

1959

# Nathan G. Chugg v. Dale Chugg and La Beta Chugg : Brief of Respondents

Utah Supreme Court

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George B. Handy; Dale T. Browning; Attorneys for Respondent;

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**IN THE SUPREME COURT**

**of the** **FILED**  
**STATE OF UTAH** SEP 16 1959

Clerk, Supreme Court, Utah

**RESPONDENTS' BRIEF**

No. 8954

**NATHAN G. CHUGG**, Incompetent, by  
his Guardian, **ORLEY J. CHUGG**,

*Plaintiff*

**vs.**

**DALE J. CHUGG**, and  
**LA RETA CHUGG**,

*Defendants.*

**George B. Handy**

**Dale T. Browning**

*Attorneys for Respondent*

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RESPONDENTS' BRIEF

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NATHAN G. CHUGG, Incompetent, by  
his Guardian, ORLEY J. CHUGG,

*Plaintiff*

vs.

DALE J. CHUGG, and  
LA RETA CHUGG,

*Defendants.*

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## ADMISSION OF FACTS

The following facts as related by appellants are admitted by respondents:

A. Nathan G. Chugg was upwards of 63 years of age at the time of the transactions. He was never married.

B. He operated a dairy farm in Farr West, Weber County, Utah. The land was comprised of 72.90 acres more or less in which his mother owned a life estate in part of the real property; that in addition thereto, there was livestock owned by Nathan G. Chugg and other items of personal property.

C. That on July 3, 1956, Nathan G. Chugg made his Last Will and Testament and that at that time was mentally competent.

D. That the respondent, Dale J. Chugg, is a second cousin of Nathan G. Chugg.

E. That the cause was tried before Judge Charles G. Cowley, sitting without a jury in the District Court of Weber County, Utah. The issues were joined and tried as to the mental competency of Nathan G. Chugg to make a valid Option and Deeds and the practice of fraud, undue influence and trickery upon him. The Court found for the respondent on all issues.

Respondents cannot further agree with the statement of facts as set forth in appellants' Brief for the reason that the Statement of Facts as given by appellants is not in accordance with the actual facts and testimony in the case and therefore, the respondents herewith make a Statement of Facts as they find them.

### STATEMENT OF FACTS

Nathan G. Chugg, who is referred to in the transcript as Nathan and Nate, is a bachelor of approximately 63 years of age, who has lived in Farr West, Weber County, Utah, all of his life and operated a dairy farm and lived there with his mother, being her sole support, and had been for more than 40 years, (Tr. 397) and his sole interest in life seemed to be his farm, his herd of registered dairy cattle and hunting and fishing. (Tr. 602-603 & 679.)

He was, by nature, quiet, (Tr. 393,302) slow to respond, (Tr. 240,459) slow in expressing himself, (Tr. 240) not very talkative (Tr. 262) and considered to be a good businessman, (Tr. 24-25).

Nathan Chugg, for some years prior to the summer of 1956 had been desirous of having someone come onto the farm and help him with the burdens of farm work and had stated that if he could find such a person, he would give him the farm when he was through with it. (*Tr.* 240, 484, 603, 679).

In the summer of 1956 Nathan Chugg approached the defendant, Dale Chugg, about helping Nathan Chugg on his farm and with his farm work.

Dale Chugg is a young man in his twenties, who is the son of a cousin of Nathan Chugg, and who, for 21 years had lived about a half mile down the road from Nathan Chugg's farm and during the boyhood and young manhood of Dale Chugg, Dale was a constant visitor of Nathan Chugg's farm, helped Nathan in his farm work, helped to prepare dairy cattle for shows and County Fairs and went hunting and fishing with Nathan. "Well, they would go duck hunting, and they would go through the fields all the time with their dogs." (*Tr.* 263-264, 293-294-295).

On four occasions in August, 1956, Nathan Chugg approached Dale Chugg with the proposition that if Dale would move into the farm home with Nathan when Nathan could make the home available to Dale, care for Nathan and his cattle and relieve Nathan of much of the burden of the farm and the farm work, that when Nathan was done with the farm, he would give the farm and livestock to Dale. As Dale Chugg was working at that time for his father, John Chugg, Nathan also approached John Chugg and related the proposition that Nathan had made to Dale. (*Tr.* 268-269-270-271). John Chugg asked Na-

than if he didn't want to discuss the matter with his older brother, Orley J. Chugg, and the family first, and was informed "I don't owe Orley or the family one cent". (Tr. 269). John Chugg asked Nathan if he would put the agreement in writing to protect Dale and Nathan replied that he would do anything that was agreeable, that he would change his Will or do anything that was necessary to protect Dale. (Tr. 272,398-399) At this period of time, which was just a month after he had made his Will, there is no question but that Nathan Chugg was competent and even plaintiff's witnesses admit that this is so. (Tr. 32,60, 65,99,100,118,120,149,150,231)

The agreement that was made in the month of August, 1956, with Dale Chugg, was that when Nathan was able to make arrangements for Dale to live on the farm, Nathan would live with them at the farm and they would take care of Nathan as long as Nathan was there; that Nathan would take the income until he was 65 years of age and upon Nathan Chugg reaching the age of 65 he would be eligible for Social Security and thereafter all of the income would go to Dale. However, Nathan was to have the right to stay on the place as long as he lived. Because Dale could not move onto the home at that time, due to the fact that Nathan was caring for his 91 year old mother at the home and had done so for over 40 years, Dale was to receive the sum of \$175.00 per month which was to take care of his necessary expenses with his family as Dale was married and had a child. (Tr. 396-397,268) From the \$175.00 per month in cash that Dale was to receive as wages, Dale was to pay the grocery bills for Nathan and for Dale's family and other household expenses. (Tr. 398,416)

Both parties agreed to this contract and Dale started work under this arrangement in August, 1956, with the understanding that the agreement would be reduced to writing in order to protect Dale. (Tr. 398,268-269) This agreement was not immediately reduced to writing because Nathan Chugg said that he would have it done as soon as he went to his accountant for his income tax matters; that he thought he would be able to save some money by having his accountant do it. (Tr. 404)

Dale Chugg, at the time he commenced performing under the oral agreement, took two of his own cows to Nathan Chugg's farm together with a flock of chickens. (Tr. 441-442-443) All of the milk from Dale's cows was co-mingled with that of Nathan's cows for which Dale received no compensation, but which increased Nathan's receipts on a Grade "A" basis approximately \$300.00 to \$400.00 per month. (Tr. 443)

Under this agreement, Dale Chugg went upon the farm and did everything he had agreed to do under the proposal submitted to him by Nathan Chugg and agreed upon by himself as heretofore set out.

Dale Chugg and family did not move into the farm home with Nathan Chugg immediately because Nathan's 91 year old mother was living with Nathan at that time and Nathan said that he would like to have Dale move in with him as soon as he could make the arrangements for Dale. Nathan was going to talk to the family and try to get one of them to take care of his mother, because he said that he had taken care of her for 40 years and he felt like it was their turn to care for her for awhile. (Tr. 397,265) Zenia Chugg, Nathan's mother, was not nudged



out of the home as has been suggested by appellants.

