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IN THE SUPREME COURT

OF THE STATE OF UTAH

TRILBA A. JONES, by her Guardian ad Litem, BONNIE JEWELL SHINER, Plaintiff and Respondent, vs. SHARON COLBY KIEFER, Defendant and Appellant.	Case No. 18339

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fourth District Court in and for Juab County granting plaintiff judgment against defendant.

Honorable, J. Robert Bullock, Judge

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FILED

SEP 22 1982

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

TRILBA A. JONES, by her Guardian ad Liten, BONNIE JEWELL SHINER, Plaintiff and Respondent, vs. SHARON COLBY KIEFER, Defendant and Appellant.	Case No. 18339

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

Plaintiff brought this action against defendant to set aside two deeds to real property located in Nephi, Juab County, Utah. (R. 1)

DISPOSITION IN LOWER COURT

The case was tried before the Court, Honorable J. Robert Bullock, sitting without a jury, resulting in a judgment for Plaintiff setting aside the two deeds. (R. 22,23) Objections to the Findings of Fact, Conclusions of Law and Judgment and a Motion for a new trial were made by Defendant. (R. 24, 25; 27-34) An order was entered denying relief as to all matters raised. (R. 38)

RELIEF SOUGHT ON APPEAL

That the judgment entered by the Court below be affirmed.

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STATEMENT OF FACTS

Plaintiff's first marriage to Sharon Atkin produced nine children, six of whom survived to March 3, 1978, to wit: Millie Colby, Bonnie Shiner, Mignon Payne, Warren Atkin, Rawlen Atkin, and Derrall Atkin. (T. 35, Ln. 9-16) Sharon Atkin died in 1944 and plaintiff married Grant Jones in 1950. (T. 35, Ln. 23, 24) No children were born of this marriage (T. 35, Ln. 27) and on July 26, 1965 plaintiff executed a will leaving her estate to her husband and in the event he should predecease her to the above-mentioned six children. (Exhibit 7)

Grant Jones and plaintiff purchased the home and real property that is the subject of this action in June of 1970 (Exhibit 2, Page 56) after Mr. Jones retired from the Board of Education in Salt Lake City, Utah. (T. 36, Ln. 2-6) Plaintiff and Mr. Jones resided alone in the said home located at 409 South First East, Nephi, Utah until his death on December 26, 1976. (T. 36, Ln. 9-27) After his funeral, it was agreed by the family that Corrine, Grant's niece, would take care of paying the bills for the funeral and take over the management and supervision of plaintiff's financial affairs. (T. 37, Ln. 21-30; 38, Ln. 1-7)

Approximately one week after the funeral, Corrine had done nothing to help plaintiff and from early January, 1977 until February, 1978 plaintiff's guardian ad litem, Bonnie Jewel Shiner, one of plaintiff's children, helped her with her finances as follows: obtained Grant's life insurance policy from the safety deposit box at First Security Bank in Nephi; paid the expenses of the funeral; converted $10,000 in regular savings to certificates of deposit; had herself established as a co-tenant, at the request of plaintiff,

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on plaintiff's checking and savings accounts, and her safety deposit box, all located at First Security Bank in Nephi; reinvested and maintained the $10,000 funds for highest interest yield; visited plaintiff frequently and reconciled her checking account as she was unable to do so; and was generally supportive of plaintiff during this period of time. (T. 11, Ln. 4-30; 12, Ln. 1-4; 38, Ln. 8-30; 39, Ln. 1-30; 40, Ln. 1-30; 41, Ln. 1-30; 42, Ln. 1-26; 56, Ln. 17-30; 57, Ln. 1-13; Exhibit 6)

Plaintiff lived by herself in the subject home from the date of Grant's death until January 31, 1978 when she fell and broke her right femur while babysitting. (T. 12, Ln. 5-30; 42, Ln. 27-30; Exhibit 1) Plaintiff was hospitalized at the Payson Hospital on that night and the fracture was treated by insertion of a traction pin and the institution of traction. This resulted in a staphylococcal infection necessitating Buck's traction instead of skeletal traction and the administration of substantial drug therapy to eliminate the infection which still obtained at discharge. (Exhibit 1, Discharge Summary, dated February 22, 1978) Plaintiff was not actually discharged from the hospital until March 27, 1978. (T. 5, Ln. 16, 17)

On February 23, 1978, Millie Colby, one of plaintiff's children, had plaintiff execute a power of attorney nominating Millie as attorney-in-fact for plaintiff to act in her behalf (Exhibit 9) directing that "my belongings and any monies derived therefrom" be used to pay her just debts and the remainder should be paid to her six children and that a proper will should be made encompassing these desires.

