

1965

Walker Bank and Trust Company, Administrator of the Estates of Minnetta Walker, aka Netta Walker, Deceased, and Ila Minnetta Walker, Deceased, and John A. Walker, Deceased, and E. Walker, Roma Walker Grock and Alta Fay Walker Lake and J.B. Walker v. Austin Walker : Brief of Plaintiffs-Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALKER BANK AND TRUST COM-
PANY, Administrator of the Estates of
MINNETTA WALKER, aka NETTIE
WALKER, deceased, and ILA MIN-
NETTA WALKER, deceased, and
JOHN A. WALKER, deceased, and
R. E. WALKER, ROMA WALKER
GROCK and ALTA FAY WALKER
LAKE,

Plaintiffs-Respondents,
and

J. B. WALKER,

Involuntary Plaintiff,

vs

AUSTIN WALKER,

Defendant-Appellant.

Case
No. 10374

Brief of Plaintiffs-Respondents

Appeal from Judgment of the Third Judicial District
Court

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FILED

OCT - 4 1965

Clk. Supreme Court, Utah

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J. B. WALKER,

Involuntary Plaintiff,

vs

AUSTIN WALKER,

Defendant-Appellant.

Case
No. 10374

Brief of Plaintiffs-Respondents

NATURE OF CASE AND DISPOSITION BELOW

Defendant has sufficiently indicated the nature of the case and the trial court's disposition of it. Defendant has also indicated the necessity for making reference to the record of *Walker Bank & Trust Co., et al. v. J. B. Walker* which was tried as a companion of the instant case. That record has been certified as supplemental record herein.

When reference to the J. B. Walker case is made in this brief, such reference will designate the "J.B.W. Record

STATEMENT OF FACTS

Defendant-appellant is one of six children of John A. and Minnetta Walker. Plaintiffs-respondents are his mother's personal representative, his deceased sister's personal representative and all his living brothers and sisters.

John and Minnetta settled on approximately forty acres in Union, Utah, at about the turn of the century. Title to a part of that acreage was vested in Minnetta alone from the time of acquisition. This is the acreage shown in pink on Exhibit 3.

John A. Walker died in 1912. Except for about one year in 1952-3, Minnetta lived in the family home until her death in November of 1959, at the age of eighty-nine. During that year, she lived with and was cared for by her daughter Fay (R. 119). Until 1933, most of her children were living with her. After 1938, one or both of her daughters, Roma and Ila, lived with her and cared for her (R. 119, 120, 143, 166, 244, 251, et seq.) Especially after 1940, that care involved extensive effort. Minnetta was frequently bedfast (R. 243-6); her legs required daily wrapping (R. 120); her stomach required daily pumping (R. 166, 251). She needed, and received from her daughters, all the services of a cook, housekeeper and nurse (R. 120, 121, 243-6, 251-4). Ila and Roma were the chief means of Minnetta's financial support throughout the period (R. 120, 159, 203, 217, 440, 470).

John A. and Minnetta Walker had carried on two kinds of gainful activity on the tracts they settled. They operated a store, and they farmed. After John's death, Minnetta continued the operation of both. All the children assisted in the farm work as farmers' children do. After 1933, when defendant married, there were no male children at home to operate the farm. Defendant moved to a home very close to his mother's and entered into a contract for the use of the farm. The terms of the contract were such that defendant occupied the farm and retained the proceeds from the sale of its produce in consideration only of his payment of the taxes (JBW Record p. 156, JBW Exh. P-14, Record page 435 et seq.). We will later discuss this contract in detail. Defendant paid the taxes and no other rental; he controlled the property absolutely (R. 436), decided what to plant (R. 436) and could have excluded his mother from the farm (although not from the house) had he desired (R. 437).

During the period defendant was the tenant of the farm, he provided some hay for his mother's cows; he also received milk and other dairy products from her (R. 247). The record is saturated with testimony about the abundance or paucity of the hay provided and the dairy products received in return, but the court could reasonably have believed that the exchange, in value, was about even.

In 1948, Minnetta Walker suffered serious illness by reason of pyloric obstruction. She was then seventy-eight years old. The "debilitation" caused by that obstruction could, in the opinion of her physician, have

caused some mental changes at that time (R. 301). Other witnesses testified to a marked decline in her mental condition after this illness (R. 122-4, 189, 252). In 1953 while living in Nevada with her daughter Fay, she was clearly disoriented (R. 266). In 1954, a few months before she executed the deeds in controversy, she was again hospitalized. At this time, the hospital records show she demonstrated all the objective and subjective symptoms of senile dementia. She had extensive arteriosclerosis; bilateral arcus senilis was observed; she was deformed by arthritis; she could remember none of her history or even that she had recently eaten or seen the doctor (Ext. P-9).

Throughout 1954, Minnetta exhibited these general indicia of senility. Her conversation was sparse and consisted of continued repetitions of phrases such as "aren't they pretty" about quilting blocks or flowers (R. 178). Her coherent statements were about events of the remote past which she was apparently re-living (R. 276, 277), and and she would forget having eaten as soon as the dishes were cleared (R. 177). There is no question about her inability to care for herself. Defendant's wife would bring her prepared baby food for lunch when Roma was away working, and feed it to her (R. 172). There were many instances when Minnetta failed to recognize her children by sight (R. 243, 244) or name (R. 178) or confuse them with her deceased brothers (R. 243). When she was able to leave her bed after her return from the hospital in the summer of 1954, she continually "shuffled" to and from the outside toilet (R. 245) making each trip without apparent memory of the last.

