know if the trust agreement requires any changes. Even after we settle on the form of the trust agreement and create the trust there will be

considerable work in conveying the various properties to the trust.

Also please obtain for me a copy of your father's antenuptial agreement with his present wife.

Very truly yours,

William Vogel

WV:dhb
Enclosure

The next items in Vogel's file were letters dated December 23, 1970, Exhibit 11, addressed to Marinus Johnson in care of Thora, and Exhibit 15, a letter to Thora.

Exhibit 11 to Marinus in care of Thora at her address was a very brief note as follows:

December 23, 1970

Mr. Marinus Johnson
c/o Mrs. E. W. Campbell
1360 Yale Avenue
Salt Lake City, Utah

Dear Mr. Johnson:

I enclosed a copy of a new will for you. I have sent the original to your daughter, Thora.

Please call me after you have read the proposed new will.

Very truly yours,

William Vogel

WV:dhb
Enclosure

Whereas, the letter to Thora was lengthy and suggested that while ordinarily he would arrange to have the will signed and witnessed in his office, yet in this case he preferred that another place and other witnesses be used to avoid a will contest. Exhibit 15 is as follows:

December 23, 1970

Mrs. E. W. Campbell
1360 Yale Avenue
Salt Lake City, Utah

Dear Thora:

I have sent to your father a copy of a new will for him and I enclose herewith the original.

I suggest that you have two neighbors who know your father well serve as witnesses to his signing of the original will. Ordinarily we would arrange to have the will signed and witnessed in our office. However, in this case, I would prefer that the witnesses be people who know him well and could testify as to his mental alertness and understanding. The witnesses cannot be related to your father or to you.

The signing and witnessing of the will should be carried out in a formal ceremony exactly as described in the paragraph immediately preceding the lines for signatures and addresses of the two witnesses.

The above instructions must be carefully carried out if your father's wishes, as described in the new will, are to have a good chance of being put into effect against the possible claims of your brother and sisters after your father's death that this new will is invalid.

Please call me about this new will.

Very truly yours,

William Vogel

WV:dhb
Enclosure

Vogel said he sent the original will to Thora and a copy to Marinus with his letter of December 23, 1970, but that it was later signed in his office on January 19, 1971 (R-210). As to any conversation with Marinus at the time of signing the will, Vogel testified:

Q Now, did you have any conference with Mr. Johnson at that time?

A I don't remember details but, I am sure I did. Obviously he was the testator.

Q In one of those letters that you sent to Thora, you refer to a five-seventeenths, five-seventeenths, seven-seventeenths division. Whose suggestion was that?

A I don't remember specifically. That was in the first conference, August 31, 1970 and it is obvious from my notes that this was based upon the number of grandchildren of Marinus Johnson and that was one idea that was discussed.

THE COURT: That is the number of grandchildren of the three daughters mentioned therein?

A Yes.

THE COURT: I have no indication or idea of the status of the son but, that relates only to the granddaughters, grandchildren of his daughters?

A Yes.

Q Now, do you remember who gave you the information with respect to the five-seventeenths, five-seventeenths, seven-seventeenths?

A I don't remember whether it was Marinus or Thora.

Q Do you remember who did most of the talking on the occasions that you talked to them?

A I indicated earlier I think Thora did. (R-211)

The will of January 19, 1971, was marked Exhibit 49 and was received by the Court for the limited purpose of showing the distribution of the estate which the Court noted was exactly the same as the March 5, 1971 will (R-213).

Vogel said he has prepared and forwarded a proposed trust agreement on September 4, 1970, and that his associate, Mr. Melling used the draft in preparing the trust of March 5, 1971 (R-214), however, the trust of March 5, 1971 followed the distribution set forth in the will of January 19, 1971 which favored Thora rather than the proposed distribution in the trust.

of September 4, 1970 which would have given each of the three girls one-third (R-220). As to the reason for the change in distribution, Vogel had no knowledge and testified:

Q Are you aware there were changes in the distribution between the March 5 trust agreement and the draft agreement that you sent?

A I am aware, yes. When I became aware I am not sure.

Q All right. Did you have anything to do with making those changes?

A The changes were made in the January 19, 1971 will so sometime between September of 1970 and January of 1971 that decision was made.

Q All right. Now, do you have any recollection as to why or how that decision was made?