On January 22, 1957, after Zenia Chugg, Nathan's mother, had moved from the home to be later placed in a rest home on State Welfare by Nathan's seven brothers and sisters, (Tr. 43-44,59) Dale, his wife, LaReta and infant daughter moved into the old Chugg farm home to reside with Nathan (Tr. 404). On January 29, 1957, as Nathan Chugg was not feeling well, Dale Chugg drove him into Ogden to see Nathan's doctor, Dr. Irvan Moncrief. Dr. Moncrief suggested that Nathan be taken to the hospital for some tests to be made and asked Nathan if everything was in order so that he could go to the hospital for a few days and Nathan answered, "Well, all but my income tax, I have got to get those taken care of." (Tr. 405) Nathan returned to his home in Farr West, gathered his records together and returned to his accountant, Mr. H. E. Erickson, (Tr. 405) The accountant, Mr. H. E. Erickson, is referred to in the transcript as Helm, Helmer, Hilmer and Elmer, and had known Nathan since boyhood, (Tr. 635) and had prepared Nathan's tax returns since 1947. (Tr. 636) Nathan Chugg went over his books and records with Mr. H. E. Erickson and provided Mr. Erickson with information so that Mr. Erickson could prepare the tax return and then Nathan instructed Mr. Erickson to make a Deed or other papers necessary to transfer Nathan's property—whatever farm property he had, buildings, cows and things of that sort, from Nathan to Dale. (Tr.647,637,628,629,630,652) Mr. Erickson's son, Eldred, was present at this time. Mr. Erickson informed Nathan that this type of work was out of Mr. Erickson's line and that Nathan would have to see an at-

torney about this. (Tr.406,628) Nathan instructed Mr. Erickson to obtain an attorney to take care of this matter and asked Mr. Erickson to instruct the attorney to prepare the necessary papers to transfer Nathan's property to Dale. (Tr. 628-629-630) Mr. Erickson said that he would have it taken care of and would bring the Deed or other papers to the hospital for Nathan to sign and Nathan said, "That will be okay." (Tr. 406) When Nathan was asked by Mr. Erickson about the terms or price for Nathan's property that was to be conveyed to Dale, Nathan replied, "Just anything to make it legal." (Tr. 406) In the opinions of Mr. H. E. Erickson and Eldred Erickson, Nathan Chugg was mentally competent at that time. (Tr.637, 629)

Dale Chugg took Nathan Chugg to the St. Benedict's Hospital and returned to Mr. Erickson's office and the son of Mr. H. E. Erickson, whose name is Eldred, but who is referred to in the transcript by the reporter as Elgreed and Delbert, took Dale to the office of an attorney, George B. Handy, whose office was in the same building as that of the accountants. Mr. Eldred Erickson instructed attorney Handy that Nathan Chugg wanted Mr. Handy to make a deed or some instrument to transfer the property from Nathan to Dale Chugg. (Tr. 628-629-630,652)

Although Nathan Chugg had requested Mr. H. E. Erickson to prepare a deed transferring the farm and other property from Nathan to Dale, and had instructed Mr. Erickson to instruct the attorney to prepare such a deed, attorney Handy decided that a ten (10) year Option to purchase would be sufficient protection for Dale Chugg and in keeping with the intentions of Nathan Chugg and

would be fair to both parties. (Tr. 652-653)

On January 29, 1957, Mr. Handy prepared an Option for Dale to purchase the four (4) parcels of land referred to in appellants' Brief, reserving a life estate in Zenia V. Chugg to the property that she had a life estate in and "including all water and water rights, farm implements and livestock now upon said premises and appurtenant thereto." Dale took the Option to the St. Benedict's Hospital on the next day and read it to Nathan Chugg at which time Nathan said that it was satisfactory and that it would protect Dale. (Tr. 407) On January 31st, 1959, in the afternoon of that day, (Tr. 536) attorney Handy together with his brother, J. Donald Handy, met Dale Chugg by appointment at the St. Benedict's Hospital where attorney Handy was introduced to Nathan Chugg and attorney Handy read the Option to Nathan Chugg in its entirety and asked Nathan, "Do you understand this?" Nathan replied that he did and attorney Handy then said, "I want you to understand that if you sign this that Dale Chugg has, within a 10 years period, to exercise his Option and require you to give him a Deed and he would be legal owner as mentioned in this Option." Nathan replied, "That's what I want." (Tr. 408,656) Attorney Handy then said, "I've left a blank space to put in some sum, what sum do you want put in?" Nathan Chugg said he didn't want anything, he wanted to give Dale the farm and attorney Handy said, "Well, I've left a blank space, we can put something in—\$1.00, \$20.00, \$1,000.00, \$10,000.00." Nathan Chugg asked Dale Chugg, "Would \$1,000.00 be all right?" and Dale Chugg said, "Yes." Attorney Handy then wrote in the figures "\$1,000.00" and presented the Option

to Nathan Chugg for signing which he did. (Defendants' Exhibit Six) (Tr.656-657) J. Donald Handy then signed as a witness and the date, the 31st of January, 1957, was filled in the space provided and the instrument was notarized by attorney Handy. Dale Chugg then gave Nathan Chugg \$10.00 in currency as the Option provided, "\$1.00, the receipt of which is hereby acknowledged." (Tr.661, 557,409) At this time, in the opinion of Dale Chugg, Attorney George B. Handy and J. Donald Handy, Nathan G. Chugg was mentally competent. (Tr. 657-658,494,410) This Option was recorded in the Weber County Recorder's Office.

On February 7th, 1957, a period of seven (7) days after the Option was signed, Nathan Chugg underwent an operation on his bladder and a tube was inserted into the bladder for drainage of urine. (Tr. 411) This operation was performed only after his personal physician, Dr. Irven Moncrief, had ascertained that Nathan was capable of giving his consent to said operation and had in fact given such consent and was mentally competent. (Tr. 454-455)

Nathan Chugg was released from St. Benedict's Hospital on February 24th, 1957, and was returned to his farm in Farr West, Weber County, Utah, and remained there until the middle of May, 1957.

During this time he carried on his own business, (Tr. 439) wrote his own checks, paid his own accounts (Tr. 39) (Defendant's Exhibit One) Balanced his own checking account (Tr.438) and at Plain City Dairy Days which was May 15th, 1957, Nathan met and talked with several of his friends who attest to his being mentally competent at that time. (Tr. 243-244,485-486-487,338,507,625,626)

In the middle of May, 1957, Mr. A. W. Cheney, a real estate agent, was calling from door to door getting listings on farms and he called at Nathan Chugg's farm to see about a listing on that farm. At that time, Nathan declined to list the farm and told Mr. Cheney that he didn't want to list the place because he had signed an Option with Dale Chugg and that if Dale would take care of the place and him and take care of the livestock that Nathan was going to let Dale have it for the price of \$1,000.00. Nathan said this sum would take care of his burial expenses. (Tr. 296-297) There was other conversation in which Nathan Chugg discussed his cattle, their pedigrees, and the mutual relatives of Mr. Cheney and Mr. Chugg. In Mr. Cheney's opinion, Nathan Chugg was mentally competent on this occasion. (Tr. 398)

During this time that Nathan Chugg was at the old farm home living with Dale Chugg, Dale Chugg besides taking care of all of the milking of the cows and other farm work, took care of the personal needs of Nathan Chugg, including caring for the urine bag that Nathan had to carry with him, cleaning the wound in the abdomen and placing dressings upon said wound and bathing Nathan Chugg.

The later part of May, 1957, Nathan Chugg was returned to the St. Benedict's Hospital in Ogden for the closure of the opening in his abdomen and the removal of the tube in the bladder. He was released from St. Benedict's Hospital on June 23, 1957. (See Hospital Record).