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On March 3, 1978, plaintiff's condition in Payson Hospital was as follows: she was 73 years of age and in pain, confused and disoriented as to time and place; was under heavy medication for pain; suffered from bedsores and constipation; had a staph infection caused by the traction pin; was under heavy medication to eliminate the infection; was catheterized and had infection caused thereby and was in isolation due to the staph infection. (Exhibit 1)

On March 3, 1978, Millie Colby had plaintiff execute a warranty deed transfering her fee simple interest in to her home in Nephi to Millie. (Exhibit 3; T. 15, Ln. 15-30; 16, Ln. 1-8; 75, Ln. 1-8) Millie Colby also had a codicil to plaintiff's will, Exhibit 7, drawn up and executed by plaintiff at or about this time. (T. 46, Ln. 3-5) On March 17, 1978, Millie Colby had an affidavit prepared and executed by plaintiff. (Exhibit 10; T. 81, Ln. 19-22)

While plaintiff was in the hospital Millie Colby closed the checking and savings accounts in the names of plaintiff and Bonnie and set up the checking account in plaintiff's name only and the savings account in plaintiff's and Millie's name jointly. (T. 45, Ln. 23-30; 57, Ln. 1-30; 58, Ln. 1-30)

Plaintiff was discharged from the Payson Hospital on March 27, 1978, and moved back into her home in Nephi. (T. 53, Ln. 19-21) When plaintiff discovered that Millie had had the bank accounts changed, she had the accounts changed back into her name and Bonnie's name jointly. (T. 46, Ln. 30; 47, Ln. 1-6; 57, Ln. 1-30; 5-8, Ln. 1-30) Plaintiff paid the 1978 real estate

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taxes on her home. (Exhibit 5)

Plaintiff continued to live in her home in Nephi until August of 1979 (T. 53, Ln. 19-21) when her health would no longer permit her to live alone. (T. 22, Ln. 25-30; 23, Ln. 1-6) On September 1, 1979 she moved into the Golden Living Center in Salt Lake City, Utah. (T. 23, Ln. 20, 21)

In the latter part of September, 1979, Bonnie was going to list plaintiff's house for sale when it was discovered for the first time that the house was in Millie's name. (T. 18, Ln. 18-25; 16, Ln. 14-19) Plaintiff originally commenced legal action against Millie Colby on October 2, 1979 but the matter was never brought on for trial. (Exhibit 2, Page 61)

An action was brought in Salt Lake County to establish a Conservatorship for plaintiff with Bonnie as Conservator; and then First Security Bank was substituted as Conservator; and finally everyone, Bonnie, Millie, Derrall, Mignon, Millie's attorney, agreed to Walker Bank as the Conservator. (T. 51, Ln. 8-15; 52, Ln. 15-21) There was never any dispute as to the necessity for the Conservatorship for plaintiff and Walker Bank refused to take the Conservatorship because there was not enough money involved. (T. 72, Ln. 29,30)

Millie Colby died April 6, 1981 and it was shortly after this that plaintiff discovered the subject home in Nephi had been transferred to defendant, who is the daughter of Millie Colby and the granddaughter of plaintiff, by warranty deed. (T. 71, Ln. 14; 66, Ln. 10-16; Exhibit 2, Page 64) Plaintiff then commenced this action against defendant Sharon Colby Kiefer. (R. 1)

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ARGUMENT

POINT I

THE JUDGMENT OF THE COURT SETTING ASIDE THE DEEDS FROM PLAINTIFF TO MILLIE AND FROM MILLIE TO DEFENDANT IS SUPPORTED BY THE REQUISITE EVIDENCE AND SHOULD BE AFFIRMED BY THIS COURT.

An action to set aside deeds is in equity and ". . .this Court has the prerogative of reviewing the facts as well as the law. However, we must take into account the advantaged position of the trial judge and will only reverse where the evidence clearly preponderated against his decision." Peterson v. Carter, Utah, 579 P. 2d 329 (1978)

A. Burden of Proof

The case of Northcrest, Inc. v. Walker Bank & Trust Co., 122 Utah 268, 248 P. 2d 692 (1952) held that a presumption of genuineness, due execution and delivery of a deed arises from acknowledgement and recordation of a deed and should be given great weight and it should not be overthrown by a mere preponderance of the evidence; but, this rebuttable presumption may be overcome by clear and convincing evidence.

The Court below was aware of this burden and made a specific finding that all of the allegations of plaintiff's complaint had been proved by clear and convincing evidence. (R. 21)

It is undisputed that undue influence, duress, fraud and the like must be proved by clear and convincing evidence, Johnson v. Johnson, 9 Utah 2d 40, 337 P. 2d 420 (1959); but it is submitted that a preponderance of the evidence is sufficient to establish the incompetency or lack of mental capacity of a grantor.

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There is a split of authority on the quantum of proof necessary. CJS, Deeds, §208(b)., p 99 states the following:

> Ordinarily, the incapacity of the grantor at the time of execution of a deed must be proved by a preponderance of the evidence, or, as is held in some jurisdictions, clear, satisfactory, and convincing evidence, ...