A I don't have any recollection and I don't find anything in the file to help me recall. (R-220)

Another indication of how little Vogel knew or remembered about Marinus is his confusion as to whether Marinus was living with his wife, Alta in 1970. (Commencing at R-225).

Q Now, Mr. Vogel, in your letter of September 4, you wrote to Mrs. Campbell. Did you also write to Mr. Johnson on that date?

A From the file, no. I was under the impression that he lived in the Campbell's house. I may have been wrong but, that was my impression.

Q Did you know he was married?

A I knew he was married but, somewhere in my recollection he might have been separated, I don't recall for sure.

Q Well, wouldn't it be part of your inquiry to determine what arrangements he had made for his wife?

A There was an antenuptial agreement that is referred to in my letter of September 4 so I knew he made arrangements in that form.

Q What would have given you the impression he was living with Thora and not living with his wife?

- A I had that impression somewhere.
- Q You don't know now whether that is true or not?
- A I don't know whether it is true.
- Q And if he were living there and you got the information from him and he was dividing as you said what should be done, why didn't you address this letter of September 4 to him instead of her?
- A I don't have the answer for that except I thought they were living at the same address, 1360 Yale Avenue as indicated. Later on I sent a letter to Thora and a letter to Marinus Johnson both at that address.
- Q But, the subsequent letter in December you wrote him about two lines and you wrote her a long letter?
- A That is right.
- Q Would there be any reason why you were corresponding and detailing these things to Thora and not to Johnson?
- A One reason that would come to mind is that she knew the details of these numerous real properties and they were in a messy state.
- Q And by addressing a letter to her did you expect she could communicate with him and then communicate back to you?
- A Yes, on the assumption they lived in the same house. . . (R-226)
- Q Do you have any recollection as to whether or not you got correspondence or any communication back from her in response to your September 4 letter?
- A I have nothing in the file and I do not recall how the - how or when the decision was made by which the September 4 indefinite status was changed to the January 19, 1971 definite distribution.
- Q Do you remember any telephone calls from Marinus Johnson to you?
- A I don't remember any. There might have been.
- Q Do you recall telephone calls from Thora Campbell to you?

- A Yes, I had calls from Thora Campbell.
- Q The information which you would have received in response to your September 4 letter, if you have nothing in the file, can you indicate how you would have gotten a response to your correspondence?
- A Would you repeat the question?
- Q Yes. You said that you sent the letter of September 4 to Thora and that you got a response subsequently. You didn't get any telephone calls from Marinus and I am asking you if you can remember what response she would have received that would have prompted the division you made in the January 19 will?
- A I testified I don't recall any telephone calls from Marinus Johnson. It is possible I may have had one but, I rather doubt it. Beyond that I don't know how, when or who transmitted it to me, the direction to make in this January 1971 will the one-half, one-quarter, one-quarter distribution. . . (R-227)
- Q Now, in response to Ms. Wassermann's question, you indicated that whenever there was a change in distribution you would be more cautious, something to that effect?
- A Yes.
- Q Now, would you have made some notations under those circumstances from the decedent with respect to his direction rather than a beneficiary with respect thereto?
- A I have no notes that would be more definite than what I have testified to.
- Q There was no input from any other children of Marinus Johnson, was there?
- A That is correct.

MR. FADEL: I think that is all. (R-228)

Mr. Vogel's last correspondence was a letter addressed to Thora, Exhibit 51, dated September 24, 1975, whereby he transmitted a document entitled "Schedule to Trust Agreement dated

March 5, 1971" instructing Thora to attach the original to the original trust document. He said the schedule was prepared sometime in September 1975 (R-230) and he did not know whether Marinus ever saw the schedule or agreed that it become a part of the trust (R-231). Marinus died December 29, 1975.

Mr. Vogel's associate, Mr. George D. Melling, Jr., testified that in 1971 he was beginning to specialize in property law and that Vogel had referred the Johnson matter to him to prepare the trust. Melling had never met Marinus before 1971, and saw him "at the most" one time before the signing of the trust of March 5, 1971, and said he may have seen Thora Campbell several times before March 5, 1971 (R-236). Melling said he was asked by Vogel to prepare a trust and a will to incorporate the trust, and when asked if he made any determination as to distribution among beneficiaries, replied:

"I really was not. I never had a planning conference with our client. Really it was following Mr. Vogel's instructions as to how the distributions were to be made." (R-237)

and that he was depending upon the will of January 19, 1971, and incorporated the same distribution in the will of March 5, 1971 and the trust of the same date.

