

1982

# Kathryn C. Williams v. Danny Gene Boyer and Michael Boyer : Brief of Respondents

Utah Supreme Court

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## Recommended Citation

Brief of Respondent, *Williams v. Boyer*, No. 18125 (Utah Supreme Court, 1982).

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IN THE SUPREME COURT OF THE STATE OF UTAH

KATHRYN C. WILLIAMS, Conservator  
of the Estate of John E. Boyer,

Plaintiff-Appellant,

v.

DANNY GENE BOYER and MICHAEL BOYER,

Defendants-Respondents.

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Case No. 18125

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Third Judicial District  
Court for Salt Lake County, State of Utah  
The Honorable David B. Dee, Judge

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FILED

JUL - 1 1982

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Clerk, Supreme Court, Utah

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## TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE . . . . .	1
DISPOSITION OF THE CASE BY LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	5
POINT I. THE TRIAL COURT CORRECTLY FOUND THAT JOHN BOYER HAD SUFFICIENT CAPACITY TO CONVEY THE PROPERTY. . . .	5
POINT II. THE TRIAL COURT CORRECTLY PLACED THE BURDEN OF PROOF OF THE INVALIDITY OF THE DEEDS UPON PLAINTIFF . . . .	17
CONCLUSION. . . . .	21

## AUTHORITIES CITED

### Cases

Anderson v. Thomas, 108 Utah 252, 159 P.2d 142 (1945) . . . .	6
Bradbury v. Rasmussen, 16 Utah 2d 378, 401 P.2d 710 (1965) . .	18, 20
Burgess v. Colby, 93 Utah 103, 71 P.2d 185 (1937) . . . . .	6
Chugg v. Chugg, 9 Utah 2d 256, 342 P.2d 875 (1959) . . . . .	5, 7, 8
Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811 (1972) . . .	5
Hatch v. Hatch, 46 Utah 218, 148 Pac. 433 (1914) . . . . .	19, 20
O'Reilly v. McClean, 84 Utah 551, 37 P.2d 770 (1934) . . . .	6, 18
Peterson v. Carter, 579 P.2d 329 (Utah 1978) . . . . .	5, 6, 7, 8
Stringfellow v. Hanson, 25 Utah 480, 71 Pac. 1052 (1903) . .	5, 6, 7

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHRYN C. WILLIAMS, Conservator  
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Plaintiff-Appellant,

**v.**

DANNY GENE BOYER and MICHAEL  
BOYER,

## Defendants-Respondents.

## BRIEF OF RESPONDENTS

Docket No. 18125

## NATURE OF THE CASE

This is an action brought by the Conservator of the Estate of John E. Boyer to have two Quit-Claim Deeds declared void and vacated based on the grounds that John E. Boyer, one of the grantors of those deeds, was incompetent at the time of their execution.

## DISPOSITION OF THE CASE BY LOWER COURT

Following trial before the Court, the Honorable David B. Dee found that John E. Boyer was competent at the time of the execution of the deeds and therefore rendered judgment for Defendants and entered Findings of Fact and Conclusions of Law.

## RELIEF SOUGHT ON APPEAL

Respondents seek this Court's affirmance of the judgment of the trial court.

### STATEMENT OF FACTS

John E. Boyer and Eva B. Boyer, who is now deceased, were husband and wife. Plaintiff-Appellant Kathryn C. Williams, who is a daughter of John and Eva Boyer, is also the Conservator of the Estate of John E. Boyer. Defendant-Respondent Michael Boyer is a son of John and Eva Boyer. (R. 235--testimony of Michael Boyer) Defendant-Respondent Danny Gene Boyer is a grandson of and was raised by John and Eva Boyer. (R. 260, 261--testimony of Danny Gene Boyer).