In October of 1954, while Roma was away at work, defendant put his mother in his car and took her to the bank where a bank officer witnessed her signature on two deeds prepared by an attorney at defendant's request. If these are valid deeds, she then conveyed to defendant everything of value she owned—certainly everything defendant believed she owned (R. 438, 9) and disinherited her daughter Ila, who had lived with her and financially supported her for fifteen years, her daughter Roma, who was nursing her, cleaning her, cooking for her and providing money for her maintenance at that very time, and her daughter Fay, who had cared for her during the preceding year (R-119, 248).

Defendant's stratagem, on the day the deeds were signed, worked well. He was able to get his mother (despite the extreme difficulty her movement entailed—R. 318) to the bank at an hour when Roma was away and after banking hours when no bank customers who might know the Walker family could observe (R. 348). He then "buried" the deeds and made no mention of them until his mother's death when he promptly and triumphantly recorded them (Exhibits P-4, P-6).

Late in 1954, defendant's sister Ila was terminally ill of cancer (Exh. P-1, 2). She was then addicted to a drug called "demerol". Defendant visited her frequently (R. 174) despite her evident dislike for him when she was well (Exhibit P-8). By December, Ila was making references to defendant as the only person in her family she could trust (R. 330), and by Christmas she had delivered and conveyed to defendant, upon an orally expressed

trust, everything of value she had accumulated in her lifetime of employment. The property transferred included bonds and cash in excess of \$4,000.00 (JBW Rec. pp. 19, 20). It included 33 shares of stock in Utah Power & Light Company (JBW Record, p. 19) and 15 shares of Amalgamated Sugar Company stock (JBW Record p. 19). In addition, Ila then conveyed to defendant real property having a value at that time of approximately \$3,000.00 (JBW Record, p. 297). The securities and realty have appreciated substantially in the ensuing ten years (JBW Record, p. 297).

Of these assets, Defendant expended approximately \$3,850.00 in payment of the expenses of Ila's last illness and burial (JBW Record, p. 20) He retained thereafter assets having a value near \$5,000.00. He admits the properties were to be utilized only for the benefit of his mother (R. p. 8). Nevertheless, as he expended moneys on his mother's behalf thereafter, he kept careful account (JBW Record - pp. 23-38) and filed tax returns by which he represented these payments were out of his own resources (R. p. 441) so that he could claim his mother was a dependent. He so represented even though he knew, as he himself testified, that the trust was the source of the money (R. 441).

Defendant has steadfastly refused to account for the assets he received from Ila, has denied obligation to do so (R. p. 161) and responds to demands with the bare statement that the trust properties were exhausted in the accomplishment of the trust purposes (R. pp. 8-9). Defendant contends that, by a process of self-dealing and ex-

mingling of trust assets with his own, he has acquired the securities and realty which were the corpus of the trust.

ARGUMENT

POINT I

THE EVIDENCE SUPPORTS THE FINDING OF CONFIDENTIAL RELATIONSHIP BETWEEN DEFENDANT AND HIS MOTHER AND THE CONCLUSION THAT THE DEEDS IN CONTROVERSY WERE PROCURED BY UNDUE INFLUENCE AND ABUSE OF THAT RELATIONSHIP.

Defendant-appellant suggests, in the opening paragraphs of his brief, that this court may approach the evidence in an "equitable proceeding" as a trial de novo on the record, place its own interpretation on the testimony and make new findings without regard for those factors of witness appearance and demeanor which only the trial judge can appraise. This has not been the position of this Court. Whatever the nature of the proceedings, the trial court's findings are accorded the greatest respect. In *Jewell v. Horner*, 366 P.2d 594; 12 U. 2d 328, Justice Callister stated what is the universal doctrine in this regard:

"This case is one in equity. The dominant question here is whether the plaintiffs, by clear convincing and satisfactory proof, established the alleged parol trust with respect to the real property. The trial court so found, and this court, upon review, should not set aside the finding of the lower court unless it manifestly appears that the lower court has misapplied proven facts or that the finding is clearly against the weight of the evidence."

(Citing *Jensen v. Howell*, 75 Utah 64, 282 P. 1034; *Capps v. Capps*, 110 Utah 468, 175 P.2d 470; *Stanley v. Stanley*, 97 Utah 520, 94 P.2d 465; *Hawes v. Jensen*, 116 Utah 212, 209 P.2d 229.)

To begin with, the trial court found there to have been, in 1954, a confidential relationship between the defendant and his mother. This finding must stand unless, in the words of *Jewell v. Horner*, it is "clearly against the weight of the evidence." It should be helpful to review, therefore, the concept of confidential relationship and what kind of evidence, under the cases, will establish it.

The doctrine is widely accepted that, where a "confidential relationship" in fact exists between a grantor and grantee, the grantee who is accused of acquiring the property by abuse of the confidence reposed in him has the burden of proving the fairness of the transaction. This court subscribed to the doctrine in *Jardine v. Archibald*, 3 U. 2d 88, 279 P. 2d 454, by this language:

"It is well settled that where a fiduciary or confidential relationship exists between the donor and donee, equity raises a presumption against the validity of such transactions and the burden is cast upon the donee to prove their validity and that there was no fraud or undue influence by proving affirmatively and by clear and convincing evidence compliance with equitable requisites. This is so because there is implied in every fiduciary or confidential relationship a superiority held by one of the parties over the other. See *Pomeroy's Equity Jurisprudence*, 5th Ed. Vol. 3, Sec. 956, page 790."

and again in *Johnson v. Johnson*, 9 U. 2nd 40, 337 P. 2d 420 (1959), by this language:

"In assaying the sufficiency of proof, the plaintiffs here have significant help in the rule that when a confidential relationship is shown to exist and a gift or conveyance is made to a party in a superior position, a presumption arises that the transaction was unfair. The presumption has the force of evidence. Therefore the burden was upon the defendant Calvin Johnson to convince the court by a preponderance of the evidence that the transaction was fair. If he failed to do so, the finding to the contrary was justified, and will not be disturbed on appeal unless the contrary evidence was so clear and persuasive that all reasonable minds would so find."