Melling saw Marinus on March 5, 1971 for one-half hour, during which time Marinus signed a three-page will (R-239) the trust agreement of eight pages and some deeds (R-242). Present at the time of signing were Marinus, Thora, a secretary and Melling at Melling's office (R-240). He had no direct

recollection of what was discussed and it seemed to be "a very ordinary meeting". Then he answered questions as follows:

- Q Can you state whether or not Mr. Johnson appeared to you to be quiet or talkative at that meeting?
- A My recollection is that he was rather quiet.
- Q Do you recall as between Thora and Marinus Johnson who did most of the talking?
- A My recollection is that Thora did most of the talking (R-241).

He had no recollection of discussing with Marinus which properties were included in the deeds to the trust (R-244), nor specifically discussing matters such as power of trustee, compensation and revocation, apart from it being a matter of practice to discuss such things (R-250).

Melling said he never talked to Marinus alone when Thora was not present, and he assumed Vogel had already done so with respect to the unequal distribution R-251). His final testimony on the question of Thora's influence is as follows:

- Q Mr. Melling, you said that there was nothing to believe that Thora was influencing him. How do you tell whether a beneficiary is influencing a testator?
- A Intuition.
- Q What would it take to - for you to convince you that there was undue influence?
- A I am not sure I know how to respond to that. I am not a psychologist. It would just be something that would tend to make me believe that. (R-251)

Thora Campbell was recalled and when asked if her father at any time told her why he wanted his property in trust,

- 18
- A He had been talking about it for 15 or 20 years before 1970 and 1971.
- Q Do you recall his ever having told you why he wanted it in trust?
- A Because of a few lawsuits that he had had prior to those dates (R-269).

Alta Johnson, Marinus' second wife and widow testified that she met Marinus at a dance in October 1968 and married him November 7, 1968. Thereafter they lived together in her home at 1409 South 400 East, Salt Lake City, Utah, until September 2, 1974, when his daughters took him to their homes. She would see him frequently after he moved, and then saw him daily when he was hospitalized in December 1975 (R-282). When Alta first met Marinus he was active, danced, walked rapidly and seemed to be in good physical condition (R-283).

In 1969 Marinus asked her if she had a will and she responded that she made her will to give her children equal portions. Then he asked if his will should be that way, to which she said yes. Marinus later took her to the office of Fred L. Finlanson where she read the will which was signed by Marinus, May 5, 1969. She could not recall anything happening between May 1969 and January, 1971 between him and his children (R-285). He never mentioned after the will of 1969 of wanting to change his will nor did he complain about his children (R-285-286). She said that in December 1970 Marinus had an accident which impaired his health a great deal and prior to that he had two or three sick spells diagnosed as epileptic

seizures for which he took a medication called Dilantin. (R-287). His condition after the accident of December 1970 did not improve and it affected his activities. Alta lent money to Marinus on three occasions to use on his property which totaled \$6,800.00 in 1969, (R-289)(Exhibit 18), which loans have not been repaid (R-291). The day after Thanksgiving 1974, she went to Thora's house to ask Marinus to give her some money owed to her so she could pay her taxes, and said he would ask Thora, whereupon Thora responded that they had no intentions of paying Alta (R-292).

Upon cross-examination Alta testified that she never knew about any wills or trusts after the May 1969 will (R-294); that she was told about the car accident in December 1970 by the police; and that Marinus said he didn't know how the accident happened but was glad there were no children on the sidewalk.

LaVerne Robertson testified that she lived with her parents in Spanish Fork until her marriage in 1940, and thereafter visited her parents annually after she moved from Utah, and at no time did she notice a change in her father's attitude towards her and her sisters (R-300).