In December, 1960, and again in January, 1981, John Boyer was diagnosed as having Alzheimer's disease. (R. 129, 131, 133-34--testimony of Moench) This is a disease of the premature degeneration of the cerebral cortex of the brain, a process of degeneration quite similar to senile dementia as is seen in advanced age. (R. 133-34, 144--testimony of Moench) On June 6, 1961, John Boyer was admitted for treatment to the Utah State Hospital and on January 4, 1963, he returned home to reside on a home visit until his release from the hospital on April 30, 1964. (R. 91, 93--testimony of Elliott)

John and Eva Boyer owned as joint tenants two pieces of property which are the subject of this lawsuit. Their home is located on one of the properties at 875 Glendale Street (hereinafter called the "house property"). The other property

which is adjacent to the house property contained a garage which is known as Lots 4 and 5, Block 5, Glendale Addition (hereinafter called the "garage property").

On May 14, 1976, John and Eva Boyer executed a will which was prepared by Wayne Ashworth, an attorney practicing in Salt Lake City. (R. 95, 96--testimony of Ashworth) Under the will, the Defendant Michael Boyer was to receive the house property and Defendant Danny Gene Boyer was to receive the garage property.

John Boyer was concerned that the will would have to be probated and he inquired of Mr. Ashworth if there were a way to avoid probate. (R. 99, 104--testimony of Ashworth) Mr. Ashworth advised Mr. Boyer that he may avoid probate by deeding the property to Michael and Danny. In response to Mr. Boyer's request, Mr. Ashworth prepared deeds to the properties. (R. 104--testimony of Ashworth) On May 18, 1976, John and Eva Boyer executed two Quit-Claim Deeds, one conveying the house property to Michael Boyer and the other conveying the garage property to Danny Gene Boyer. (Exhibits 4, 5; R. 103-05--testimony of Ashworth) Both deeds contained a reservation of life estate to John and Eva Boyer. (R. 106-07--testimony of Ashworth) John Boyer recorded the deed to Michael Boyer. (R. 105--testimony of Ashworth) Wayne Ashworth recorded the deed to Danny Gene Boyer. (R. 108--testimony of Ashworth) Michael Boyer and Danny Gene Boyer did not request or encourage the preparation of the deeds. They did not even

know that the Boyers contemplated conveying the properties. Michael first found out about the deeds approximately two years after they were executed in February of 1978 when his mother showed them to him. (R. 246--testimony of Michael Boyer) Shortly after that time, Danny Gene Boyer for the first time also heard about the deed to him. (R. 265-66--testimony of Danny Gene Boyer).

On April 19, 1978, Plaintiff Kathryn C. Williams was appointed Conservator of the Estate of John E. Boyer. (Exhibit 7; R. 149--testimony of Kathryn C. Williams) She initiated suit against Defendants to avoid and cancel the deeds on the grounds that John Boyer lacked sufficient capacity to convey property and Defendants fraudulently procured the signature of John Boyer on the deeds. (R. 2-4--Plaintiff's Complaint) At trial the parties stipulated to strike the fraud allegation. (R. 233) In rendering judgment for Defendants, the trial court found that John Boyer did have and possess sufficient legal capacity to execute and deliver the deeds and that the deeds were validly executed and delivered. (R. 74--Findings of Fact and Conclusions of Law) The Plaintiff appeals from that judgment, claiming that the trial court erred in finding that John Boyer had sufficient legal capacity to execute and deliver the deeds and in placing the burden on the Plaintiff to prove the invalidity of the deeds.

## ARGUMENT

### POINT I

THE TRIAL COURT CORRECTLY FOUND THAT JOHN BOYER HAD SUFFICIENT CAPACITY TO CONVEY THE PROPERTY.