The case of Peterson v. Carter, Utah, 579 P. 2d 329 (1978) held as follows in regard to the quantum of proof necessary for showing incompetency as compared to undue influence at 579 P. 2d 331:

> . . .the burden of showing undue influence in the execution of the deed is even greater than that of showing incompetence. It must be established by clear and convincing evidence that the grantee exercised a dominating influence over the grantor.

In the case of Blankenship v. Christensen, Utah, 622 P. 2d 806 (1981) this Court also appears to have adopted the preponderance of evidence standard to establish the incompetency of a grantor. This Court held at 622 P. 2d 808:

> Even though it may plausibly be contended that the evidence would support a contrary finding, we are not persuaded that there is no reasonable basis in the evidence to support the trial court's finding that at the time he made the assignment to his wife, Dee E. Christensen lacked mental capacity and that the assignment was thus invalid and passed no interest in the property to her.

This could not be by clear and convincing evidence as this standard requires the evidence to be such that there is no serious or substantial doubt as to the conclusion. Northcrest, Inc. v. Walker Bank & Trust Co., supra.

It is submitted that plaintiff has proved her case by clear and convincing evidence wherever necessary and at the very least has demonstrated by a preponderance of the evidence

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her lack of capacity to make the deed, (Exhibit 3), on March 3, 1978.

B. The Mental Capacity of Plaintiff on March 3, 1978.

This Court has announced the following test in determining the mental capacity or competency of a grantor in making a deed, in the case of Anderson v. Thomas, 108 Utah 252, 159 P. 2d 142 (1945):

> 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?

The Court below answered the foregoing inquiry in the affirmative and made the following findings of fact with reference to plaintiff's mental capacity on March 3, 1978:

> 3. On January 30, 1978 the Incompetent, age 73, broke her right femur and was confined as a bed patient in the Payson Hospital, Payson, Utah from that date until March 27, 1978. For a substantial part of this time, the Incompetent was in pain, confused and disoriented as to time and place; was under heavy medication for pain; suffered from bed sores, constipation, staph infection of the right leg, catheterization and infection caused thereby and was kept in isolation because of the infection. (R. 19, 20)

This finding is supported by the testimony of Bonnie Shiner as follows:

> Q And when you were going in, you had made the statement previously that in your conversation with Millie that you didn't think that her mental condition was "too good;" now what, who made that statement, or did you?
>
> A We both agreed to that. We both talked about it.
>
> Q Then what was the basis, on what did you base that statement?
>
> A The way she talked. She talked out of her head every time that I visited her.

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Q Now wait, what's talking "out of her head"?

A Sometimes she didn't know where she was. She talked about her husband, who was no longer living, kept crying for him. She didn't know why she was in the hospital or what hospital.
(T. 44, Ln. 16-29)

The nurse's notes in Exhibit 1 state as follows:

2-6-78, 1100, patient seems disoriented, pain in left leg; 2-6-78, 1300, patient is still disoriented and confused; 2-6-78, 2200, patient confused; 2-7-78, 0400, patient disoriented, she states she doesn't know where she is; 2-9-78, 1610, patient confused at present time, family at bedside; 2-9-78, 1750, patient confused, looks very tired at present; 2-9-78, 2000, patient very disoriented and confused; 2-10-78, 2400, talking to people who aren't here, and as if she was home, keeps trying to get out of bed, put restraints on; 2-11-78; 1630, patient in pain, a little disoriented; 2-12-78, 2140, gave patient medication for sleep - disoriented; 2-14-78, 0230, awake, appears confused; 2-14-78, 2400, momentarily confused ; 2-15-78, 1200, confused about time and date; 2-16-78, 2045, patient crying, stated husband passed away year ago; 2-19-78, patient moved to isolation; 2-20-78, 1110, crying, asking for elders; 2-21-78, 0630, patient appears to be disoriented this a.m.; 2-21-78, 0815, crying and pain in leg; 2-21-78, 1000, appears confused, crying and asking for deceased husband; 2-21-78, 2140, patient was crying, appears confused and calling out for Grant; 2-23-78, 0400, awake, seems confused; 2-25-78, 0700, patient seems confused and disoriented; 2-25-78, 1330, appears to be confused still; 2-26-78, 0550, crying and pain in right leg; 2-27-78, 1230, patient depressed; 2-28-78, 1019, patient confused, calls for Milly (sic); 3-1-78, 0800, patient awake, confused; 3-1-78, 2400, patient awake and very disoriented; 3-2-78, 1335, pain in right leg; 3-3-78, 0540, patient awake and crying. R.N. gave medication for pain; 3-3-78, 1400, visiting with family; 3-3-78, 1930, complaints of being depressed, crying at present, reported to R.N.; 3-7-78, 2000, patient, just nervous; 3-8-78, 0800, patient confused as to place; 3-9-78, 1015, patient has very negative attitude, seems depressed; 3-12-78, 0400, appears confused at times; 3-17-78, 2130, patient a little dispondent at present; 3-18-78, 0400, patient seems a bit disoriented; 3-18-78, 0600, patient is a bit disoriented, thinks she is home; 3-21-78, 0715, on telephone, appears to be a little confused; 3-22-78, 0200, confused and disoriented; 3-22-78, 2105, patient