Darlene Olson died prior to trial and her five children were substituted as plaintiffs in her stead. Her testimony from the probate proceeding from "day two of two days", pages 23 to 28, were read by the court and received in evidence. In summary, Darlene testified that she was the youngest of Marinus'

four children, lived with her parents until 1946, and visited about twice a week thereafter; that her father was proud of his family; that they were a close family; that nothing changed in the family relationship after 1969; that her brother, Eldon, had a drinking problem both before and after 1969, but he worked from time to time with Marinus on the Delta property and making repairs on the Salt Lake dwellings; that many times after 1969 Marinus mentioned he was going to leave his property in four equal shares; and that in September 1974 he wanted another daughter to act as executor with Thora.

POINT I

A CONFIDENTIAL RELATIONSHIP EXISTED BETWEEN THORA CAMPBELL AND HER FATHER WHICH PLACED THE BURDEN OF PROOF UPON THORA TO PRESENT A PREPONDERANCE OF EVIDENCE THAT THE ARRANGEMENTS WERE FAIR.

In *Blodgett v. Martsch*, 590 P2d 298 (Utah 1978) this Court stated: "There are a few relationships (such as parent-child, attorney-client, trustee-cestui) which the law presumes to be confidential".

A previous case, *Johnson v. Johnson*, 9 Utah 2d 40, 337 P2d 420 (1959) was an action to rescind a conveyance by a 72 year old father to his son Calvin. The following excerpts from the opinion are pertinent to the instant case:

It appears that the youngest son, Calvin, was closer to his father than these plaintiffs, the two older children, in more than one sense of the word. He assisted in the handling and management of the business and gradually increased his control until he finally dominated his father's affairs.

It was Calvin who talked to the attorney about preparing the papers referred to above, by which on the same day Arthur Johnson executed two documents on his town property which appeared to be inconsistent with each other, the deed and the contract; and the will might also be considered inconsistent with them. The latter quite strongly suggests that he desired to treat his children equally by dividing the property among them and may well have been led to believe that he was doing so.

There can be no doubt about the existence of a confidential relationship here of the very kind for which the above rule was fashioned. The evidence shows that his father reposed great confidence in Calvin. This is epitomized by his cooperating with him in making final arrangements about his property for the eventuality of death.

In assaying the sufficiency of proof, the palintiffs here have significant help in the rule that when a confidential relationship is shown to exist and a gift or conveyance is made to a party in a superior position, a presumption arises that the transaction was unfair. This presumption has the force of evidence and will itself support a finding if not overcome by countervailing evidence. Therefore the burden was upon the defendant Calvin Johnson to convince the court by a preponderance of the evidence that the transaction was fair.

Marinus Johnson was 73 years old in May 1969 when he and his second wife, Alta, went to his long-time attorney, Fred L. Finlanson, to sign a will leaving his property equally to his four children (R-206). No one knew of anything which changed Marinus' attitude toward his children, particularly his daughters.

Thora testified that in the summer of 1970 her father went to Fabian & Clendenin because "He wanted to get his stuff taken care of so his burdens would be lightened" (R-179), and she later testified that her father had been talking about putting his property in trust for 15 or 20 years before 1970

and 1971 for the reason: "Because of a few lawsuits that he had had prior to those date" (R-269).

There was no testimony from anyone that Marinus went to Fabian & Clendenin in order to provide a larger bequest for Thora. Mr. Vogel addressed a letter to Thora dated September 4, 1970 (Exhibit 14) wherein he said he structured the proposed trust agreement to provide equal distribution between Thora and her sisters, and that if her father decided on the 7/17, 5/17, 5/17 proportion or some other, Vogel would make the necessary changes. Vogel could not remember how or when the decision was made to change the indefinite proposal of September 4, 1970 to the definite changes reflected in the will of January 19, 1971, and which bequests were continued in the subsequent will and trust of March 5, 1971, wherein his wife, Alta was to get \$500.00; his son Eldon was to get \$2,500.00; and the remaining "gifts" as follows:

ARTICLE V: Gifts to Daughter, Thora. I give, devise and bequeath all of the real and personal property I own in Juab County, Utah, (the personal property being, among other things, machinery, implements, and pumps) to my daughter, Thora Campbell. In addition I give, devise and bequeath all of my stock and any other interest I have in Warm Springs Foundation to my daughter, Thora Campbell.

ARTICLE VI: Gifts of Residue. I give, devise and bequeath the residue of my estate as follows:

One-half (1/2) to my daughter, Thora J. Campbell;
One-fourth (1/4) to my daughter, Darlene Olsen; &
One-fourth (1/4) to my daughter, LaVerne Robertson.