(Citing *Omega Investment Co. v. Woolley*, 72 Utah 474, 271 P. 797, quoting 2 Pomeroy, *Equity Jurisprudence*, sec. 956. In *re Swan's Estate*, 4 Utah 2d 277, 293 P.2d 682.)

What constitutes a "confidential relationship" has been the subject of frequent litigation, and the phrase has been given a much broader meaning than "fiduciary relationship." It exists whenever confidence is reposed by a weaker person in a stronger one. The term is defined in *Corpus Juris Secundum* (26 CJS 772) as follows:

"Confidential relations between grantor and grantee are not restricted to those formally recognized as fiduciary in character. The courts carefully refrain from defining particular instances of such relationships in a manner which might exclude new cases wherein the relation was in fact confidential, and, broadly speaking, the term 'confidential relationship' extends to all cases wherein trust is reposed on one side and a dominant influ-

ence is exercised on the other. Stated otherwise, it has been said that the term 'fiduciary relation' as used in this connection is a very broad one, that it exists, and relief is granted, in all cases in which influence has been acquired and abused, or in which confidence has been reposed and betrayed, and that the origin of the confidence and the source of the influence are immaterial."

Generally, the fact of kinship alone is not enough to establish the confidential nature of a relationship. It is just persuasive evidence. It should appear by some additional evidence that (1) the grantor really did reposit trust and confidence in the grantee, and (2) the grantee was able to exercise a dominant influence. This court has had at least two occasions to express itself as to the kind of evidence which will suffice. In *Haws v. Jensen*, 116 U. 212, 209 P.2d 229, this court said:

"The defendant contends that there is no allegation of a confidential relation between Amber and Mrs. Haws. True, it is not specifically alleged that there was a confidential relation. However, in the complaint it is alleged that Mrs. Haws conveyed the property to Amber intending that the latter hold the property in trust for the benefit of the whole family. Implicit in this allegation is that Mrs. Haws reposed confidence in Amber; otherwise, Mrs. Haws would have not made the conveyance. Thus this allegation along with the fact that the grantor and grantee were mother and daughter, which appears on the face of the complaint, is a sufficient allegation of a confidential relation. Scott on Trust, Vol. I, Sec. 44.2, states:

'A constructive trust is imposed even if there is no fiduciary relationship such as that between attorney and client, principal and

agent, trustee and beneficiary; it is sufficient that there is a family relationship or other personal relationship of such a character that the transferor is justified in believing that the transferee will act in his interest.' "

In *Johnson v. Johnson* (supra), this Court found a confidential relationship on the basis of kinship (parent-child) plus the fact that the grantor reposed confidence in the grantee as "epitomized by his cooperating with him in making final arrangements about his property in the eventuality of death". The element of domination by the grantee was supplied, as the court said, by the evidence that the grantor was "*becoming* senile, and was so affected that he would be easy prey to a scheming person in whom he had confidence". (Our emphasis.)

In the instant case, the evidence of the two necessary elements, (1) trust and confidence actually reposed and (2) the defendant's being the superior in influence, are stronger by far than in the *Johnson* case. We have the defendant's own testimony (R-439) that his mother trusted him and his opinions about the property "implicitly" and had confidence in him, and that he talked with her about the property "at intervals" in 1954 (R-439). We further have his testimony that she conferred with him about possible sales of the property in 1933 and 1947 (Deposition, p. 34-36). As to defendant's being the dominant personality, we have abundant evidence, not of her "becoming" senile but of her *being* senile. Dr. Young, her physician, said so in so many words—"She was senile" (R. 316). Dr. Young was defendant's witness. We have already reviewed the other evidence in detail. On the

question of her being "easy prey to a scheming person in whom she had confidence," we believe the following excerpt from the testimony of Shirley Walker Johnson, defendant's daughter, is eloquent (R. 395, 6) :

"Q. Do you have any statement to make as to whether your grandmother was alert during this period of time?

A. I think she remembered things that were — she couldn't remember the day. She had her time confused on the day, but she knew—I mean she knew me, and she would remember those things.

Q. Did she talk about her family?

A. I didn't talk to her too much. I can't remember specific things. She talked about the weather. She was appreciative of my taking food. Anyone who took her food she was appreciative of, even though it was pureed baby food, and she was so grateful because she appreciated things that people did for her."

Defendant has cited and quoted from Utah cases which hold that "the relation of parent and child . . . does not, in and of itself, create any such presumption." This kind of statement cannot be contorted to suggest, however, that the fact of the relationship should be ignored. In Utah, as elsewhere, the fact that the suspect transaction is between parent and child is a matter of some consequence. In the view of the recognized trust authorities, some of whom have been quoted by this Court, family relationship is strong if not fully persuasive evidence of "confidential relationship". Professor Bogert, in Chapter 24 of his exhaustive work on *Trusts*

and *Trustees* (see page 205 of Volume III) comments on the indicia of the "confidential relationship" as follows:

"If, by reason of kinship, business association, disparity in age, or physical or mental condition, or other reason, the grantee is in an especially intimate position with regard to the grantor, and the latter imposes a high degree of trust and confidence in the former, the court may find the relationship is technically 'confidential.' The mere existence of such a connection prohibits the one trusted from seeking any selfish benefit for himself, during the course of the relationship, and gives ground for fastening a constructive trust upon the property in the hands of B, the grantee, irrespective of his oral promise to use it for the benefit of another."

Professor Bogert then quotes with approval from the California case of *Brison v. Brison*, 17 Pac. 689:

"The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive trust. This is independent of any element of actual fraud. * * * The law, from considerations of public policy, presumes such transactions to have been induced by undue influence."