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appears to be confused; 3-23-78, 0800, patient asks, "Why am I in the hospital." seems a little confused; 3-23-78, 1845, appears disoriented, 3-24-78, 0245, patient is confused; 3-24-78, 0310, patient gets upset and confused; 3-25-78, 2100, seems somewhat confused; 3-26-78, 1845, patient seems to have a very negative attitude and seems depressed; 3-27-78, 0950, discharged to home . . . fairly cheerful but somewhat confused. (Exhibit 1)

Plaintiff's orientation in the hospital can be seen from the following:

Q Do you remember, do you know how long you were in the hospital?

A It seemed like about two or three weeks.

Q Two or three weeks?

A Yes.

* * *

Q Would you think it might be closer to two months?

A Oh, no, I wasn't there that long.

Q Okay.
(T. 13, Ln. 10-14; Ln. 17-19)

Concerning the execution of the deed:

A Millie says, "Momma, sign this paper," And I said, "What is it?" She said, "It's just a paper." Well, how'd I know what I was signing.

Q Well, did you just go ahead and sign it based on that information?

A I signed it, yes.

Q You didn't know this was a deed to your house?

A No, I didn't know nothing.

Q Did you ever -- well, when did you first find out about this deed that you had signed?

A I don't know. Somebody brought it to me afterwards. I didn't no more know what I was doing than nothing.
(T. 16, Ln. 1-12)

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Q (By Mr. Anderson) Do you remember at the time that Millie, that you signed the deed, do you remember signing the deed?

A She told me it was just a paper.
(T. 27, Ln. 28-30; 28, Ln. 1)

Discovering that she no longer owned the property:

Q Well, after you got out of the hospital, how long was it until you discovered that you didn't own your house any longer?

A Well, I was going to sell it, and I decided that it wasn't, I couldn't sell it. They told me I couldn't sell it, it wasn't mine. And that is unbelievable. You know better than that, Wendell.
(T. 16, Ln. 13-19)

Her primary treating physician:

Q And your doctor's name was Dr. Mendenhall?

A Dr. McDonald.

* * *

Q Do you remember seeing Dr. Mendenhall for your leg or anything?

A I don't know.
(T. 19, Ln. 3-4; Ln. 7-9)

About the notary public:

Q Okay. You don't remember Mr. Harmer notarizing your signature, in other words, saying yes? You don't remember him talking to you and saying, Millie, do you know what this is -- I mean, "Trilba, do you know what this is?"

A No.

Q You don't recall that?

A She just had come over and asked me if I'd sign the paper, and so I did.
(T. 28, Ln. 4-11)

Instructions to Millie:

Q Did you go ahead and tell her to have a deed prepared so you could give her your house?

A No, I don't remember nothing like that. I don't [illegible] or doing that at all.
[illegible] 30, Ln. 1-3)

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Defendant contends that plaintiff's execution of Exhibit 3 represented a gift of plaintiff's home in Nephi to Millie. (T. 91, Ln. 6-23). Defendant further testified that Millie told her about the gift at the time of the hospitalization, at the time the deed was signed in 1978. (T. 93, Ln. 15-26)

The Court below further found:

> The Court finds that on March 3, 1978 the Incompetent did not have the requisite mental capacity to make a valid gift of her home and real property and even if she did have the mental capacity to execute the deed she did not know she was making a gift. The Incompetent did not have the intent to convey the property to Millie Colby as her sole and separate property nor did she intend to make a gift of the property to Millie Colby to the exclusion of her rights and the rights of the other heirs.
> (R. 20)

At the time of the alleged gift to Millie, plaintiff was a widow, 73 years of age, with no employment and whose assets consisted of her home in Nephi; $10,000 in savings; a car and miscellaneous furniture; a social security check monthly in the sum of $478.00; and a monthly VA check in the sum of $75.00. (T. 23, Ln. 29; 64, Ln. 13; 55, Ln. 14-30; 56, Ln. 1-6) Bonnie Shiner testified at the time of the trial that there was only $7,900.00 left out of the savings. (T. 60, Ln. 5) Plaintiff had been residing at the Golden Living Center in Salt Lake City, Utah, since September 1, 1979, at a basic cost of $650.00 per month. (T. 25, Ln. 9)

Also, at the time of the alleged gift, plaintiff had five other children who she had remembered in her will, Exhibit 7, and in the Power of Attorney, Exhibit 9, executed just eight days prior to the execution of Exhibit 3.