Appellant contends that the trial court erred in finding that John Boyer had sufficient capacity to execute and deliver the deeds. Since this is an action in equity, this Court may review the evidence; however, the Court must take into account the advantaged position of the trial judge and should only reverse when the evidence clearly preponderates against his decision. Peterson v. Carter, 579 P.2d 329 (Utah 1978); Chugg v. Chugg, 9 Utah 2d 256, 342 P.2d 875 (1959). In Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811, 812 (1970), the Utah Supreme Court stated:

It is true, as plaintiff asserts, that this action to avoid deeds is one in equity upon which this Court has both the prerogative and duty to review and weigh the evidence, and to determine the facts. However, in the practical application of that rule is well established in our own decisional law that due to the advantaged position of the trial court, in close proximity to the parties and the witnesses, there is indulged a presumption of correctness of his findings and judgment, with the burden upon the appellant to show they were in error; and where the evidence is in conflict, we do not upset his findings merely because we may have reviewed the matter differently, but do so only if evidence clearly preponderates against them.

The time of the execution of the deed is the material or critical point of time to be considered upon the inquiry as to the grantor's capacity. Stringfellow v. Hanson, 25 Utah 480, 71 Pac. 1052 (1903).

The Utah Supreme Court has on a number of times defined the test to determine whether the grantor has sufficient capacity to make a deed.

The test whether grantor had sufficient mental capacity to make a deed is: Were mental faculties so deficient or impaired that there was not sufficient power to comprehend the subject of the deed, its nature and its probable consequences, and to act with discretion in relation thereto, or with relation to ordinary affairs of life?

Peterson v. Carter, supra at 331; accord: Anderson v. Thomas, 108 Utah 252, 159 P.2d 142, 146 (1945); O'Reilly v. McLean, 84 Utah 551, 37 P.2d 770, 772 (1934); Burgess v. Colby, 93 Utah 103, 71 P.2d 185 (1937).

In Stringfellow, supra, at 1054, the Utah Supreme Court, in discussing the mental capacity of the grantor, stated:

The test is, has the party at the time sufficient reason and mental capacity to understand the nature of the contract he is entering into, and to realize and appreciate the probable results of the transaction? If so, he would be bound by his acts, and equity, in the absence of fraud and mistake, will not relieve him from his bargain, however unreasonable, in the judgment, of others, it may appear to be.

It is clear from the test as announced by the Utah Supreme Court, there is not a two-part test in determining the capacity of the grantor as the Appellant seems to argue. There does not have to be both a finding of capacity to convey property and of sufficient capacity to form the intent to transfer property as is required under the doctrine of delivery as Appellant argues. Inherent in the test to determine the capacity of the grantor to convey is that he understands the nature and the probable

consequences of a deed. Thus, the grantor must have the intent to convey the property to meet this test.

Courts have generally construed the competency requirement liberally, demonstrating the difficulty in determining who in this society composed of individuals of varying personalities and levels of intelligence has the sufficient mental faculties to conduct his own affairs. In Stringfellow, supra, at 1055, the court stated:

Even if his mind were weak and debilitated, compared to what it had been, his demeanor on occasion eccentric, and even if he had not capacity to transact general business, yet if he understood, as he clearly did, the nature of that particular act--recollect the property he was disposing of, and the person to whom he is giving it, and how he desired to dispose of it--has enough to make his act valid.

In Chugg, supra, the court noted that it was not to be questioned that the plaintiff's evidence in that case standing alone would be sufficient to support a finding that the grantor was incompetent, at least at some times during which the questioned transactions occurred. However, the Utah Supreme Court found that "there is ample basis therein upon which to reject plaintiff's contention that he had proved by clear and convincing evidence that Nathan Chugg [the grantor] was neither incompetent or a victim of undue influence." 432 P.2d at 878.