Scott on *Trusts* in Volume 1, page 253, Section 44.2, comments on the kind of relationship which is presumed to be confidential:

"* * * A constructive trust is imposed even though there is no fiduciary relation such as that between attorney and client, principal and agent, trustee and beneficiary; it is sufficient that there is a family relationship or other personal relationship of such a character that the transferor is justified in believing that the transferee will act in his interest."

One thing is axiomatic about undue influence; it is seldom exercised in the presence of those who are intended to be injured. There are innumerable judicial statements to the effect that the evidence may and usually must be circumstantial. The Alabama Court in *Phillips v. Ford*, 164 So. 2d 908, recently said:

“Evidence to show undue influence in the procurement of a deed must be largely circumstantial and need not be of that direct, affirmative and positive character required to establish a tangible fact”. (and see *Bounds v. Bounds*, 382 SW2d 947 - Texas, 1963)

Courts are frequently confronted with the situation where one of several children has procured the conveyance to him of all or most of a parent's property as the parent approaches senility or death. The cases fall readily into pattern, and the circumstances which mark the exercise of undue influence have been the subject of frequent comment. The editors of *Corpus Juris Secundum* devote several pages of their treatise on deeds to this point. Beginning at page 766 of Volume 26 (Deeds § 62) they say:

“Particular circumstances which should be taken into consideration in determining whether a deed was procured by undue influence include the character of the transaction, the divergence of results accomplished from results normally to be anticipated, the inequality of distribution, the situation of the grantor, the relationship of the parties, the activity of the beneficiary and the participation by the transferee or his agent in the preparation of the deed, the time and manner of offering suggestions or advice and the under-

lying motive thereof, and the grantor's condition of mind and body."

It will serve to emphasize the soundness of the court's finding in the instant case to consider the evidence of each of these "circumstances" separately.

A

The Divergence of Results from Those Normally To Be Anticipated

The result of the conveyances, if they are upheld, was to disinherit five of six children. Two of them, Ila and Roma, had lived with the grantor practically all their lives, had been the principal source of her financial support and had ministered to her incessantly, not only in ordinary housekeeping, cooking and laundering — all without inside plumbing, running water or central heating (R 370, 371) — but also in the performance of the disagreeable tasks of nursing, the daily wrapping of ulcerated legs and the incredibly recurrent pumping of her stomach. It is hardly to be anticipated that a mother would disinherit such daughters, just as both of them had become seriously ill, in favor of a son who was eminently employable, in no financial need and in no physical distress.

B

The Inequality of Distribution

The conveyances in question worked as unequal a distribution as one can achieve among six children. One got all, and five got none.

C

The Situation of The Grantor

At the time of the execution of the deeds, the grantor was living in a condition which, except for the herculean efforts of her daughters, would have constituted extreme privation for our society. Before 1948, when she was alert and coherent, she repeatedly spoke of her reliance on her real property for her old age. (R 478, R 476) Nevertheless, the defendant insists she freely conveyed to him every asset she possessed without consideration and left herself completely impoverished.

D

The Relationship of the Parties

The grantor and grantee were, of course, mother and son. He had, for many years, farmed the premises. She consulted with him about possible sales (Deposition pp. 34, 35). In his own words, she trusted him "implicitly" (R-439). In response to the question: "Do you think your mother trusted your opinion about the property?", defendant said: "There is no question in my mind about that." One wonders what evidence could more directly bear on the question of whether defendant enjoyed a relationship of which he could take advantage.

E

The Activity of The Beneficiary

Defendant's activity in the procurement of the deeds demonstrates patience and planning. As late of 1947,

he had offered his mother \$1,000.00 per acre for the land in question. (Deposition of Austin Walker, page 41; R-186). Although she became increasingly senile — markedly so during the period of pyloric obstruction in 1948 — he made no ostensible effort to obtain the property again until 1954. The time was particularly auspicious for the "discussions about the property" which he had with his mother in 1954. Ila was hospitalized and soon to die. Roma, recovering from heart surgery and commuting by bus to Salt Lake employment with the Deseret Sunday School, was not present to protect herself. To the degree that Minnetta could receive impressions and be influenced, defendant had, for the first time, a free hand in moulding her thoughts. There is little question about the kind of notion defendant sought to instill. He continues to labor the arguments that he has "paid the taxes and farmed the land". He somehow excludes from his consciousness the fact — uncontradicted in the evidence — that he has paid taxes as cheap rental for the land and farmed it for profit. He acquired no right or equity in the land by his lease contract. He was, in fact, taking advantage of his family relationship by occupying the farm at so low a rental. Mr. Fletcher, a land appraiser whose qualifications are unimpeachable, testified (JBW Record p 297) that a reasonable rental for the farm during the total period of defendant's occupancy would have been \$18,270.00. The farm included, of course, the lands in issue here and those in issue in the suit against J. B. Walker. Our review of the record (Exh. D-12, R-407, 435, JBW Exh D-20, D-23, D-44) fails to reveal

tax payments by dependant in excess of \$3,551.25 with reference to all of the land involved in both lawsuits from 1920 to the present. The taxes assessed against all the property from 1920 to the 1962 totaled \$5,642.66 (JBW Exh D-20, D-23, D-44)

Defendant was dealing with an 84 year old woman whose mind was at least failing and whose memory had failed. He carefully removed her from her home environment to execute the deeds, even though movement was slow and painful for her (R 318), rather than bring a notary to her. In her own home, she might remember her other children, or Roma might come home early. He returned his mother while Roma was away, and contrived to complete the transaction in secrecy. He then followed a pattern of conduct which is always indicative of sharp practice; he hid the executed deeds for five years until his mother's death without recordation, and recorded them within two days thereafter.