The evidence in support of the above findings of fact is overwhelming.

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C. Duress and Undue Influence.

The Court below made a finding of fact as follows:

> The Court further finds that Millie Colby exercised duress on the Incompetent in procuring the deed from the Incompetent to herself dated and recorded March 3, 1981 involving the home and real property hereinabove referred to. (R. 20)

Duress is defined as follows in CJS, Deeds, §61, p. 727:

> Duress invalidating a deed may be defined as a condition of mind produced by improper external pressure destroying the free agency of the grantor and inducing him to execute a conveyance not of his own volition.

CJS, Deeds, §61, further explains the sufficiency of conduct necessary to produce duress at p. 757 as follows:

> Under the modern doctrine there is no exact legal standard with respect to the sufficiency of facts to produce duress. Accordingly, whether or not a deed will be set aside on the ground that it was procured through duress depends on the circumstances of the particular case, such as age, mental capacity, and relation of the parties, and pecuniary necessity and distress.

All of the argument with reference to plaintiff's mental capacity in the preceding argument is incorporated herein by reference. Plaintiff was of limited financial resources and testified as follows:

> Q Do you remember Millie coming in and then she was saying that Bonnie was going to steal all of your money?
>
> A Yes.
>
> Q And that Bonnie was going to steal your house, too?
>
> A Yes. Yes.
>
> Q And that was about the First of March, and Bonnie was going to steal everything you had?
>
> A That's right.

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Q That's right, you remember that. And then Bonnie told you -- or Millie told you that you'd better change the bank accounts into her name, isn't that right?

A Right, that's what Millie says.
(T. 30, Ln. 4-16)

This testimony is corroborated by defendant's own testimony given to discredit Bonnie Shiner:

A My grandmother is scared of Bonnie Shiner.

Q Do you know why?

A She talks her into doing anything that she wants her to do.

* * *

A Yes, while my mother, well, my grandmother, Trilba, was staying in Payson Hospital, she had my mother take her purse home over to her house in Spanish Fork and keep it because she knew that Bonnie was coming down that weekend to the hospital to see her and she didn't want to have anything stolen out of it.

* * *

Q Was there anyone in particular she was afraid of that would have access to her checking account?

A Bonnie.
(T. 90, Ln. 1-4; Ln. 7-12; Ln. 23-25)

And further by the testimony of Bonnie Shiner:

A . . .And my sister asked me what I had done with her money.

Q What was your response?

A I told her I moved it to Salt Lake City.

Q And what did she say then?

A Well, she said I stole it, I never should have done that, and I stole her money, I stole everything she had.
(T. 43, Ln. 21-27)

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As noted in the definition of duress, supra, it is not necessary to have the "bare knuckled" variety; it is sufficient if "improper external pressure" destroys the free will of the grantor. It is submitted that the threats of what Bonnie was going to do with her "belongings" was sufficient pressure on plaintiff in her physical and mental condition as to overcome her free will; and particularly if she felt that Millie was going to hold the property for her.

Defendant's attorney's cross-examination of Bonnie attempted to discredit her to no avail and plaintff's own evaluation of Bonnie is as follows:

> Q Does Bonnie ever steal anything from you?
>
> A No. She's the one that pays my bills. Never in her life.
>
> * * *
>
> Q Did you ever have any arrangement with reference to your bank accounts with Bonnie?
>
> A Well, Bonnie paid my bills, and she sees that I have enough money to get, to pay my rent and get along on.
>
> * * *
>
> Q In fact you counted on Millie on a lot of things?
>
> A You bet I did.
>
> Q Okay. So she helped you out a lot?
>
> A You are not kidding. So's Bonnie.
>
> Q They are good daughters, aren't they?
>
> A Both of them. I don't know what I'd have done without either one of them.
>
> Q Did you ever give Millie your purse and say, "Please take it home so someone won't get into it"?

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A No, I don't.
(T. 30, Ln. 28-30; 11, Ln. 26-29; 28, Ln. 19-28)

Millie's threats to plaintiff concerning Bonnie were not made in the presence of Mr. Harmer or Mrs. Luke. Neither of these parties, based on education and experience, and based on a specific interrogation of plaintiff regarding probable consequences of the deed, could render opinions bearing overwhelming probative value and the Court below appropriately disregarded these opinions or gave them little, if any, weight in making its decision.

Immediately following the above quoted finding of fact, the following additional finding of fact appears:

> Persons who stood in a fiduciary capacity to the Incompetent and who had a duty to tell her of the deed failed to do so.

Plaintiff agrees with the statement appearing in appellant's brief at page 16, "The only 'person' to whom the finding could refer is Millie Colby."