In Peterson, supra, Mrs. Peterson, a 91-year-old woman living in a rest home, conveyed her home and underlying real property to others. Subsequently, a guardian was appointed over the person and estate of Mrs. Peterson and he brought suit to vacate the deed based on the grantor's incompetence and

undue influence in connection with the conveyance. The trial court refused to vacate the deed and the Utah Supreme Court affirmed. The Utah Supreme Court stated that "[i]rrespective of Mrs. Peterson's competency now, or even before the conveyance, substantial evidence was introduced to show that at the time of the conveyance, Mrs. Peterson knew and understood the nature of the transaction." 579 P.2d at 331. The attorney who was asked to assist in completing the transaction testified that after having talked with Mrs. Peterson and after her various questions about the effect of the sale had been answered; "there was no question in my mind that she knew what she was doing and she wanted the home to go to Mr. and Mrs. Carter." 579 P.2d at 331. The Utah Supreme Court stated:

Although other testimony might show Mrs. Peterson's incompetence, we are inclined to defer to the trial court's decision due to his proximity to the situation and his ability to observe the witnesses and their demeanor.

579 P.2d at 331.

As in Peterson, supra, the attorney involved in the transactions in the instant case also testified concerning those transactions. Wayne Ashworth, a member of the Utah State Bar, prepared a will for John and Eva Boyer and that will was executed on May 14, 1976. (R. 94, 95, 96, 101--testimony of Ashworth) Wayne Ashworth and his secretary, Carol Barbury, were witnesses to the will. (R. 97--testimony of Ashworth) Defendant Michael Boyer and his wife, Jaylene Boyer, were to receive under the will the house property and Danny Gene Boyer was to receive the garage property. (R. 100--testimony of Ashworth).

The Boyers had come into Ashworth's office on May 10, 1976, when Ashworth was not in and left the information they wanted in the will with his secretary, Carol Barbury. (R. 95--testimony of Ashworth) Mr. Ashworth called Mr. Boyer before preparing the will to make sure that he wanted it the way he had stated to his secretary. He had talked to Mr. Boyer a couple of times on the phone. (R. 99-110--testimony of Ashworth).

Mr. Ashworth testified that at the time of signing of the will, Mr. Boyer appeared normal and was interested in the transaction.

Q. (By Mr. Weston) Directing your attention, Mr. Ashworth, to the time you were here signing the will with Mr. and Mrs. Boyer in the presence of Mrs. Jensen [maiden name for Mrs. Barbury], did you observe anything at that time about Mr. Boyer's condition?

A. No. He appeared normal to me.

Q. At any time during that meeting do you recall that Mr. Boyer did anything or said anything that seemed unusual to you?

A. No.

Q. How did he appear as far as being interested in or alert to what was going on at the time?

A. Well, he appeared to know what he wanted about that, because I thought to myself, "Why is he giving it to his grandson?" I didn't ask him why, but I thought that was a little unusual. I thought if that was his wishes, I'd put that in the will.

(R. 101--testimony of Ashworth)

Mr. Ashworth also testified that at the time of the signing of the will, Mr. Boyer appeared to be sound of mind.

Q. At the time Mr. Boyer signed the will on this occasion, did you then form any opinion about his soundness of mind?

A. No. Not really. I mean, he appeared of sound mind to me. You know, if he had acted a little bit funny or something like that, I would have had some reservations about him signing the will the way it was made up.

Q. Did you have any reservations?

A. None whatsoever.

Q. Based on what you saw and heard?

A. No.

Q. What is your opinion as to whether he was sound of mind and understood what he was doing?

A. I think he was mentally sound at the time he signed it. There was nothing to indicate to me that he was anything else but.

Q. Do you have an opinion as to whether or not he knew he was signing a will?

A. I'm sure he did, because I talked to him after we got the information on the form. I had a couple of phone calls from him to discuss it.

Q. Do you recall what he said at that time?

A. No, I don't recall. It was--after I read the note that the secretary had taken, I had a couple of questions I wanted to ask him. So I did call him to make sure that that's the way he wanted it. Like I said before, it seemed a little unusual that he was going to give it to this one child and the grandson. So I called him back to fully discuss this with him and asked if that was the way he wanted it.