F

The Participation of Defendant in Preparing the Deed

Defendant and no one else made the arrangements for preparation of the deeds. He called the attorney (R-401), the deeds were delivered to him, and he moved his mother out of her home to sign them. He even arranged for the acknowledgement to be taken by a bank officer who was a stranger to Minnetta (R-317) after banking hours.

*The Time And Manner of Offering
Suggestions and Advice*

Defendant's timing was, of course, excellent. Despite his protestations that his mother had determined on this course of conduct years earlier, it was in 1954 that he prevailed on her to sign deeds. She was convalescing from an illness which required hospitalization and accentuated her symptoms of mental deterioration. Ha had been forced by circumstances of her own illness to move into Salt Lake. Roma, just recovered from heart surgery, was working or seeking work in Salt Lake. Minnetta was particularly confused, unable to remember events of a few moments before and delightfully tractable.

There is little evidence of the actual advice defendant gave his mother. From his deposition, we know he offered her \$1,000.00 per acre for the property in 1947 (Deposition - page 41; R. 86). We also know he advised her against selling tracts to strangers in 1933 (Deposition - page 34) and 1947 (Deposition - page 35). In 1954, by his own testimony, he "told mother that H. A. said a quitclaim deed could be prepared and given to me, and she agreed that was all right" (R. 404). The idea of the conveyances was clearly implanted by defendant. He admits having discussions with her about the property "at intervals" in 1954. There can be little doubt about the amount of emphasis defendant gave to his own contributions or his failure to mention

Ila's and Roma's. There is only doubt that Minnetta could comprehend.

H

The Grantor's Condition of Mind And Body

Minnetta's physical condition is not even a matter of controversy. She suffered for years from open sores on her legs; she was hump-backed and deformed from arthritic disease; she was unable to eliminate naturally because of pyloric obstruction, and her stomach had to be pumped with awesome regularity. The "consultation record" of Dr. Robert M. Dalrymple (page 8 of Exh - p 9) includes a resume of Minnetta's formidable array of physical ailments.

As to Minnetta's mental condition, there is testimony in abundance. Defendant maintains she was fully alert and able to comprehend the consequences of her acts in 1954 and not so impaired mentally as to be subject to his influence. Plaintiffs and their witnesses, on the other hand, testified as to the advanced state of her senility in 1954. Defendant's witnesses, inadvertantly, often contributed to the evidence of mental deterioration. There is, for instance, this sequence from direct examination of Dr. Harold E. Young, Jr., defendant's witness (R 301):

"Q. Now, Doctor with regard to the illnesses which you have described that she was suffering from, I will ask you whether or not any of those would have any effect upon her mentality as far as her competency mentally is concerned.

THE COURT: You mean as of a certain date?

MR. BOYER: Well, as of when she was in the hospital to start with.

- A. Yes. I think the debilitation caused by the pyloric obstruction could cause some mental changes at the time.
- Q. And would this be something that would be continual, or would it be a temporary thing and clear up?
- A. It could be a temporary thing, yes, Sir.
- Q. And was this condition cleared up at the time that she was in the hospital in 1954?
- A. According to my hospital notes, the last note at the hospital when she left the hospital on 5/18/54 indicates that she was improving, but I have a note, "She doesn't remember very well," that she was eating better, and her leg was essentially the same. That is the last note on the hospitalization."

Dr. Young testified he'd been seeing Minnetta for years, but he merely *thought* she recognized him (R-309) and, on most occasions when he visited her, he *thought* she was competent — the plain inference being that, on some occasions, he thought her incompetent (R-303). "Competency" is, of course, a word of art which is not used carelessly. Dr. Young thought Minnetta drifted between competency and incompetency, but there is no question as to his opinion about her senility. At page 316 of the Record, on redirect, he stated that opinion as simply and starkly as possible: "She was senile". It would not be unusual for her simply to giggle, for instance, when asked who Dr. Young was on the occasions

of his visits (R-313). He could not give her instructions for her care. They had to be given to others (R-316). Her ability to function as a sentient being depended on a factor so precarious as the degree of her hydration when she suffered from chronic failure to move fluids into her intestines.

Gladys Walker, defendant's wife, gave this testimony on cross examination beginning at page 457 of the Record:

"Q. Your testimony is that you saw no change in your grandmother's mental condition from 1954 until approximately the time of her death except during periods when she was ill?

A. Oh you could tell a difference in her mental — old age coming on naturally, but I felt she was competent.

Q. During the entire period?

A. Yes. She was failing all along, but she wasn't really gone."

In the statement of facts, much of the evidence of senile dementia is reviewed at length. There is credible evidence of Minnetta's disorientation, inability to recognize her children, forgetting having eaten, eternally shuffling to and from the outside toilet and, when coherent, speaking as if she were living in her young adulthood. These are, according to Dr. Roy McDonald, the symptoms of senile dementia (R 102). That Minnetta could sign her name is not evidence to the contrary (R-103).

While defendant presented some evidence of a limited ability on his mother's part to comprehend and respond in 1954, that evidence could hardly be held to *compel* the trial judge to find that Minnetta was capable of resisting defendant's pressure. If anything, the total evidence compels findings that Minnetta did not, at the time she signed the deeds, understand the consequences of her act, recognize the natural recipients of her bounty or comprehend the nature and value of her property.

In evaluating the total evidence, particular weight should be given, we believe, to these facts:

1. The only disinterested witnesses who had close association and repeated opportunity to observe Minnetta in late 1954, Signe Holmgren and Vivian Biltz, testified to her lack of mental capacity, not by giving opinion but by describing her conduct and her utterances — the repeated "aren't they pretty" about flowers and quilting blocks which she simply held in her lap, the statements that she "hadn't eaten all day" made within minutes after her meals, and her inability to comprehend who Ila was (R, pp 168, 177, 178).