On June 24th, 1957, attorney Handy, was requested by Dale Chugg to come to the Chugg farm and was informed that Nathan was going to go to the Veterans'

Hospital in Salt Lake City and wanted to execute a deed to the property.

Upon arriving at the farm attorney Handy asked Nathan if he wanted to execute a Deed giving Dale the property. Nathan said that he did. (Tr. 659) This Deed (defendants' Exhibit Four) was executed in the presence of Dale Chugg, LaReta Chugg and George B. Handy. Nathan then executed the Bill of Sale, (defendants' Exhibit Five) to the cows and other personal property upon the farm and belonging to Nathan Chugg. This Bill of Sale was executed in the presence of the same witnesses. (Tr. 420-421, 660-661) The Deed and Bill of Sale were delivered to Dale Chugg by Nathan Chugg at which time Dale Chugg gave Nathan consideration as recited in the instruments. (Tr. 660-661) On this day, June 24, 1957, Nathan Chugg was mentally competent. (Tr. 662-663)

The Deed and Bill of Sale referred to above which was executed on June 24, 1957, each bore a date February ....., 1957. This Deed and this Bill of Sale had been prepared by attorney Handy in February, 1957, because Nathan Chugg had, in the beginning, requested that a Deed be prepared and Mr. Handy had prepared one to have in readiness in the event that after Nathan Chugg returned from the hospital, Nathan Chugg still wanted to give Dale Chugg a Deed to Nathan Chugg's property. (Tr. 658-659)

In the event that there was litigation in the future instigated by the brothers and sisters of Nathan Chugg, Mr. Handy informed Dale Chugg that it would be better if another Deed were procured because the Deed executed June 24, 1957, bore the date of February ....., 1957, which Mr. Handy did not want to erase or scratch out in order

to insert the date of execution and also it was desirable to have other witnesses to the execution of the Deed other than attorney Handy, Dale and LaReta Chugg. (Tr.663)

On July 17, 1957, attorney Handy, Dale and LaReta Chugg drove from Ogden, to Salt Lake City, Utah, to the Veterans' Hospital where Nathan Chugg was a patient. This was the Veterans' Hospital on Twelfth Avenue. Attorney Handy, and Dale and LaReta Chugg arrived at this hospital at approximately 2:30 or 3:00 o'clock p.m., on that day. (Tr. 664) Dale and LaReta Chugg went into Nathan Chugg's room and Mr. Handy went into the office directly across the hall from Nathan's room to ascertain what the health of Nathan was at that time and to see if some of the hospital personnel who were acquainted with Nathan would act as witnesses to the signing of the Deed. Mr. Handy was informed that it was against hospital policy for the personnel to act as witnesses to any legal instruments executed in the hospital. (Tr. 665) Attorney Handy discussed Nathan Chugg's condition with a Dr. Neely who was present and was informed by Dr. Neely that the Dr. Wilson who was in charge of Nathan Chugg was absent and Dr. Neely was not acquainted with Nathan Chugg well enough to give an opinion as to his competency to execute a legal instrument. Dr. Neely declined to act as a witness informing Mr. Handy that it was against hospital policy for personnel of the hospital to take any stand to indicate whether a person was competent or incompetent and to act as witnesses. (Tr. 665-666) Attorney Handy then went into Nathan Chugg's room where Dale Chugg informed Mr. Handy that he had explained to Nathan their purpose in being there. Attor-

ney Handy, after a short conversation with Nathan Chugg, informed Nathan Chugg that it would be better if another Deed be executed to his property if it was all right with Nathan, and upon being asked if he wanted to sign the Deed, Nathan replied that he did. (Tr. 667,424, 425,426) Nathan Chugg then signed the Deed in the presence of Attorney Handy, Dale and LaReta Chugg. This deed, (defendants' Exhibit Three) was recorded at the Weber County Recorder's Office in Ogden, Utah. In the opinion of attorney, George B. Handy, Dale Chugg and LaReta Chugg, Nathan Chugg was mentally competent at the time the Deed was signed. (Tr.667,357,428)

After the above Deed, executed on July 17, 1957, was signed by Nathan Chugg, Mr. Theron Gregg, a hospital aide with two and one-half years psychiatric study, came into Nathan Chugg's room. Mr. Theron Gregg was informed by attorney Handy that Nathan had signed a Deed and was asked if Mr. Gregg thought Nathan Chugg was mentally competent to know what he was doing at that time and that Mr. Gregg informed Mr. Handy that in Mr. Gregg's opinion, Nathan Chugg was mentally competent at that time. (Tr.668)

At that time, Dale Chugg gave Nathan Chugg, \$1.00, the consideration stated in the Deed and also a check for \$1,000.00 (defendant's Exhibit Nine) which was the price stated in the Option (defendant's Exhibit Six) and Nathan Chugg signed a receipt for the \$1,000.00 (defendants' Exhibit Eight) Nathan Chugg endorsed the check and returned it to Dale Chugg with instructions to deposit the sum in a savings account for Nathan Chugg (defendants' Exhibit Seven) (Tr. 427)



After brothers and sisters of Nathan Chugg found that the Option had been recorded, Orley J. Chugg, was appointed Guardian of Nathan Chugg because he was ill not because he was mentally incompetent. (Tr. 720)

On August 1, 1957, Dale Chugg began to receive the income from the farm. From August 1, 1957, to January 1, 1958, Dale Chugg received, as such income the total sum of \$3,790.37. (Tr.433) and expended a total sum of excess of \$6,368.64. (Tr. 434-435) Dale even paid the Doctors and hospital expenses incurred by Nathan. The difference between the amount taken in as income and the amount expended was taken from the life savings of Dale Chugg, which were used up in their entirety. (Tr. 437)

Nathan Chugg is at the present time in the Veteran's Hospital in Salt Lake City, Utah, and in the event he is able to return to his farm in Farr West, Dale Chugg and his wife, LaReta, are willing to take care of him as they have heretofore agreed. (Tr. 366,414)

Suit was filed in this matter in October, 1957, by Orley J. Chugg, as Guardian of the estate of Nathan G. Chugg on the grounds that the Option dated January 31st, 1957, and the Deed dated July 17th, 1957, were obtained by fraud and undue influence and at a time when Nathan G. Chugg was mentally incompetent.

## STATEMENT OF LEGAL POINTS

1. The respondents rely upon the agreement made between Nathan Chugg and Dale Chugg in August, 1958, and the instruments that resulted therefrom, to-wit:

(1) The Option bearing date of January 31st, 1957, and acknowledged before George B. Handy. (2) The Warranty Deed bearing date of February, 1957, but signed and executed June 24, 1957, and acknowledged before George B. Handy. (3) The Bill of Sale dated June 24, 1957. (4) The Warranty Deed bearing date of July 17, 1957.

Respondents position is that the oral agreement and each of the instruments were made when Nathan Chugg was legally competent and not acting under fraud or undue influence.