While Vogel could not remember what response he received which prompted him to make the above quoted revisions in favor of Thora

as against the previous equal divisions in the May 5, 1969 will, yet he said he had telephone calls from Thora, but could not recall any telephone calls from Marinus (R-227). The detailed "gifts" quoted above are extensive and specific and would seem to require some definite, substantial discussion by Vogel and whoever communicated the information to him. As reviewed in the Statement of Facts he had very little contact with Marinus and many contacts and communications with Thora, all of which should be a plain indication that the changes were inspired, engineered and driven by Thora.

The amount of property involved was substantial. Exhibit 50, prepared in 1975 to attach to the 1971 trust agreement shows the Juab County property to consist of over fifteen tracts totaling more than 1,200 acres; interests of Marinus as seller of several hundred more acres; interests in water wells, and interests in government leases. The schedule also shows eight tracts in Millard County of about 480 acres plus his interest as purchaser of two other tracts. Property in Salt Lake County consisted of two dwellings and contracts as seller of two others. Also listed were the personal property in Juab County and all interest of Marinus in stock of the Utah Warm Springs Foundation.

Under the will of May 5, 1969, Thora would get one-fourth of the estate, whereas under the wills of January 19, 1971 and March 5, 1971, she would get all real and personal property in Juab County, the Foundation stock, and one-half

of the residue.

No evidence was presented that the transaction was fair. The documents themselves glare with lack of fairness notwithstanding the comment of the trial court in granting the motion to dismiss:

"I don't know that I can infer that this is unfair is the problem. They all get something, don't they? One gets more than others. Nobody is cut out, are they?" (R-319)

WHAT IS "FAIR"?

It is hoped that the legal definition of "fair" is not a personal philosophical interpretation. Some applicable dictionary definitions of "fair" from Webster are: marked by impartiality and honesty; just; equal treatment of all concerned. The natural attitude of an ordinary reasonable parent is to treat his children equally unless there is some compelling reason to do otherwise. Thora was not honest in her testimony that she was not the driving force in taking her father to a firm of attorneys not known to him, but known to her husband. She denied under oath that which Attorneys Vogel and Melling stated under oath that she conducted most of the transactions relating to the wills and trusts in 1970 and 1971. The glaring conflict in the testimony is reviewed at length in the Statement of Facts. The attorneys' testimony, the correspondence and the documents all point to Thora's lack of veracity and efforts to divert attention from her guilty association in selfishly attempting to take the lion's share

from an estate expected to be shared equally by her "close family" of sisters and a brother. No evidence was given as to why Thora should have been entitled to more, either in her own judgment or that of Marinus or other children.

The presumption of undue influence in a confidential relationship arises, as stated in the concurring opinion in Estate of Orris, 621 P.2d 337, Utah (1980), "from the commonly known natural propensity of persons to act in their own interest". No evidence indicated any other reason to favor Thora.

POINT II

SINCE THE TRUST OF MARCH 5, 1971 WAS BASED UPON DECISIONS MADE IN CONNECTION WITH THE WILL OF JANUARY 19, 1971, THE FINDING OF THE JURY AND TRIAL COURT IN THE PROBATE ACTION THAT IT WAS BORNE OF UNDU INFLUENCE SHOULD BE DISPOSITIVE OF THE QUESTION OF UNDU INFLUENCE IN CREATION OF THE TRUST.

The will contest in Probate No. 62967, now on appeal as Case No. 15798, should be considered conclusive on the issue of undue influence with respect to the trust of March 5, 1971.

A will contest is subject to a trial by jury on the issue of fact, whereas an action to set aside a trust instrument is an equitable one (Johnson v. Johnson, supra). Technically, the trust action could not have been tried by jury as a matter of right and was in fact excluded. However, the jury found that both the will of March 5, 1971 and the will of January 19, 1971 were the result of undue influence by Thora, and the trial court after expressing his agreement with the verdict, entered a decree declaring the latter two wills void, and admitting to

probate the will of May 5, 1969, which divided the property equally among the four children.

No evidence was offered in the trust action which controverted that of the will contests. This is further indicated by the testimony of Mr. Melling that he saw Thora several times but only met Marinus twice at the most, and the last time was on March 5, 1971 (R-236) and further answered:

Q Were you making any determination as to the distribution among beneficiaries in connection with your work?