2. Whenever any trained person had occasion to observe Minnetta in 1954 and make official notation of her condition, he invariably made comment about the signs of her mental deterioration. Dr. Dalrymple (Exh P-9, page 8) wrote: "History is difficult to obtain because of patient's mental confusion", and he noted the bilateral arcus senilis, the generalized sclerosis and the advanced arthritic involvement. The nursing notes for May 14 include the statement that Minnetta was able to communicate her complaints of "pain all over", but also that she "does not remember eating, dressing leg, Dr. being in, etc."

Dr. Young testified that his last written notation before her discharge was of Minnetta's failing memory.

I

The Absence of Independent Advice

In *Jardine v. Archibald* (supra), this court commented on the significance of the donor's having received independent advice as follows:

"Of course, among the elements which might be of great importance in most cases in determining alleged undue influence where a confidential relationship exists, is whether independent advice had been received by the donor, and in some instances without such proof the donee might not be able to sustain his burden of proving good faith. Pomeroy's Equity Jur. 5th Ed., Sec. 956, pages 796-98 states the rule thus:

'There are a number of cases which lay down the rule generally that, in order to rebut the presumption of undue influence or unfairness arising from the fact that the parties to a transaction stood in a confidential or fiduciary relation, it is necessary to show that the one reposing confidence acted upon independent advice. However, in most jurisdictions where the question has arisen it appears that the courts have not laid down any such hard and fast rule. The question as to whether such independent advice is essential is ordinarily determined with respect to the nature of the confidence reposed, the nature of the transaction, and the circumstances in each particular case. In other words, a rule requiring proof of independent

advice is ordinarily applied where it is a reasonable requirement and where the circumstances are such that it would be difficult to show the fairness of the transaction without proof of independent advice. The rule is peculiarly applicable in gift cases, • • • it would seem that proof of independent advice is not indispensable where other satisfactory evidence is available to show that there was no abuse of confidence and that the transaction was fair and free from the undue influence inferred from the relationship.'

To the same effect see the Annotation in 123 A.L.R. commencing on page 1505."

In this case, there is not the slightest evidence of Minnetta's having obtained advice of anyone but defendant about the wisdom or fairness of giving all her property to defendant. Defendant made all the arrangements. Except for defendant's self-serving testimony, the record would show that defendant was not only the prime mover but the only one.

J

The Adequacy of Consideration

The record is clear that, at the time the deeds in question were signed, defendant gave his mother no more than \$10.00 consideration. (Deposition of Austin Walker, p. 41). He makes no allegation that he promised her any further payment, and he made no further payment except as a part of his intricate manipulations of the trust assets he received from Ila.

Defendant persists in the plaint that he is more deserving than the plaintiffs and has built up tremendous equities because of his having sacrificed himself in paying the taxes on and operating the farm. He so strongly relies on this position that we feel compelled to analyze it in some detail.

To begin with, defendant's operation of the farm was a business venture. The evidence is unrefuted that defendant had the use of the farm upon the understanding that he would pay the taxes assessed against the farm land. That this kind of contract was the basis of defendant's use and occupancy of the farm is the testimony of defendant and his witnesses. Exhibit P-14 of the J. B. Walker case is a letter to H. A. Smith, dated July 16, 1952 — just two years before the signature of the deeds which here concern us. It was signed by J. B. Walker, one of defendant's witnesses in this case, and it contains the following language:

"All these tax receipts were given to my brother, Austin L. Walker, when he was redeeming the property on taxes which he had not paid, which were a part of the consideration for him having the use of the property, rent free, from 1920 to date."

J. B. Walker also testified (JBW Record, p 156), when asked by what agreement A. L. Walker had paid taxes on the farm, as follows:

"that he would have the use of the property to take care of the taxes upon it and maintain it at least in the condition which he received it."

Defendant made no attempt to refute that testimony. He

corroborated it. At page 435 of the Record, he said, "there were years when I was not concerned for the payment of those taxes, . . . that mother gave me a sum of money to pay for the taxes which were delinquent previous to that time". This can only be interpreted as an acknowledgement that he had a contractual obligation, as to some years, to pay the taxes. It is also clear from the record that defendant occupied both the pink and orange tracts (of Exhibit 3) on the same understanding. He testified (R 437) that his right to possession was so well recognized that he could have excluded his mother "if there had been any difference" between them. At pages 434, 435 and 436 of the Record, he testified that he had the same kind of possession and control of the pink property as of the orange.

The undisputed fact is, then, that defendant had possession and control of the entire farm for the consideration of his payment of the taxes. Exhibits D-20, D-23 and D-44 of the J. B. Walker case are an exhaustive compilation, made by J. B. Walker, of the taxes assessed against the properties making up the farm from 1920 to 1962 and by whom those taxes were paid. Those exhibits indicate a total payment by defendant of \$3,551.25. Defendant's checks, which are in evidence, total to something less than that. Mr. Fletcher, plaintiffs' witness as land appraiser, testified that a reasonable rental for the farm from 1933 to trial date would have been \$18,270.00 (JBW Record, p 297). Since there is no other evidence on the point, it must be concluded that defendant rented the farm for about one-fifth of an adequate rental. There is no evidence of the profit

defendant actually made from the sale of the produce from the farm. He refused to answer an interrogatory on the point (JBW Record, p. 17, interrogatory No. 7, p 21, answer no. 7) and no competent evidence was received at the trial. It is difficult to see how he establishes a strong equitable position, however, by having taken advantage of his mother for so many years.