Q. Was that before or after he signed the will?

A. That was before.

Q. In your opinion did he know who his heirs were at that time?

A. Well, he--I would--I think he must have done, because he gave me all of their names.

(R. 102-103--testimony of Ashworth)

Mr. Ashworth testified that Mr. Boyer read the will and asked whether the will would have to be probated. He wanted to

property. (R. 99--testimony of Ashworth) Mr. Boyer asked if there was any way he could get out of probate, and Mr. Ashworth advised him that there is a possibility to avoid probate by deeding the property to the children and reserving a life estate to Mr. Boyer. In response to Mr. Boyer's request, Mr. Ashworth prepared the deeds conveying the house property to Michael Boyer and the garage property to Danny Gene Boyer. The deeds were executed by John and Eva Boyer on May 18, 1976, four days after the Boyers had signed the will. (Exhibits 4, and 5). The deeds were notarized by Mr. Ashworth and witnessed by Carol Barbury. (R. 104--testimony of Ashworth)

Mr. Ashworth testified that in his opinion there is no question that Mr. Boyer had capacity to sign the deeds.

Q. (By Mr. Weston) Directing your attention, Mr. Ashworth, to the time that these deeds were executed in the Boyer home, did you observe anything about Mr. Boyer at the time that was unusual in his conduct?

A. I did not.

Q. Did he appear to be interested and attentive to what was going on?

A. Yes.

Q. Were you concerned, to the best you can recall at this late date, were you concerned at that time as to whether he understood what he was signing? Do you understand my question?

A. Give me that question again.

Q. Reflecting back on what you observed at the time, did you then have any concern as to whether Mr. Boyer really understood what he was signing?

A. No, I didn't. Not for a minute. I didn't have any question about his capacity to sign.

(R. 108--testimony of Ashworth)

Carol Barbury, Mr. Ashworth's secretary who had taken the information initially from the Boyers concerning the will, also testified that Mr. Boyer understood the will and was perfectly sound of mind at the time of the execution of the will.

Q. Directing your attention to the time that the will was signed--this, as I understand, was in your office, is that correct--in Mr. Ashworth's office?

A. Yes.

Q. Do you recall at all the demeanor that Mr. Boyer had at that time? Did he appear to be alert and interested?

A. Yes, he was.

Q. Do you know whether he read the will before he signed it?

A. Yes he did.

Q. You saw him read it?

A. Yes.

Q. Was there anything about what Mr. Boyer said or what he did that gave you any concern as to whether he really understood what he was doing?

A. No.

Q. From what you observed, did you at that time frame any opinion as to whether he was sound of mind and understood what he was doing?

A. He seemed to be perfectly sound of mind and understood just what he was doing.

Q. You've had no concern--

A. No.

Q. --with what you saw and observed then?

A. No.

(R. 118-19--testimony of Barbury)

Additionally, Mrs. Barbury testified that Mr. Boyer was alert and attentive at the time of signing of the deeds.

Q. Directing your attention to the time that the deeds were signed at the Boyer home, in that same regard did Mr. Boyer on that occasion appear to be alert, attentive, and interested in what was going on?

A. Yes. He seemed to be very relieved to sign the deed to know it was going to be the way he wanted it.

Q. Do you recall discussing the deeds with Mr. Boyer at that time or hearing any discussion at that time with Mr. Boyer?

A. I don't recall the exact conversation no. It is just that--the thing I do recall is that he said: "Now, this should take care of everything. This should put it the way I want it." And Mr. Ashworth said, 'It should.' Other than that, I don't recall, no.

Q. Do you recall on that occasion at the home when the deeds were being signed Mr. Boyer saying or doing anything to give you any impression or concern as to whether he really understood what he was doing?