#### QUESTION OF FRAUD OR UNDUE INFLUENCE

Nathan Chugg had expressed himself many times over the last 9 or 10 years that he would like to get a young fellow on the place who would take care of him, the farm and the herd and that the young fellow would get the place. Nathan had expressed this desire to his friend and neighbor, James A. Davis, and they had talked about it several times .(Tr. 240-241)

Nathan Chugg had talked this over with another of respondents' witnesses, Edgar S. Smoot, a dairy operator from Centerville, who was the Vice President of the National Association of the Jersey Dairyman's Association, and who had known Nate for many years and had shown cattle many times with Nate. (Tr. 481-482) Nate had expressed a desire to get someone on there who would take care of the herd and continue it and Edgar Smoot had advised Nathan that in order to get such a person Nathan would have to give somebody an interest in the herd and the place. (Tr. 483-484) Nathan said that Dale was the only one with any interest in the place and that Dale was

the only one who knew his herd and satisfied him in the taking care of it. (Tr. 483-484) This was in June, 1956 (Tr. 483)

Edgar Smoot saw Nathan in the spring of 1957 at Plain City Dairy Days and Nathan said, "It looks like the herd will continue on and they will be showing from now on. I have got my deal fixed up pretty well the way we talked about it," and stated that Dale had the interest in the place. (Tr 484-485)

Respondents' witness, Angus C. Richardson, who runs a feed, grain and seed store in Ogden, Utah, and sells to all of the Chuggs, and who had grown up with Nate, testified that Nate said the cows were all that he had and that Nathan was as interested in his cows as other people were in their children. (Tr. 603-603) Nathan stated to him that if Dale would stay with him and take care of the place, Dale could have the place. (Tr. 603)

Respondents' witness, Nolan Harris, stated that back in 1955, Nathan Chugg had said he would like time to enjoy life and if he could find somebody who would thoroughly satisfy him, he would consider arrangements whereby he might even leave the place to that party. (Tr. 679-680)

Respondents' witness, H. E. Erickson, who had grown up with Nathan and had taken care of his accounts for many years, said that a number of times Nathan had mentioned that he would give the young fellow a good proposition who would come and help him. (Tr. 636)

It was not Dale Chugg who contacted Nathan Chugg in regards to the proposition, rather it was Nathan Chugg

who presented the proposition: Nathan came a number of days consecutively to the home of John Chugg and his son, Dale Chugg, to see if he could not convince Dale Chugg to come and live with him on the farm and that if Dale would take care of the herd and make a home for Nathan at the farm, Dale would get the place. This was in August, 1956. (*Tr.* 266-267-268-269-270-271) Nathan stated that he would put this in writing. (*Tr.* 272) (Also for Dale Chugg's testimony, see *Tr.* 396-397-398-399-400). It was Nathan who suggested that he would have a Will or Deed fixed up and that he would want to have his accountant do it when he went to have his income tax return prepared at the end of the year, because he said his accountant had an attorney and it would be cheaper that way. (*Tr.* 403-404)

It was Nathan Chugg who, with Dale Chugg, went to Ericksons' Accounting Office, (*Tr.* 405) and it was Nathan Chugg who gave the instructions to the accountants to have a Deed or Instrument fixed up to protect Dale so Dale would get the farm. (Dale's testimony *Tr.* 405-406-407). Both of the accountants testified to this fact, (Eldred, *Tr.* 627-628-629 and H. E. Erickson, *Tr.* 637) and it was under Nathan Chugg's instruction that the accountant told attorney George B. Handy to fix up an instrument to have the property transferred to Dale. (*Tr.* 630-632-633-634 & 637) The instructions were to transfer to Dale "all of the farm property he had, buildings, cows and things of that sort". (*Tr.* 647)

These papers which the attorney was to draw up were to be delivered to Dale Chugg when completed. (*Tr.* 648)

It was the respondents' contention that all of the instruments involved arose under these directions of Nathan Chugg. After the Option was signed the other instruments were taken to him and in each case he expressed that this was his wish and executed them in accordance therewith. (Tr. 304-305-306,308-309), also (Tr. 297-299), also (Tr. 407-408-410-418-419-420-427-429), also (Tr. 485-459-460-461), also (Tr. 667)

It should be added further here, that in addition to the work that Dale Chugg did, under his agreement with Nate, Dale also spent his entire savings of \$3,500.00 on the farm. (Tr. 434-435-436-437) In addition to this, Dale brought two of his own cows on the place and their milk went in with the other. Dale never received any additional compensation for this other than the fact that he was to get the farm. (Tr. 441-442-443)

#### AS TO THE COMPETENCY OF NATHAN CHUGG

In going over the testimony of both the appellant's and respondents' witnesses, we feel that without doubt, when the oral agreement was made in August, 1956, and when the different instruments were executed to carry out that agreement, Nathan Chugg was competent. Even the appellant's witnesses feel he was competent. We feel it would be effective to touch on this problem first with appellant's witnesses and then with respondents' witnesses.

#### APPELLANTS WITNESSES ON COMPETENCY OF NATHAN CHUGG

The appellant's witness, MAUDE C. FOSTER, a sister and beneficiary under his Will, said Nate was men-

tally competent in the summer and fall of 1956. (Tr. 60) She was not sure whether she saw Nate on the 31st of January, but thinks that she did and was not sure whether anything was wrong with Nate's mind on the 31st. (Tr. 65) She only visited Nate a few times in the spring of 1957 and there was nothing to show in the visits during this time that he was incompetent before he went to St. Benedict's Hospital on May 27, 1957, for the second operation. (Tr. 67-68-69)

The appellant's witness, RAY CHUGG, brother of Nathan and beneficiary under his Will, testified that he did not see Nathan during January of 1957. (Tr. 211) The time he saw Nate was when Nate was in a coma. (Tr. 220) (This coma was late in May or early June, 1957,) (See St. Benedict's Hospital Record)

The appellant's witness, IRA A. HUGGINS, testified that Nate was competent when the Will was made in July, 1956. (Tr. 231)

The appellant's witness, FRANK MACINTIRE, said Nate was competent in the Dee Hospital. (Tr. 98) The first time that he saw Nate when he thought Nate was not competent was when he was in the Veterans' Hospital in July, (Tr. 98-99) (I should add here that this witness said at the Dee Hospital in place of St. Benedict's Hospital. It should have been the St. Benedict's Hospital.) (Tr. 100) This witness also said that Nate was mentally competent at the farm when the tube was in his side, (Tr. 102) which tube was taken out at St. Benedict's Hospital at the second operation which was after May 27, 1957. (See St. Benedict's Hospital Record)

The appellant's witness, GEORGE LEATHAM, brother-in-law of Nathan said Nate was perfectly rational in 1956, (Tr. 118) and mentally all right before he went to the hospital. (Tr. 120)

The appellant's witness, MABEL C. POWELLSON, sister of Nathan, and beneficiary under his Will, indicated Nate was competent (Tr.149-150-151) and that he was rational between the first and second operations. (Tr. 157).

The appellant's witness, ORLEY J. CHUGG, brother of Nathan and beneficiary under his Will, said Nate was a capable fellow and took care of his own business. (Tr. 16) Orley said that Nate was capable of running the farm after he came out of St. Benedict's Hospital in February, 1957, and while Dale was at the farm. (Tr. 24-25) He said Nate was competent in the summer of 1956 (Tr. 32) and that Nate was running the farm all right in the spring of 1957. (Tr. 34) Orley Chugg did not see his brother from January 19 to the middle of February, 1957.

MYRTLE C. LEATHAM, a sister and beneficiary, testified there was nothing to indicate Nathan was mentally incompetent while Dale was there. (Tr. 202) Dale was there January, 1957, (Tr. 404) and the spring of 1957, (Tr. 415) and when Deed was executed June 24th, 1957. (Tr. 659-660)

DR. O'GORMAN, who had never seen Nathan and who testified from the hospital charts (the same as respondents' witness, Dr. Wheelwright)

"Q. Let me separate it then for your benefit ,Mr. Woolley. These physical ailments then wouldn't neces-

sarily make a person incompetent so that he wouldn't recognize his family, he wouldn't know who they were.