There is testimony from many witnesses about Minnetta's cows, how much of defendant's hay they ate, how much feed Minnetta had to buy elsewhere and how much in dairy products defendant received in return. By defendant's own testimony, however, Minnetta had disposed of all her cows by 1946 (R. 418). In 1947, again by defendant's testimony (Deposition p. 41) he offered to pay his mother \$1,000.00 per acre for her land. Certainly at that time, when his mother was fully competent, defendant and his mother did not agree that he had "earned" the farm. Between 1947 and 1954, defendant continued to use the farm for a token rental, gave his mother no hay and made no other contribution which would establish him, in equity, as his sisters' superior. During that same period, until 1952, Ila and Roma provided Minnetta's financial support and acted as her nurse, housekeeper and cook. When Ila became ill in 1952, Minnetta went to Nevada and stayed with plaintiff Fay Walker Lake for at least a year. Defendant helped his mother financially only when both Ila and Roma were too ill to be employable.

The only major change which occurred between 1947 and 1954 was the deterioration of Minnetta's mental

apparatus. It was not until that deterioration had progressed to the point where Minnetta could not remember her children — at least when they were out of sight — that defendant succeeded in the procurement of Minnetta's signature on the instruments which disinherited five of her children — including the ones who had done the most for her.

Defendant has cited the several Utah cases which hold that the doctrine of confidential relationship has application only when there is a showing (1) of inequality between the parties and (2) that the defendant occupied a superior position. In every one of those cases, one of the elements was obviously lacking. In *Bradbury v. Rasmussen*, on which defendant heavily relies, the evidence of inequality was entirely lacking, and the court would not sustain a finding of confidential relationship or give plaintiff the benefit of the presumption of undue influence in the absence of such evidence. In every other case defendant has cited for his claim of trial court error in finding a confidential relationship, such evidence has been similarly lacking. Where the two elements are shown to be present, as in *Johnson v. Johnson* (supra), this court has not hesitated to give effect to the presumption.

The one case defendant cites where the facts are somewhat similar to those in the instant case is *Anderson v. Thomas*, 108 U 252, 159 P 2d 142. At page 12 of his brief, defendant presents a statement of the facts of that case within quotes as if it were an excerpt from the court's opinion. It is not. We are certain this oc-

curred by inadvertance, and point it out only so the court will recognize that the abstract is defendant's and not the court's. In the *Anderson* case, the trial court found for the defendant, that there was no undue influence. In considering plaintiff's appeal, this court reviewed the evidence of the grantor's mental impairment and found *nothing* to suggest such impairment, let alone enough to reverse the trial court findings. All the evidence was to the effect that the grantor was perfectly able to deal with the grantee and others on terms of reasonable equality. Interestingly, the plaintiffs appear never to have raised the question of confidential relationship, and the court doesn't comment on the doctrine or the presumption that arises from it.

We believe the comment of Justice Turner, in his concurring opinion in the *Anderson* case, has relevaney to the instant case:

"I think courts should accept wills and conveyances made by the extremely aged or severely ill with great caution. It is universally known that serious illness and age wear down both body and mind. Wills and conveyances, generally speaking, should be made before the final turn, the time when it becomes apparent that there is no hope for recovery. In every land and in many families there are some so saturated with greed that they, like vultures, watch the sick and dying and await the opportune time to strike and take everything possible. Greed has no regard for justice or decency. Courts should lend no encouragement to people of such character. It is much better that property be distributed according to statutory law than have the courts give invitation or approval to undue influence and greed."

Defendant has cited and quoted from all the Utah cases in which claims of undue influence have been asserted and rejected. The problem is a recurrent one, and there are as many cases where plaintiffs have failed as there are cases where they have succeeded in proving undue influence. Space prohibits our analyzing each case in detail, but we ask the court to note that, in every case cited by defendant, either (1) the trial court found for the defendant on credible and competent evidence and this court merely upheld its findings, or (2) there was no evidence of mental debility on the part of the grantor or dominance on the part of the grantee.

The instant case is, on the contrary, a case where the trial court found for the *plaintiffs*, and the evidence of the grantor's lack of ability to resist defendant's pressures or to exercise independent judgment, even if one considers the testimony of defendant's witnesses only, is overwhelming. The plaintiff's evidence of Minnetta's disorientation, complete failure of memory, and inability to recognize her children (we believe the episode of Minnetta's failure to recognize Ila at her funeral — R 124 and 189 — is particularly revealing) would support findings of total incompetency.

POINT II

THE TRIAL COURT COMMITTED NO ERROR IN RECEIVING EVIDENCE AND MAKING FINDINGS AS TO UNDUPLICATE INFLUENCE EVEN THOUGH THE PRETRIAL ORDER FAILED TO FRAME THAT ISSUE SPECIFICALLY.

Defendant's first contention, in his argument under Point I, is that the pre-trial order failed to frame an

issue with reference to undue influence. The order was, of course, written by the pre-trial judge after lengthy pre-trial, involved the several issues of two lawsuits, and was considerably longer than most. Plaintiffs did state their contention of undue influence in the general discussion of competency during the pre-trial conference, but the plaintiffs' specific contention in this regard was not incorporated in the pre-trial order.

In the trial of the case, plaintiffs proceeded from the opening statement on the theory that undue influence was an issue. That issue was clearly joined in the pleadings — plaintiffs alleging the procurement of the deeds by undue influence in the Complaint, and defendant denying it in his Answer. During the trial, reference was made to the fact that certain testimony was being adduced because of its relevancy on the issue of undue influence, and no attempt was then made to exclude it. The trial judge himself stated repeatedly that undue influence was an issue (R 296, 338, 409, 416) without objection from defendant, and defendant adduced evidence in rebuttal on the issue (R-409).

Rule 16 of the Utah Rules of Civil Procedure requires that the Court shall make an order limiting the issues "to those not disposed of by admissions or agreements of counsel". There were no admissions or agreements at the pre-trial conference which could have eliminated undue influence as an issue, and it was sheer inadvertance that specific language on the point was not incorporated in the order.