A. No he didn't.

(R. 119-20--testimony of Barbury)

Joseph Kankelborg, who is the son-of-law of John and Eva Boyer, testified that in May of 1976 he was at the Boyer home for a birthday party for his daughter and at that time John Boyer told him that he had gone to the lawyer to sign papers that had given Michael the home and Danny the property in back. (R. 310-311--testimony of Joseph Kankelborg). Richard Kankelborg testified that at that time John Boyer knew his name and he knew whether or not he owned his house. Kankelborg did not find Mr. Boyer's behavior socially unacceptable or socially unusual. (R. 313--testimony of Kankelborg) Michael Boyer testified that in May of 1976 John Boyer knew where he was

living and who his children were. (R. 244-45--testimony of Michael Boyer) John Boyer had cared for his wife, Eva, after her stroke between 1972 to 1978. He gave her medication, washed the clothes, did the general housework and made the meals. (R. 247--testimony of Michael Boyer).

Danny Boyer testified that he did not notice anything about John Boyer's conduct or his activities that made him doubt about his mental competency. (R. 268--testimony of Danny Gene Boyer). Sherry Lynn Kankelborg, daughter of John and Eva Boyer, testified that John Boyer understood who he was, where he lived and whether he owned his own home. (R. 296--testimony of Sherry Lynn Kankelborg) She also testified that John Boyer's behavior was socially appropriate. (R. 296-97--testimony of Kankelborg) Marilyn Rosemary Boyer, another daughter of John and Eva Boyer, testified that her testimony is the same as Michael's, Danney's and Sherry's as to John Boyer's competency. (R. 318--testimony of Marilyn Boyer) Robert Boyer, another son of John and Eva Boyer, testified that his testimony would be the same as Michael's, Danny's and Sherry's as to the recollection and understanding of John Boyer of the circumstances around him. (R. 324--testimony of Robert Boyer)

Dr. Moench, a psychiatrist, testified that he had examined John Boyer in December of 1960 and again in January of 1981 and he concluded that Mr. Boyer had an organic brain syndrome known as Alzheimer's disease. (R. 129-,130,133-34--testimony of

Moench) He gave his opinion that at the time of the signing of the deeds, Boyer's condition would not have been significantly different than at the time of the examinations and that Boyer wouldn't know the meaning of a legal document. (R. 134-135--testimony of Moench).

However, Dr. Moench did not see or examine Mr. Boyer between the time of the examination in December, 1960, and the examination in January of 1981, a 21-year gap. (R. 135--testimony of Moench) Dr. Moench also admitted that the degeneration with Alzheimer's disease can take place at varying rates; and one cannot predict the rate of deterioration. (R. 137--testimony of Moench) Dr. Moench also testified that with this type of condition, it is possible there can be a remission for a period of time, even a lucid interval or improvement for a period of time. (R. 140-141--testimony Moench) It is even possible that Mr. Boyer may very well have entertained a degree of lucidity that would have permitted him to understand the nature of his property and the boundaries of the same and the names of his heirs. (R. 142--testimony of Moench) Dr. Moench was not able to say with certainty that Mr. Boyer would not know if he owned his own home. (R. 140--testimonv of Moench) It is also possible though not probable that Mr. Boyer would have known the names of his children and would have recognized his children. (R. 140--testimony of Moench).

In summary Dr. Moench could not say definitely that in May, 1976, Mr. Boyer did not have sufficient lucidity to have permitted him to have knowingly executed the deeds.

Q. You feel his ability was impaired? And finally, the bottom line is that from your experience, Doctor, from what you have seen in the years of your practice, you were not able to say definitely that in May of 1976 Mr. Boyer did not have a sufficient lucid interval to have permitted him to have executed the deeds, clearly understanding the property that he was conveying and the individuals to whom those interests were being conveyed? Is that correct?

A. No, sir. I was not there. I did not examine him at that time. I could only give an opinion.

(R. 147--Testimony of Moench).