The case of Johnson v. Johnson, 9 Utah 2d 40, 337 P.2d 420 (1959) refers to and treats duress and undue influence as one and the same where a confidential relationship exists. The Johnson case, supra, was urged on the Court below as the law of the case and the result reached by the said Court is consistent with the Johnson case on facts that are strikingly similar.

The finding with reference to the fiduciary duty of Millie Colby is tantamount to a finding that a confidential relationship existed and there is ample evidence in support of the same in addition to the mother-daughter relationship: Millie had plaintiff give her a power of attorney on February 23, 1978; had all of the bank accounts changed by deleting Bonnie as a co-tenant on

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or about March 1, 1978; took the warranty deed in question to plaintiff's home on March 3, 1978; took an affidavit from plaintiff on March 17, 1978; and had a will or codicil prepared and executed by plaintiff during plaintiff's hospitalization.

Once again, the testimony of plaintiff is helpful on the issue of the confidential relationship:

> Q In fact you counted on Millie on a lot of things?
>
> A You bet I did.
>
> Q Okay. So she helped you out a lot?
>
> A You are not kidding. So's Bonnie.
>
> Q They are good daughters, aren't they?
>
> A Both of them. I don't know what I'd have done without either of them.
> (T. 28, Ln. 19-25)

Defendant also knew the relationship between her mother Millie and plaintiff:

> Q Okay. To your own knowledge, what was the relationship between your mother and your grandmother, Trilba?
>
> A They had a very good mother-daughter relationship.
>
> Q Okay.
>
> A My mother did a lot of things for my grandmother. She always thought a lot of her.
>
> Q Okay. And in fact do you have personal knowledge that while your mother was in the hospital and prior to that time that -- or, excuse me, -- your grandmother was in the hospital that your mother actually handled some financial affairs for your grandmother?
>
> A Yes, I do.
>
> Q Do you have personal knowledge as to whether or not your mother's name was on some of your grandmother's accounts?

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A Yes, I do.
(T. 88, Ln. 22-30; 89, Ln. 1-8)

The test of the existence of a confidential relationship sufficient to raise a presumption of unfairness as to a conveyance is set forth in the case of Bradbury v. Rasmussen, 16 Utah 2d 378, 410 P. 2d 17 (1965). The evidence is abundant to show that plaintiff reposed great confidence in Millie on March 3, 1978, and was in a position of inequality due to the mental and physical factors at that time; and that on the aforementioned date, Millie was clearly in a position of superiority. Also, the confidence reposed in Millie carried with it an express legal duty and an abiding moral duty in general and specifically with respect to plaintiff's home.

Defendant claims that the deed represents a gift by plaintiff of the home in Nephi to Millie and the deed from Millie to her is also a gift. Applying the law of Johnson v. Johnson, supra, to the case at bar, a presumption of the unfairness of the said gift arises which in and of itself will support a finding of duress and/or undue influence unless the presumption is overcome by a preponderance of the evidence that the transaction was fair.

At the time of making the alleged gift on March 3, 1978, it represented her greatest asset and the place to which she was going to return when and if she was discharged from the hospital; if she lived in the home she would have adequate funds, social security and veterans administration, with which to maintain herself; she had six children and had expressed the desire to leave her "belongings" to these children in the 1965 will and the February 23, 1978 Power of Attorney; there was nothing in the records to impell plaintiff to make a gift to Millie to the exclusion of the other

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children and indeed to the exclusion of herself as duly noted by the Court in a previous finding of fact.

Thus, the Court's findings with reference to duress and/or undue influence and the fiduciary relationship of Millie to plaintiff and in fact to the other heirs are supported by clear and convincing evidence or the unrebutted presumption of unfairness.

D. Gift or Trust

Defendant's testimony as to the gift made by plaintiff to Millie and then from Millie to defendant was clear and unequivocal.

> Q Now, was this, the signing of the deed by your mother to you, was there any consideration for that? By that I mean, was it a gift or was it some type of bargain that you had struck between you?
>
> A My mother wanted me to have the house.
>
> Q Now, to your knowledge is that the same reason that Trilba gave the house to Millie?
>
> A Yes.
>
> * * *
>
> Q In other words, that deed from Trilba to your mother, that was a gift?
>
> A Yes.
>
> Q That was a gift. This Plaintiff's Exhibit 3 is a gift?
>
> A Yes.
>
> * * *
>
> Q Well, when, when was that that she told you that she had received it from? When did you first hear that, that she had received this house from Trilba as a gift?
>
> A Shortly after the deed was signed from Trilba to my mother.
>
> Q In other words, back in 1978, back in right [illegible] that hospitalization, at the

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time that it was signed, that's when you were told that it was a gift from Trilbe (sic) to Millie?

A Yes.

* * *

Q In other words, a week after June 30th of 1980, your mother Millie called you in Denver and said, "You have a house," that she had executed a deed and recorded it, is that correct?

A No. She called me after the 10th of July. The deed was not recorded until the 10th of July.