A I really was not. I never had a planning conference with our client. Really it was following Mr. Vogel's instructions as to how the distributions were to be made.

Q Were you depending on any of the provisions of the January 19, 1971 will with respect to that?

A Yes, I was.

Q With respect to the distributions to the beneficiaries, do you recall whether there was any substantial difference between the distribution of the will of January 19, 1971 and the will of March 5, 1971?

A To the best of my knowledge they were the same. (R-237)

All of the facts establishing undue influence transpired prior to or contemporaneously with the trust of March 5, 1971. The will of the same date incorporated the same trust, and the will was declared void in the probate action.

Melling further acknowledged that he made no independent determination of Marinus desire with respect to distributions under the trust or whether he was acting under undue influence in this testimony:

Q Now, you said that unequal distributions are not normal. Did you ever talk to Marinus Johnson alone when Thora was not present?

A No, I don't believe that I did.

Q When there is an unequal distribution and you have reasons to suspect it, would there be a good reason to talk to the testator alone out of the presence of the beneficiary?

A There would be and I assumed that Mr. Vogel had done so as this was already my understanding as to Mr. Johnson's desires.

Q And that is the reason you did not go into - approach him alone?

A I felt that there was no need, that this had been - the decision had been made as to how -

Q Mr. Melling, you said that there was nothing to believe that Thora was influencing him. How do you tell whether a beneficiary is influencing a testator?

A Intuition?

Q What would it take to - for you to convince you that there was undue influence?

A I am not sure I know how to respond to that. I am not a psychologist. It would just be something that would tend to make me believe that.

MR. FADEL: I think that is all. (R-251)

Mr. Melling's response was a realistic acknowledgment of the difficulty of trying to determine the question of undue influence by passive observation. Even a detailed personal, separate interview by an attorney may not result in detecting the undue influence, but this was never done or attempted by either Vogel or Melling.

Vogel, in his forwarding letter of December 23, 1970, to Marinus was very terse in stating he enclosed a copy of a new will, the original of which he had sent to Thora (Exhibit 11). Then in a long letter of the same date to Thora he

endeavored to remove himself from responsibility by suggesting that Thora get some neighbors to witness the signing of the will away from his office in order that: "Your father's wishes, as described in the new will, are to have a good chance of being put into effect against the possible claims of your brother and sisters after your father's death that this new will is invalid." (Exhibit 15). With all this concern about a will contest, Mr. Vogel may have conducted separate, lengthy interviews with Marinus had he known that the burden of proving the validity of the will would fall upon him. However, he had no notes or recollection of any separate advice to or consultation with Marinus and to his apparent surprise the neighbors were brought to Vogel's office to witness the will. The neighbors and Vogel all testified in the probate proceeding wherein the will was declared void.

POINT III

THE FINDINGS OF THE COURT AND JUDGMENT ARE NOT SUPPORTED BY THE EVIDENCE.

The Findings of Fact and Judgment prepared by the defendant and signed by the District Judge recite that the Court having heard all the evidence at trial, reviewed exhibits and pleadings and heard arguments of counsel makes Findings of Fact pursuant to Rule 41(b) Utah Rules of Civil Procedure. Although the reference is to Rule 41(b), involuntary dismissal, the recital that the Court heard "all the evidence at trial" is accurate in that defendant's counsel orally represented to

the Court during argument (but not reported) that she had nothing further to offer and was submitting the matter for consideration on its merits.

Plaintiffs acknowledge that under the holding in *Lawrence v. Bamberger Railroad Company*, 3 Utah 2d 247, 282 P.2d 335, it is the duty of the Court on appeal to review the evidence in the light most favorable to the findings, and they must be allowed to stand if reasonable minds could agree with them.