A. They may or may not.

Q. And it wouldn't make him mentally incompetent to understand what property he had.

A. It may or may not.

Q. And it wouldn't make him mentally incompetent to know what he wanted to do with that property?

A. It may or may not.

Q. Now, Doctor O'Gorman, if a person did sign this document on the day of January 31st, and in June of 1957, and he recalled having done it, would that indicate that he knew what he had done in the hospital?

A. If he spontaneously mentioned it, I would presume that he did recall, without any suggestions.

Q. If he mentioned it in a conversation regarding his property, for example, you would have to assume then, wouldn't you, that he recalled the transaction?

A. Yes, you would assume that." (Tr.172-173)

#### RESPONDENT'S WITNESSES ON THE COMPETENCY OF NATHAN G. CHUGG

JAMES A. DAVIS, a neighbor and friend of Nathan Chugg, who had known Nate since they went to grade school together (Tr. 238) said Nathan was competent in 1956; that he saw him March 3, 1957, and he was competent and also that he saw him April and May, 1957, and he was competent at all times. (Tr.214-242-243-244)



JOHN CHUGG, cousin of Nathan Chugg and the father of Dale Chugg:

John Chugg testified when Nathan came and asked Dale to come on the place and take it over, that he was competent. (Tr. 272) That he saw Nathan in the hospital before the tube was removed; that he was competent. (Tr. 276) That he saw him in April, May and July, 1957, and Nate was competent at all these times. (Tr. 276-729-280-281-284)

A. W. CHENEY:

This was a real estate broker who called on Nathan about the middle of May, 1957, for the purpose of trying to get Nathan to allow him to sell the farm. Nathan told him he had given Dale an Option to buy the farm for \$1,000.00. (Tr. 297) Nathan and Mr. Cheney discussed the farm, cows, their pedigrees and mutual distant relatives of Nathan and Mr. Cheney. Mr. Cheney felt that Nathan was perfectly competent. (Tr. 298) Nathan also stated that he had signed a Deed to Dale for the place. (Tr. 299)

JOSEPH TURNER:

This witness was a friend and neighbor of Nathan's of many years who was told by Nathan that Dale was to have the place and his accountant was working out the details, (Tr. 304-305) and to whom Nathan later stated that his accountant had an attorney get it in writing and Nate had signed it. (Tr. 306-308-309) He saw Nathan in August or September of 1956, and saw him other times, one of which was the last of February, 1957, or the first part of March. Nathan was mentally competent. (Tr. 305-306)

THERON GREGG:

This is witness who was subpoenaed by respondents and was approached by Attorney Woolley in the hall outside of Courtroom and after showing Mr. Woolley the letter and subpoena from Mr. Handy, and having informed Mr. Woolley that his testimony would be that Nathan Chugg was competent on July 17th, 1957, when the Deed was signed, Mr. Gregg was instructed by Mr. Woolley that he would not be needed and to go back to Salt Lake City.

This man was directly in charge of Nathan Chugg at the Veterans' Hospital and had taken two and one-half years of psychiatric study. (Tr. 328) He saw George B. Handy on the 17th of July, when the Deed was executed and told attorney Handy that Nathan was rational and competent at that time. (Tr. 315-316)

CHARLEY JONES:

This man had known Nathan Chugg for many years, was a cousin and saw Nathan the last of March and April, 1957, and stated that he was perfectly competent. (Tr. 331-332)

HYRUM AUSTIN MARBLE:

This witness was an acquaintance of Nathan's for many years and saw Nathan Chugg April, 1957, and he was competent. (Tr. 336-338)

WARD BARKER:

Had known Nathan for many years and saw Nathan in April, 1957, and he was perfectly competent. (Tr. 343-344)

LA RETA CHUGG, the wife of Dale Chugg and one of the defendants:

Not until after the coma in early June, 1957, was Nathan ever not competent. (Tr. 370) Thereafter, he sometimes was and sometimes was not. (Tr. 370) He seemed perfectly competent when he signed the Deed on the 17th day of July, 1957. (Tr. 373)

DALE CHUGG, defendant:

Nathan Chugg was perfectly competent when he approached Dale on coming up and running the farm and getting the farm. (Tr. 398-400-401-402-403) When they went to Ericksons' office for Nathan to tell Erickson what he wanted done in regards to legal instruments to protect Dale, he was mentally competent. (Tr. 405-406) When Nathan signed the Option on the 31st, he was competent. (Tr. 410) After the operation at the St. Benedict's Hospital, Nate came home to the farm and he was competent and happy (Tr. 414) Nathan did his own business, balanced his bank statements, made a contract to have a furnace cleaned in April and May, 1957. (Tr. 438-439) Nathan was perfectly competent when the Deed and Bill of Sale were signed and later the other Deed was signed. (Tr. 418-419-422-428)

DR. IRVEN H. MONCRIEF, M.D.:

This was Nathan's personal physician and the one who took care of him during his illness. (Tr. 446) He stated that there was nothing in the hospital records at St. Benedict's Hospital that would show that Nathan was mentally incompetent on his admission January 28th. (Tr. 447-448) He stated that he saw Nathan more than

*and on Jan 31, 1957 45*

once in January, 1957, (Tr. 452) and that Nathan was perfectly competent at those times (Tr. 453-454) That Nathan was competent when the doctor took his consent for the operation on February 6, 1957. (Tr. 455) That Nathan would have understood the Option and the implications of it, January 31st, 1957; (Tr. 456) that Nathan was competent. (Tr. 458) The doctor stated that the note in the nurse's notes on the hospital records where it says Nathan seemed slow to respond would be normal for Nate; for this was his usual personality. (Tr. 459) The doctor stated after he was released from the hospital on February 24, 1957, he saw him at weekly intervals and that he was competent at these weekly visits. (Tr. 459-460)

EDGAR S. SMOOT, Dairyman and National Officer of the Jersey Association and long time friend of Nate's:

Mr. Smoot testified he saw Nathan in June, 1956, and 1957, and he was mentally competent. (Tr. 483) That he saw Nathan in the spring of 1957 at Plain City Dairy Days and again saw Nathan later in June, 1957, and that Nathan was competent at all times. (Tr. 484-485-486-487-488)

J. DONALD HANDY, a witness and brother of attorney George B. Handy, and public school teacher:

He testified that when the Option was signed January 31st, 1957, that Nathan was competent. (Tr. 491-494)

EARL PAUL, long time friend of Nathan's:

Mr. Paul testified that he saw Nathan the middle of May, 1957, and he was competent; that he saw him in April, 1957, and that he was competent. (Tr. 507-508)

ANGUS C. RICHARDSON, feed store operator, long time friend of Nathan's:

He testified that Nathan was competent to understand his family, property and what he wanted to do with it. (Tr. 603)

ERNEST EKINS, dairy owner and friend of Nathan's, who had known Nate for 30 years:

Mr. Ekins testified that he had seen Nathan in January and May, 1957, and said that Nathan was competent to know his relatives, nature of his property and money and what he might want to do with it during those times. (Tr. 625-626)

NOLAN HARRIS:

During the times that he saw him in 1957, Nathan was competent. (Tr. 680)

DELBERT ERICKSON, also referred to in the transcript as Elmer, Elgreed, but whose true name is Eldred: (Tr. 646)