Q Oh, it was dated then - -

A It was dated June 30th, but it was not recorded down here in the courthouse until the 10th of July. She called me approximately about a week after that and told me that.

Q And that this was your house?

A Yes.
(T. 91, Ln. 6-13; 91, Ln. 18-23; 93, Ln. 17-26; 92, Ln. 30; 93, Ln. 1-12)

The Court below made short work of this claim by defendant and found that plaintiff did not ". . .intend to make a gift of the property to Millie Colby. . .". In making this ruling, the Court relied heavily on the testimony of Miriam Winn, a daughter of Millie Colby and a half-sister to defendant, concerning the intent of plaintiff in making the warranty deed, Exhibit 3. Mrs. Winn testified as follows:

A She -- I knew that it had been turned over, that it had been turned over to Momma while Grandma was still in the hospital. By phone. I don't remember whether I called Momma or she called me. But a number of times we talked about it. The idea behind the whole thing that Momma could see was that Grandma kept telling her Bonnie had stolen her money, she wouldn't have a home to live in, and she wanted Momma to put it in her name, that she was afraid that she wouldn't have it when she was ready for it. So Momma done this. At that time they tried to straighten it out between the two of them, and resulted in a lot of argument.

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* * *

Q Did you ever have any conversations with Bonnie concerning this house?

A Yes, uh-huh.

Q When did they take place?

A Well, with Grandma, and we had talked about what we were going to do. The house originally was put in Momma's name to be held for Grandma. (T. 68, Ln. 20-30; 71, Ln. 19-25)

On November 1, 1979, a hearing was held in Third District Court wherein Walker Bank & Trust Company, by stipulation between all of the parties involved, was appointed Conservator of plaintiff's estate. A conversation took place between Millie and Mrs. Winn in the hallway before the hearing concerning plaintiff's Exhibit 8, a quit-claim deed from Millie to First Security Bank on plaintiff's home:

A We talked outside before we were waiting for the other hearing to be over. And at that time I said to my mother, "What are we going to do about the house? What do you want to do about it?" And Momma said, "As soon as the bank has this in hand, I will sign it back."

* * *

A Like I tell you, she was very ill. She was concerned she wouldn't be able to do anything with the house and that it would be turned over to Bonnie without it being turned to Grandma. So a couple of times she tried to get me to go to the courthouse with her and have it put in my name.

* * *

A Yes. I told her I'd rather not get involved in it. I thought it was between her, her brothers and sisters, and Grandma. And so then I wouldn't go and have it put in my name.
(T. 67, Ln. 29, 30; 68, Ln. 1-3; 69, Ln. 23-29; 70, Ln. 13-16)

After Millie's death, Mrs. Winn had a conversation with defendant concerning plaintiff's home:

A On the phone. I called Sharon to tell her that ... rs were coming down and they need-

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ed the papers from the bedroom, where they were, and that they would need them to get the house straightened around for Grandma. And she said, "Okay." About twenty minutes later she called me back and said she thought she should be the one to tell me that Momma had turned the house over to her, and what should she do. I said, "Sharon, you should turn the house back to Grandma." She said, "No, the house was signed over to me and I'm keeping it."
(T. 70, Ln. 30; 71, Ln. 1-9)

This conversation was corroborated by defendant:

A And so I called Mairiam (sic) back and told her that I wanted to be the one to tell her that mother had given me the house.

Q Okay.

A She told me that she didn't feel like the house was mother's to be giving away.
(T. 87, Ln. 23-28)

This testimony, taken with all of the other evidence concerning the transfer from plaintiff to Millie, would justify a finding of an express or implied trust, or at the very least, a constructive trust. Hawkins v. Perry, ___ Utah ______, 253 P. 2d 372 (1935).

The testimony of plaintiff on recross-examination, relied upon heavily by defendant throughout her brief:

Q That's right. And isn't it true that you gave her the house and that you wanted her to have the house, but now that she's dead you want it back; is that right?

A That's correct;
(T. 33, Ln. 13-16)

is consistent with the idea that Millie held the property for plaintiff to be returned at some future time.

If the deed from plaintiff to Millie fails for any reason, the deed from Millie to defendant also fails as there is nothing to convey. Blankenship v. Christensen, supra.

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E. Consideration.

Defendant testified as follows concerning the deeds to plaintiff's home:

> Q Now, it was a gift, as far as you were concerned, you didn't pay any money for this house?
>
> A No, I did not.
>
> Q What about your mom, Millie, did she pay any money? Did she ever tell you anything about that?
>
> A No, I never heard her mention anything about it.
> (T. 95, Ln. 1-6)

Defendant claimed at the pre-trial hearing that the consideration for both deeds was as follows:

> Mr. Anderson: Yes, there was consideration. We allege that there was consideration on the part of Mrs. Colby to Mrs. Jones, and then on the part of Mrs. Kiefer to Mrs. Colby.
>
> * * *
>
> Mr. Anderson: She was her daughter, and she was taking care of her. It was much the same as the original consideration. They were taking care of their mothers, and in consideration of that.
> (Pretrial T. 10, Ln. 25-28; 11, Ln. 3-6)

The case of Jordan v. Jordan, Utah, 445 P. 2d 765 (1968) relied on by defendant, refers to love, affection and ensuing actions as consideration for the deed in that case. However, the grantee in that case had promised to care for the grantor during his declining years which was the actual consideration rather than love and affection.