Plaintiff and her husband testified that John Boyer was incompetent. The main basis for this conclusion is their allegation that Mr. Boyer remained in the home with his wife even though she was allegedly sleeping with a boarder in the home, Mr. Deberry. (See R. 159--testimony of Kathryn C. Williams; R. 174--testimony of Jack D. Williams.) Appellant's counsel also argues that John Boyer must have been incompetent if he would abandon his wife to a boarder. (See Appellant's Brief at 10.) The Appellant argues that the circumstances in the John Boyer home for the years immediately preceding the execution of the deeds would compel a finding of Mr. Boyer's incompetency. However, such ignores the evidence of a father who was gainfully and responsibly employed until December of 1960 and who maintained thereafter a close and a considerate relationship with his family and who involved himself in the care of the home and his wife after she suffered a stroke in 1972. The evidence portrays John Boyer as having a loving, warm and tolerant nature. It is completely without merit to assume, as Appellant contends, that there were improper

circumstances existing in John Boyer's home and that Mr. Boyer's continuing attention and interest in his wife and family were to insufficient mental capacity rather than to a loving and forgiving nature.

There has been substantial evidence in this case that John Boyer had sufficient power to comprehend the subject and nature of the deeds that he executed in May of 1976 and that he understood the consequences of the deeds. He was interested that Michael and Danny Gene receive the property. He did not want probate to pose an interference to that desire. The evidence is conflicting yet it does not clearly preponderate against the findings of the trial court which is presumed correct that John Boyer did have legal capacity to execute the deeds.

## POINT II

### THE TRIAL COURT CORRECTLY PLACED THE BURDEN OF PROOF OF THE INVALIDITY OF THE DEEDS UPON PLAINTIFF.

Appellant argues that the court erred in placing the burden upon Plaintiff to show that the deeds were not authentic. It is clear that the language of that court that Appellant cites to in the record concerns to the burden of proving the competency of the grantor. The court stated that the Plaintiff bears the burden of showing that John Boyer was mentally incompetent. (R. 180-81) It is clear that the party attacking the competency of the grantor bears the burden of proving his incompetency. It is presumed that the grantor in

the deed was competent to execute it at the time of its execution and the burden of proving incompetency is on the person alleging it. O'Reilly, supra, at 772. In Chugg, supra, a 876 the court discussed the burden of proof in context of the suit to void a deed on the basis of the incompetency of a grantor.

The deed and bill of sale conveying the property to Dale are in proper form and duly executed, and the deed is acknowledged and recorded. This establishes prima facie the genuineness of the transaction and casts upon the party attacking it the burden of showing invalidity of the documents by clear and convincing evidence.

Appellant appears to argue that since the transaction in this case was between close relatives, there is a confidential relationship and the Respondents bear the burden of proving that the transaction was fair. It is true that if there is a confidential relationship, the superior party must prove the fairness of the transaction.

If 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 over come by counterveiling evidence. The burden is upon the superior party to convince the court by a preponderance (not clear and convincing) of the evidence that the transaction was fair.

Bradbury v. Rasmussen, 16 Utah 2d 378, 401 P.2d 710, 713, n. 4 (1965).

However, this rule is clearly inapplicable in the transaction involving Michael Boyer and Danny Gene Boyer. Neither Michael Boyer and Danny Gene Boyer were involved in the transactions in this case. They did not request or encourage

the preparation of the deeds. Neither knew that the deeds were, in fact, executed or that the Boyers even contemplated conveying the properties. Michael and Danny Gene first found out about the deeds approximately two years after they were executed in February of 1978. (R. 246--testimony of Michael Boyer; R. 265-66--testimony of Danny Gene Boyer) Clearly, a presumption of unfairness would not arise in this situation where the grantees were not involved in the transactions and did not even know that the transactions were developing.

Appellant seems to argue that since Eva Boyer was in a confidential relationship to John Boyer, then the Defendants bear the burden of showing the fairness of the transaction. However, the rule requiring the showing of fairness would not apply in this situation. The purpose of the doctrine of confidentiality is to not allow a person in a superior position in a confidential relationship to unfairly benefit from that relationship. In this case, even if Evan Boyer were found to be in a confidential relation with John Boyer, she did not benefit from that relationship. She did not receive the property from Mr. Boyer.