On January 26, 1957, Nathan came to our office and asked Dad to make a Deed transferring his property from him to Dale Chugg. He went over his accounts and matters that he had with Dad. (Tr. 627-628) He went into the problem of getting an attorney to have that done when we told him we did not do that kind of work. "In my opinion, he was competent." (Tr. 628-629-630) He instructed us to transfer everything, farm, buildings, cows and such things. (Tr. 647) and to deliver the deed or other papers to Dale when they were completed (Tr. 648)

H. E. ERICKSON, had known Nathan since boyhood, had prepared Nathan's income tax returns for 10 years:

When Nathan Chugg came into my office January 29, 1957, and instructed us to prepare a Deed from him to Dale, he was competent. (Tr. 637) When I saw him in the spring of 1957, he was competent. (Tr. 639)

GEORGE B. HANDY, attorney:

Went to the hospital January 31st, 1957; (Tr. 654-655) read the Option in its entirety to Nathan Chugg, explained the legal consequences and Nathan replied that was what he wanted. Mr. Nathan Chugg himself set the consideration at \$1,000.00. (Tr. 656) The Option money which was to bind the Option was paid (Tr. 661-662) and the Option was signed, witnessed and notarized and at that time Nathan was mentally competent. (Tr. 657)

When the Deed and Bill of Sale were signed, Nathan was perfectly competent. (Tr. 662-663) When the second Deed was executed in Salt Lake City, I felt Nathan Chugg was competent. (Tr. 667)

DR. HARVEY P. WHEELWRIGHT, physician, with three years training in psychiatry, with practice limited to field of psychiatry:

His qualification to testify as to competency of Nathan Chugg was the same as Dr. William O'Gorman, plaintiff's witness, as neither Dr. Wheelwright nor Dr. O'Gorman had personally examined Nathan and both were testifying on the basis of hospital charts.

He described Nathan's condition on January 31,

1957, the date the Option was signed as being “mildly ill” (Tr. 614) with no evidence of brain damage, and nothing negative about his mental condition. (Tr. 615)

Further pursuing this matter, Dr. Wheelwright was questioned as follows:

“Q. Is there anything in the record that you have that would indicate that along about the 31st of January, 1957, that Nathan G. Chugg was mentally incompetent.

A. No, I don’t think there is enough to say that he was. Actually, before one should give a clear-cut opinion about this, one should see the patient, but if one were pressed for an opinion, just on the record only, which of course, is all we have, I would doubt very much that he would be considered incompetent for legal purposes.

Q. Doctor, I show you, also, what has been marked for identification only, defendant’s Exhibit No. 6, which is entitled an Option. Is there anything in the record to indicate that on January 31, 1957, that Nathan G. Chugg did not have mental competency to understand the nature of that instrument?

A. I see no reason why he wouldn’t understand it from what information we have, as I said which is limited. (Tr. 615-616)

Dr. Wheelwright is then handed Plaintiff’s Exhibit D, which is the medical record of Nathan G. Chugg while in the Veteran’s Hospital in Salt Lake City and was questioned as follows:

“Q. Is there anything in the record, I refer to the Veteran’s Hospital record, that indicated that on the 17th of July, 1957, Nathan G. Chugg was mentally incompetent?

A. No actually, in this record we have more reason to believe that we could say that he was competent, than we could from the record of the St. Benedict’s Hospital on the previous date. However, here again, one is almost on shaky ground in making an opinion about mental competency without actually seeing the patient with that in mind.

Q. I will show you, Doctor, what has been marked for identification only, an instrument that is Defendant’s Exhibit No. 3 and I will ask you if there is anything in the record of the Veteran’s hospital that would indicate that on the 17th of July, 1957, Nathan G. Chugg was mentally incompetent to understand the nature and effect of that instrument?

A. I see no reason why he wouldn’t be expected to understand it. He would be, as expected, a little bit slow to read it over and respond, but otherwise, I really think that he would probably understand it.”  
(Tr. 617)

## ARGUMENT

The Court has presented, for its consideration, the situation wherein an older person, in attempting to provide security for himself for his old age, or for a time of infirmity, has induced a younger person to come, live with him, take over his burdens and to provide the older



person with a home and someone to care for him based upon the promise to leave his property to the younger person at some future time.

The evidence conclusively shows that Nathan Chugg, realizing that caring for his herd of registered Jersey cattle and farm work were becoming burdensome to him and finding it impossible to hire someone to help him on his farm who was competent and dependable, had for many years been attempting to find someone who was interested in his cattle and who would come and live with him, take care of him, the cattle and the farm, and if they would do this, he would give the farm, together with all of his other property to such a person. He had been so advised by his friend of long standing, Edgar Smoot, of Centerville.

Nathan Chugg was interested in hunting and fishing. He wanted to devote more time to these interests, but of course, found that the cows and the farm restricted his activities too much. Nathan's mother who was now 92 years old, had lived with Nathan for 40 years and was now an additional burden to him.

It was greatly to Nathan Chugg's advantage if he could make these arrangements. His brothers and sisters were all married with families of their own and they had no interest in Nathan. Nathan had no children to care for him in his old age or to assist him with the farm work. This was Nathan's way of providing security for himself.

By this arrangement he would guarantee a home for himself, for life at the farm, have someone to fix his meals, keep house for him and to take care of the farm,

not to mention his registered Jersey cows that he stated he had as much affection for as another person would have for his children.

It was Nathan Chugg who approached Dale Chugg on the proposition to turn the farm over to Dale in exchange for Dale's taking Nathan and his burdens upon himself. Dale never suggested such an arrangement to Nathan.

It must be remembered that this was done in August, 1956, not more than a month after Nathan had made a Will disposing of his property to his mother and brothers and sisters. Of course, appellant strongly contends that Nathan was of sound and disposing mind when he willed them the farm and other property and this is attested to by Attorney Ira A. Huggins.

Although the brothers and sisters of Nathan, who are beneficiaries of Nathan's Will, and therefore, very interested in the outcome of the suit, were of the opinion that Nathan was mentally competent in the summer of 1956, which would cover the period when he made his Will and when he induced Dale Chugg to take over the farm work, when Nathan reduced the agreement to writing, they contend he was not all right, was a very sick man and in a condition to be imposed upon. Appellant's position does not seem to be very consistent. Appellant has never produced any evidence of any nature to overcome the presumption that Nathan was competent in August, 1956, when he made the oral agreement with Dale Chugg that induced Dale Chugg to take care of Nathan and the farm work and which agreement Dale Chugg has complied with as fully as possible.

The evidence of respondents regarding this oral agreement, to-wit: the promise to make a Deed or Will that would protect Dale, with Dale's subsequent performance, would entitle Dale to a finding in his favor if the trial Court had found Nathan was incompetent when the Option of January 31, 1957, was executed. Further if the trial Court had found that Nathan was competent when the Option was executed, but was incompetent when the Deeds dated June 24, 1957, and July 17, 1957, were executed, then respondent would be entitled to exercise the Option anytime within the ten year period. The Court allowed the Answer to be amended to set up these additional defenses and to conform with the evidence after this evidence was in. (Tr. 763-764-765-766)

However, since the Court found that Nathan was competent when each and all of the written instruments (Option, Bill of Sale. Deed dated June 24, 1957, and Deed dated July 17, 1957) were made and executed, the additional defenses did not need to be considered.

It must be taken under consideration that the proposition offered Dale Chugg was not of a nature to appear to be a gratuity. Nathan had tried for some time to find someone who would accept such a proposition. He had tried all of his nephews and they were not interested in the long hours and hard work promised by life on the farm, coupled with the obligation of caring for Nathan Chugg for many years.