The Findings and Conclusion of the Court were as follows:

FINDINGS OF FACT

1. At all relevant times Marinus Johnson possessed sufficient mental capacity to execute the trust agreement and subsequent transfers of trust property that are the subject of this action.
 2. The trust agreement and conveyances in connection therewith were not the product of undue influence exercised over Marinus Johnson by the defendant, or anyone.
 3. Defendant did not commit a fraud upon Marinus Johnson as alleged.
 4. Defendant did not stand in a fiduciary capacity as to Marinus Johnson.
 5. There was nothing inherently unfair in the creation and terms of the subject trust agreement and conveyances made in connection therewith.
- From the foregoing Findings of Fact, the Court now makes and enters its

CONCLUSIONS OF LAW

1. No testamentary formality is required in the execution and creation of the trust agreement.
2. The trust agreement and all conveyances made in connection therewith were, and are, valid.
3. Each of the plaintiffs' claims not heretofore dismissed should be dismissed with prejudice.

The judgment recited:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs' Complaint be dismissed with prejudice on the ground that upon the facts and the law the plaintiffs have shown no right to relief."

On appeal, plaintiffs concentrate on the findings relating to undue influence and the fiduciary capacity of Thora Campbell.

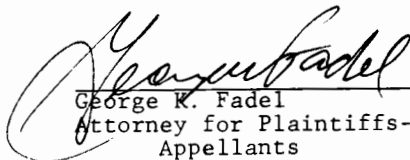
As reviewed hereinabove, there was no independent action or consideration by Marinus Johnson with respect to the trust of March 5, 1971, apart from that relating to the wills of March 5, 1971 and January 19, 1971, both of which were declared void by reason of undue influence of Thora Campbell upon substantially the same evidence.

Presumably, the jury and District Judge in the probate case are reasonable minds which disagree with the District Judge in the civil action. It is anticipated that the file in the probate case which is on appeal as Case No. 15798 will be available for simultaneous review by the Supreme Court for the reason that an order issued by this Court August 29, 1978 provided that appellant's brief would be due twenty days after a decision in Civil No. C-784709. When such brief is filed and a reply made thereto, a complete review of evidence in both causes will be available to this Court for a determination as to what "reasonable minds" could agree to with respect to the issue of undue influence.

CONCLUSION

The same compelling reasons apply to declaring the trust of March 5, 1971 void by reason of undue influence of Thora Campbell as were applied in the probate proceedings which found the wills of March 5, 1971 and January 19, 1981 void because of such undue influence in that the trust was inseparably conceived and executed pursuant to the same plan and transaction. A conclusion that undue influence was exercised by Thora over her father, Marinus, in arranging for attorneys of her choosing and acting upon her directions to change the will of May 5, 1969 from an equal distribution to a division giving her over eighty percent of the estate was supported by evidence convincing to most reasonable minds.

The judgment of dismissal should be reversed and the cause remanded to require an accounting by Thora and delivery of all of the property received by her pursuant to the trust to the administrator of the estate in the probate proceeding.


George K. Fadel
Attorney for Plaintiffs-
Appellants

December 23, 1970

Mr. Marinus Johnson
& Mrs. E. W. Campbell
1360 Yale Avenue
Salt Lake City, Utah

Dear Mr. Johnson:

I enclose a copy of a new will for you. I have sent the original to your daughter, Thora.

Please call me after you have read the proposed new will.

Very truly yours,

William Vogel

WV:dhb

Enclosure



(his 74)
when Mr. Johnson dies,
\$ 2500 to Marinus Eldon Johnson
San Francisco
remainder, $\frac{1}{3}$ to

La Verne Robertson
Lewistown, Penna

Darlene Olsen
Salt Lake City

Thora Campbell
S L C

Trustee pays ^{trustors} ~~the~~ expenses for his life

Marinus



December 23, 1970

Mrs. E. W. Campbell
1360 Yale Avenue
Salt Lake City, Utah

Dear Thora:

I have sent to your father a copy of a new will for him, and I enclose herewith the original.

I suggest that you have two neighbors who know your father well serve as witnesses to his signing of the original will. Ordinarily we would arrange to have the will signed and witnessed in our office. However, in this case, I would prefer that the witnesses be people who know him well and could testify as to his mental alertness and understanding. The witnesses cannot be related to your father or to you.

The signing and witnessing of the will should be carried out in a formal ceremony exactly as described in the paragraph immediately preceding the lines for signatures and addresses of the two witnesses.

The above instructions must be carefully carried out if your father's wishes, as described in the new will, are to have a good chance of being put into effect against the possible claims of your brother and sisters after your father's death that this new will is invalid.

Please call me about this new will.

Very truly yours,

William Vogel

WV:dhb

Enclosure