In Hatch v. Hatch, 46 Utah 218, 148 Pac. 433, 437-38 (1914), the court stated:

. . . If the courts should interfere in a transaction between husband and wife, or between those of parent and child, every time it is shown that the wife asked, or even coaxed, the husband to transfer property either to her or to one of the children or both of them, all such transactions must of necessity cease. Such, fortunately, is not the law, and the courts have frequently so declared.

Even if the law of confidentiality may apply in this situation, Defendants have failed to prove that a confidential relationship existed; that John Boyer reposed confidence in Eva Boyer that resulted in Eva Boyer's superiority and influence over John Boyer. The relation of husband and wife does not in and of itself create any presumption of a relationship of trust and confidence that will cast the burden of proof to show the fairness of the transaction. Hatch, supra, at 438. In

Bradbury, supra, at 713, the court stated:

While kinship may be a factor in determining the existence of a legally significant confidential relationship confidential relationships, there must be a showing, in addition to the kinship, of reposal of competence by one party and the resulting superiority and influence of the other party. The relationship must be such as would lead an ordinary prudent person in the management of his business affairs to repose that degree of confidence in the other party which largely results in the substitution of the will of the latter for that of the former in material matters involved in the transaction. The doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. Mere confidence in one person by another is not sufficient alone to constitute such a relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the competence, and it must result in a situation where as a matter of fact there is a superior influence on one side and dependence on the other.

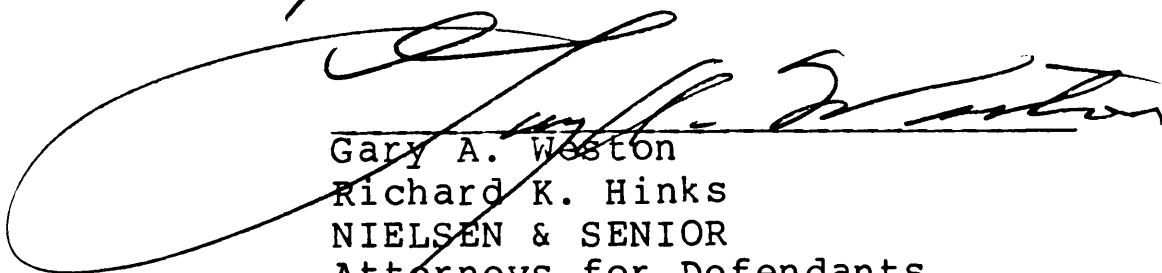
Appellant has failed to produce any evidence which shows the motive or purpose of Eva Boyer in conveying the property. Appellant has failed to produce any evidence Eva Bover was in a superior position over John Boyer and that John Boyer reposed such confidence in Eva Boyer that Eva had any resulting superiority of influence over him.

Even if Respondents do bear the burden of showing that the transaction was fair, that burden has been met. John and Eva Boyer made a gift of property to the son and to a grandson whom they raised and cared for. The Boyers had a loving and caring relationship with the Defendants. There is no evidence that the transaction was unfair or improper.

#### CONCLUSION

The evidence in this case, even though conflicting, does not clearly preponderate against the trial court's finding that John Boyer has sufficient mental capacity to convey the property. Appellant bears the burden of showing John Boyer's incapacity. Additionally, the doctrine of confidential relationship does not apply to this case. If it does apply, there is no evidence that a confidential relationship did exist.

DATED this 1<sup>st</sup> day of July, 1982.



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CERTIFICATE OF MAILING

SERVED two copies of the foregoing Brief of Respondents by mailing a copy thereof, postage prepaid, to Horace J. Knowlton, attorney for Plaintiff-Appellant, at his office address, 214 Tenth Avenue, Salt Lake City, Utah 84103, this 1<sup>st</sup> day of July 1982.

A large, stylized handwritten signature in black ink, which appears to read "Horace J. Knowlton", is written over a horizontal line.