Dale Chugg had to give considerable thought to Nathan's proposition. He discussed it with his wife, LaReta, because upon her would fall the burden of caring for Nate

when he was ill or infirm. Dale Chugg, himself, would be giving up his freedom and other opportunities if he accepted Nathan's offer.

Nathan Chugg was not an old man. He was about 63 years of age. His health was apparently good. Dale Chugg was under the obligation of caring for Nathan as long as Nate would be on the farm and no one knew how long that would be.

As is true in all situations of this type, Dale Chugg could very well have had the worst part of the deal and then be faced with the possibility of fighting Nathan's brothers and sisters to receive what Nathan had agreed for Dale to have. Dale and LaReta might have had to take care of Nathan for 20 or 30 years. If the mother, Zenia V. Chugg, who holds a life estate on the home and a good part of the farm, passes on or allows Dale and LaReta to take care of Nathan at the old farm home at such a time as Nathan is able to return, the respondents will then have to take care of Nathan as agreed upon and as they have expressed their willingness so to do.

After Nathan's mother had been taken from the farm by Nathan's seven brothers and sisters to be placed in a rest home on public welfare, and not nudged out by Dale as has been falsely suggested in appellant's brief, Dale Chugg and wife and child moved in with Nathan. Nathan's brothers and sisters were content to have Dale live with Nathan. They did not, at that time, think Nathan had to be protected from himself. They surely considered Nathan to be competent at that time.

It was Nathan who instructed Mr. H. E. Erickson,

lifetime friend and Nathan's accountant, to make a Deed from Nathan to Dale. Dale did not suggest this and Mr. Erickson and his son, Eldred, both attest to Nathan's competency at this time, two days before the Option was signed.

In view of the testimony of John Chugg and Dale Chugg telling of how Nathan Chugg, on several occasions, approached Dale and attempted to induce Dale to accept Nathan's proposition and the additional testimony of Mr. H. E. Erickson and his son, Eldred, that it was Nathan who instructed Mr. Erickson to prepare the Deed from Nathan to Dale or to find an attorney who would do so, it is difficult, to say the least, how anyone could claim that Dale exercised any undue influence upon Nathan.

In the case of *Anderson vs. Thomas* 159 Pac. 2nd, 142 (Utah) an aged mother, 86 years of age, gave a Deed to her property to her son. In a suit by the other brothers and sisters to cancel the Deed on the grounds of undue influence, the Court held:

"The plaintiff must do more than merely raise a suspicion. There must be some affirmative evidence to show Richard did exercise a dominating influence over his mother and thus induced her to part with her property. Such affirmative evidence is almost totally lacking here."

In the case of *IN. Re Lavelle's Estate*, 122 Utah 253, 248 Pac. 2nd, 372,378, this Court said:

"It likewise is true that a finding of undue influence cannot rest upon mere suspicion. There must be some substantial facts upon which the inferences and

deductions are based, and the circumstances relied on should clearly point out the person who it is alleged exercised the undue influence and his acts constituting the alleged undue influence.”

The above cases are also cited in the late Utah case of *Richmond vs. Ballard*, 325 Pac. 2nd, 839 (Utah).

On January 31, 1959, attorney George B. Handy, Dale Chugg and J. Donald Handy testified that the Option was read to Nathan, he acknowledged understanding it, wanted to give the farm to Dale, but asked Dale if it was all right to ask for \$1,000.00 cash when the Option was exercised. Nathan set the terms and did not ask for more because he had previously agreed upon terms that were satisfactory to him.

At this time, attorney Handy, Dale Chugg and J. Donald Handy attest as to the competency of Nathan.

Dr. Irven Moncrief, Nathan's personal physician, who had known Nathan for over a year, testified that Nathan was mentally competent at this time. Dr. Moncrief never once indicated that Nathan was incompetent during this period as has been falsely asserted in appellant's brief. Dr. Moncrief, it must be remembered, performed an operation on Nathan's bladder seven days after the Option was signed. Dr. Moncrief stated that he obtained Nathan's consent to this operation both orally and in writing and was of the opinion that Nathan was competent to give such consent.

Compare this with the testimony of the brothers and sisters of Nathan for this period of time. And it must be kept in mind that they had hoped to inherit Nathan's

property under his Will. Orley J. Chugg was in California on a trip from January 19, 1957, to the middle of February, 1957. He never saw Nathan for a month during which time the Option was signed and Orley thought Nathan was mentally competent when he last saw him prior to January 19, 1957; Ray Chugg, a brother, never visited Nathan, at all, not even once when Nathan was in the St. Benedict's Hospital from January 29th to February 24th, 1957. Maude Chugg Foster, thinks she might have visited Nathan on January 31st, 1957, is not sure and could not say that she thought Nathan was incompetent at that time; Myrtle Chugg Leatham, a sister, testified that Nathan was incompetent, because on January 31st, 1957, and she remembers the day well, Nathan was lying in bed like a dead man with a tube in his side draining his bladder. The record shows that the purpose for Nathan to be in the hospital at this time was to have an operation on his bladder to have the tube inserted and the operation was not performed until seven days after the Option was signed. Myrtle Chugg Leatham therefore, testifies that she observed the tube in Nathan seven (7) days before it was placed in him. Mrs. Leatham further bolsters her claim that she fortunately visited Nathan on the exact day the Option was signed because she remembers distinctly picking peonies out her garden to take to the hospital. It must be admitted by all that Mrs. Leatham's memory must have failed her if she claims to have picked peonies out of her garden on January 31, 1957. The testimony of Myrtle's husband must be given about as much weight as Myrtle's because he went to the hospital with Myrtle and testifies similarly; Mabel Chugg Powlson did not think there was anything to indicate Nathan

was not mentally competent until after his stroke in June, 1957.

After Nathan returned to his farm following February 24, 1957, he seemed to be happy with his arrangement with Dale, was cared for faithfully by Dale and La-Reta, who cleansed and dressed the opening in Nathan's abdomen, prepared special meals for him and cared for the farm. All of Nathan's lifelong friends that came in contact with Nathan at that time testify that he was mentally competent during this period.

Consider especially the testimony of Mr. A. W. CHENEY, a real estate broker, a complete stranger to Nathan, who sought a listing on Nathan's farm and was told by Nathan that the farm was not for sale as Nathan had previously given Dale an Option to purchase the farm for \$1,000.00 which sum would pay Nathan's burial. Nathan well remembered signing the Option, what it's legal effect was, the property covered, the amount of money involved and evidently was satisfied with the transaction. Mr. Cheney relates that in comparing their names, they discovered that they were distant relatives and discussed mutual distant relatives known to both of them. Mr. Cheney could draw no other conclusion, than that Nathan was mentally competent at that time in May, 1957, and we can draw no other conclusion than Nathan was also competent when the Option was signed January 31, 1957, which transaction Nathan remembered so well several months later.

On June 24, 1957, Nathan executed a Deed to the real property and a Bill of Sale to the personal property. There is no evidence in the record that Nathan was men-



tally incompetent at this time. Coupled with the presumption of competency is the evidence of several of Nathan's lifelong friends and associates that Nathan was mentally competent at this time to which is added the testimony of attorney Handy, Dale and LaReta Chugg.