There was no evidence adduced at the trial to show any intent on Millie's part to care for plaintiff in consideration for the deed. In fact, at the time of the transfer, Millie was

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residing in a rented apartment in Spanish Fork and did not after the conveyance ever live in plaintiff's home in Nephi. Love and affection and caring for plaintiff was not even mentioned in defendant's closing argument.

POINT II

THE COURT BELOW PROPERLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL.

Defendant's Motion for a new trial is based on Rule 59(a)(3) of the URCP relating to accident and surprise. (R. 27) Defendant's claim in her brief is that the ". . .establishment of a trust or other fiduciary relationship . . ." was not established as an issue at the pre-trial conference. During the pre-trial hearing, the following occurred:

> The Court: Al right, what are they?
>
> Mr. Ables: The next one is undue influence. Fourth one is no consideration. And fifthly, that conveyance was made to Millie Colby for her to hold until either Trilba Jones got well; or if she was deceased, she was supposed to administer it under the will.
>
> Mr. Anderson: I don't think that was pled. That's a new one on me.
>
> The Court: Don't you have some problems with the parol evidence rule on that?
>
> Mr. Ables: Well, of course we have, Mrs. Jones could go ahead and testify as to that.
>
> The Court: All right, we'll leave it as an issue. (Pretrial T. 8, Ln. 26-30; 9, 1-9)

Then, from this erroneous premise, defendant argues that because Miriam Winn was not mentioned at the pre-trial as a potential witness and she testified that Millie was holding plaintiff's home in order to protect it from Bonnie, that this constitutes

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". . .surprise in the raising of a new issue."

The objection raised by defendant on T. 69, 70 was that the issue had never been raised before which is not true. No objection was made to Mrs. Winn as a witness on the basis of accident or surprise or on any other basis.

The case of Jensen v. Thomas, Utah, 570 P. 2d 695 (1977) is in point and holds that even assuming accident or surprise, it must be such that ". . .ordinary prudence could not have guarded against."

Defendant claims that Clint Colby could have rebutted Mrs. Winn's testimony. It is atonishing that Clint Colby, Millie's husband, defendant's father and Mrs. Winn's step-father, who was present at the time Exhibit 3 was executed was not called by defendant as a witness in the first place. Not only did Mr. Colby not testify, he was not even in Court at the time of the trial.

Defendant testified as to the conversation she had with Mrs. Winn concerning the purpose of the deed and it could not have been a surprise to defendant when Mrs. Winn appeared in Court. Ordinary prudence suggests having Mr. Colby available just in case; assuming his version of the facts was the same as defendant's.

POINT III

THE EVIDENCE CONCERNING THE FIDUCIARY RELATIONSHIP WAS PROPERLY RECEIVED.

Defendant has complained that before the evidence of a fiduciary relationship could be received, it should have been specifically pleaded in plaintiff's complaint. The issue was

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raised at the pre-trial hearing and that is tantamount to an amendment of plaintiff's complaint. The purpose of the pleadings is to give notice to the opposing party and the notice was given at the time of the pre-trial hearing. Plaintiff's complaint could have been amended at the pre-trial hearing and could have been amended after the trial to conform to the evidence. Rule 15, URCP.

Also, the finding could have been based on the Power of Attorney, Exhibit 9, which was introduced into evidence by defendant.

CONCLUSION

The evidence supports the findings of the Court below in whatever quantum necessary and the judgment of the Court setting aside the deeds from plaintiff to Millie and from Millie to defendant should be affirmed; and if necessary, new findings and conclusions should be made by this Court affirming the result reached by the Court below. To reverse the judgment for plaintiff and enter one in favor of the defendant would be to sustain the deed from plaintiff to Millie as a gift which, based on this record and the realities and verities of life, would be incredible and work a manifest injustice on plaintiff.

DATED this _____ day of September, 1982.

Respectfully submitted,

Wendell P. Ables
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Salt Lake City, Utah 84105

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I mailed two true and correct copies of the foregoing, postage pre-paid, on the _____ day of September, 1982, and further certify that on the _____ day of September, 1982, I hand delivered two true and correct copies of the foregoing to the following:

Robert J. Schumacher
81 East Center Street
P. O. Box 1667
Provo, Utah 84603
(Hand delivery to the Court hearing on the above matter)

____

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