On or about June 25, 1957, Nathan Chugg was taken to the Veterans' Hospital in Salt Lake City. Contrary to what the appellants would mislead the Court to believe, Dale did not take the lead in placing Nathan in the Veterans' Hospital. An examination of the facts as shown by the testimony of the sister, Maude Chugg Foster, the brother, Orley J. Chugg, George Leatham and Dale Chugg shows that Nathan Chugg was placed in the Veterans' Hospital by his brothers and sisters and immediate family.

After Nathan went to the Veterans' Hospital and on July 17, 1957, attorney Handy, Dale and LaReta Chugg went to Salt Lake City for the purpose of having Nathan execute another Deed to the identical property covered by the Deed of June 24th, 1957. Why was this Deed procured? The reason given by attorney Handy was that he could foresee litigations sponsored by Nathan's brothers and sisters and wanted a Deed executed under the circumstances where others then parties involved could attest as to Nathan's competency, even people with medical experience. It was apparent, even then, that Nathan's brothers and sisters thought that they were entitled to Nathan's property and that Nathan had no right to do with it as he pleased, even though they considered him to be the owner of it.

The testimony is that on this day, July 17, 1957, Nathan was mentally competent. This is the testimony of attorney Handy, Dale and LaReta Chugg and Theron Gregg, the hospital assistant, all of who very particularly observed Nathan at that time with the sole purpose of determining whether or not Nathan was competent at that time to execute the Deed. Counsel for appellant thought that Theron Gregg's testimony would be sufficiently damaging to their case, that appellant's counsel sought to send Theron Gregg home before he was able to testify for the respondents. (Tr. 158)

Dr. Harvey P. Wheelwright, from an examination of the records of St. Benedict's Hospital was of the opinion that Nathan Chugg was mentally competent at the time the Option was signed in the St. Benedict's Hospital on January 31st, 1957, and when the Deed was signed July 17, 1957, the records of the Veterans' Hospital showed more reason to believe that Nathan was competent than the records of St. Benedict's Hospital on the previous date. Dr. Wheelwright, never at any time expressed doubt as to the Grantor's competency as is falsely stated in appellant's brief, but a reading of his testimony clearly shows that from the records alone, which is all either Dr. O'Gorman, appellant's witness, or Dr. Wheelwright, respondents' witness, had to go on in rendering an opinion, clearly indicate nothing seriously wrong with Nathan physically and that he was mentally competent on January 31, 1957, and July 17, 1957.

Because of reasons best known to Appellants, Dr. Wheelwright's complete answers are not quoted by appellant and appellant has attempted to mislead the Court by

claiming that Dr. Wheelwright has testified contrary to what he actually testified to. For this reason the Court's attention is invited to Dr. Wheelwright's testimony in the record and as cited in respondents' Statement of Facts. The Court is invited to compare the testimony of Dr. Wheelwright with that of Dr. O'Gorman and note the evasive "could be or couldn't be" type of opinion expressed by Dr. O'Gorman.

Examination of the record will also reveal that at no time has Dale Chugg forgotten his agreement with Nathan. Both Dale Chugg and LaReta Chugg, under oath testified, that if they could have Nathan at the farm home under the arrangements as made by both parties that they would be willing to care for him. Nathan's brothers and sisters heretofore have made this impossible at the present time. Orley Chugg has had himself appointed as Nathan's guardian and has forced Dale off the farm. Dale Chugg brought to light the fact that Zenia V. Chugg, Nathan's mother, had a life estate on the farm home and surrounding property at a time, when, as disclosed by appellant's pleadings, it was thought by appellant that Nathan owned all of the property in fee simple.

It certainly cannot be seriously contended by appellant that the testimony that appellant produced and the type of testimony produced has overcome the presumption that Nathan Chugg was competent at the time the said instruments were executed and it is apparent that the evidence that Nathan was competent at these times is overwhelmingly in favor of respondents. The trial court, Charles G. Cowley, after hearing the evidence and observing the witnesses for appellant and respondent and

observing their appearance, their demeanor on the witness stand, their apparent interest in the outcome of the matter or want of it, held that Nathan G. Chugg was mentally competent at each of the times when each of the written instruments were executed and that they were executed without fraud, undue influence or trickery being perpetrated upon the grantor.

This Court, on more than one occasion, has stated what is necessary in order for a contestant in a case of this type to invalidate a Deed.

In *Northcrest vs. Walker Bank*, 248 Pac 2nd, 692 (Utah) "One asserting invalidity of deed must so prove by clear and convincing evidence."

See also *Richmond vs. Ballard*, 325 Pac. 2nd 839 Utah) Competency of a Grantor is always presumed and this presumption must be overcome by clear and convincing evidence as stated above.

The following citations will be of aid to the Court: "American Jurisprudence, Vol. XVI, Sections 86 and 87. "In a general way, senility, eccentricity or even partial impairment of mental facilities is not necessarily sufficient to incapacitate the Grantor in a deed if he has sufficient mental capacity to comprehend the nature of the transaction and to protect his own interest. Average mental capacity on the part of Grantor is not required."

*Tate vs. Murphy*, 217 Pac. 2nd 177 (Oklahoma)

"The test of capacity to make a deed is that the Grantor has the ability to understand the nature and

effect of the act in which he is engaged and the business he is transacting. To invalidate a deed, it must appear that he is incapable of comprehending that the effect of the deed when executed and delivered is to divest himself of the title to the land set forth in the deed."

"A person of weak mentality whose incompetency has not been judiciously determined may be capable of executing a valid conveyance or other contract during lucid intervals in which he is capable of understanding the nature and effect of his acts, even though he is weak from old age and physical infirmities, may suffer lapses of memory and sense of direction, may be irritable and irrational at times and changeable in his views upon certain subjects and may suffer eccentric hallucinations and express irrational views when sick and under influence of sedatives."

See also *Crawford vs. Crawford* 27 P2 240 (Kan)

*Pioneer Trust Company vs. Currin*, 311 Pac.2nd, 445 (Oregon). This was a guardian's action to set aside a deed to real property executed by the ward prior to institution of guardianship. There were the usual allegations of incompetency and inadequate consideration. There was testimony that the Grantor was a paranoid schizophrenic "sometimes was all right and sometimes was not". The Court held: "If at the time of the execution of the document, the Grantor has mental capacity sufficient to comprehend the nature of the business in which he was engaged, the instrument is valid. Grantor had moments of lucidity and

could have been competent at the time of the transaction.”

The Court in this case held that it was immaterial what the mental capacity of the Grantor was before and after the transaction, if the evidence showed he was lucid when the instrument was signed and even though \$2,000.00 appeared to be an inadequate consideration, this sum was all that the Grantor asked and was therefore valid consideration.

*Goldman vs. Goldman*, 253 Pac. 2nd, 474 Calif.)

This was a suit brought by a second wife of Grantor attacking the validity of a deed to Grantor’s son held: “Influence gained by kindness is not undue even though deceit is practised on the donor and the gift is the voluntary act of the donor.”

“Subject to the privilege of sovereignty a citizen has absolute dominion over his property and his right to alienate it depends neither upon the justice of his prejudices nor the soundness of his reasoning.”

## CONCLUSION

From the testimony of lifelong acquaintances of Nathan Chugg and disinterested witnesses and from the facts and law applicable thereto, the only conclusion that can be arrived at is that Nathan Chugg was mentally competent on January 31, 1957, when the Option was signed and on June 24, 1957 and July 17, 1957, when the Deeds were executed, and that he entered into this arrangement with the intention of benefiting himself and providing se-

curity for himself and that Nathan Chugg received the consideration that he himself asked for.

Respectfully submitted,

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and

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