We believe the defendant should have made some

point of his contention that undue influence was not an issue at the time of trial instead of permitting plaintiffs to proceed on that theory. The policy of Rule 15(b) should in any event be held to control. "When issues not raised . . . are tried by express or implied consent of the parties, they shall be treated as if they had been raised . . ."

POINT III

THE COURT DID NOT ERR IN ITS RULINGS ON THE "DEAD MAN'S STATUTE."

It appears to be defendant's position that if, in a proceeding of this kind, any evidence of undue influence is permitted to be introduced by the estate's administrator, the adverse party must be permitted to testify as to all conversations, matters and transactions which must have been equally within his knowledge and that of the deceased. It is therefore his position that the plaintiff, in an action of this kind, may not undertake to prove his allegations by evidence of any kind without waiving the protection of the statute. It can hardly have been the intention of the legislature that a party against whom an administrator proceeds should become competent to testify about the proscribed matters as soon as the administrator introduces any evidence at the trial. It is almost startling that, in his Point I, defendant maintains plaintiffs adduced *no* evidence of undue influence, and, in Point II, he maintains plaintiff waived statutory protection by adducing such evidence.

Defendant points to no instance, in the course of the trial, where plaintiffs were allowed to testify about

transactions equally within the knowledge of defendant and deceased, but defendant was not. As a matter of fact, the court was most scrupulous in finding waivers. For example, defendant did not record the deeds in question from the time of their signature until his mother's death more than five years later. We believe his reasons were obvious; he had procured the signatures in secret and, if plaintiffs became aware of the instruments, they would certainly have litigated Minnetta's competency when her mental condition could have been scientifically investigated. Since delivery was a transaction which must have been equally within the knowledge of the defendant and the deceased, plaintiffs objected to defendant's testifying about delivery. The court ruled, however, that defendant could so testify because plaintiffs, in taking defendant's deposition, had asked him how much money he had paid his mother "at the time of the conveyances". By using the word "conveyances" instead of "signing", plaintiffs waived the protection of the statute, said the court, as to defendant's testifying about delivery and about Minnetta's conversation at the time (R. 405-6). This is conversation which the bank officer, by the way, doesn't remember (R. 318).

Furthermore, the record contains a full exposition of the defendant's conduct over the years, and this is the conduct which he maintains is the foundation of his great merit as compared with his brothers and sisters. He was even able to adduce the testimony of his brother J. B. Walker (who was certainly committed to an agreement with defendant that he would help defendant to keep the pink property if defendant would help J. B. to keep the

orange — see discussion at R. 361 ff.) that Minnetta had said she was giving defendant the property in consideration of his services. Only Robert Frost could have put more poignant words into Minnetta's mouth than did J. B. Walker.

The trial judge was apparently persuaded that Minnetta had some conception of what she was doing when she signed the deeds. He did not find her incompetent. But the trial judge was convinced that whatever motive or idea she might have expressed was implanted by defendant. What she said was not even material if she was unduly induced to accept the idea she was expressing. If defendant persuaded his mother he was entitled to the land because he had paid taxes on it and farmed it, he implanted a false belief. He had, on the evidence in this case, really taken advantage of her by paying less than a fifth of adequate rental.

It is interesting that defendant also paid the taxes against and farmed the land J. B. Walker claimed in the companion case. J. B. Walker has felt no moral compulsion to convey that land to defendant.

The record herein is so full of the kind of testimony defendant claims he was prevented from giving that the court's rulings are hardly reversible error. To the extent that defendant made a record of the excluded testimony, as provided by Rule 43 (c), Utah Rules of Civil Procedure, it would appear that the testimony would have been cumulative and immaterial as to whether Minnetta was unduly influenced. The question is not whether

she was motivated but whether she was unduly induced to be so motivated.

We believe the cases, including those cited by defendant, support the trial court's rulings. There is no waiver of statutory protection when an administrator introduces evidence except as to the specific transaction to which that evidence relates. In particular, we would refer this Court to *Tracy Loan & Trust Co. v. Openshaw Inv. Co.*, 102 U 509, 132 P. 2d 388; *Cook v. Jones*, 115 U 536, 206 P 2d 630; and *In re Pilcher's Estate*, 114 U 12, 197 P 2d 143.

POINT IV.

THE TRIAL COURT DID NOT ERR IN FINDING A CONFIDENTIAL RELATIONSHIP BETWEEN DEFENDANT AND HIS SISTER ILA.

The finding of a confidential relationship between defendant and his sister was entirely unnecessary to support the judgment and final order as it related to Ila's property. The court did not, of course, make a finding of undue influence or avoid the transfers from Ila to defendant. If it is defendant's position (despite the testimony of his witness, Mrs. Strickland, R. 330) that Ila did not repose trust and confidence in him, we would see no harm in expunging that finding from the record.

The order that defendant account, however, results from his admission that he received the property in trust. He is asked to make the kind of accounting trustees must always make and distribute any remaining property to the beneficiaries of the trust.

If the finding defendant questions is error, it is harmless error. Plaintiffs felt it was material, in a case which puts at issue the question of defendant's capacity for imposing his will on the mentally affected, that Ila would select as trustee, in 1954, a person about whom, in 1952, she said this: (Exh P-8, page 5)

"I have never seen so much crust as the A. L. family has. When mother left, Gladys took everything there was around the place that could be eaten."

and on page 3:

"that doesn't mean I don't have to pay back everyone but Aust and as I told Mary that was a means of my collecting what they owe me."

POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING DEFENDANT COMPENSATION FOR HIS SERVICES AS TRUSTEE.

Defendant takes an incredible posture with reference to his trusteeship. He admits the trust but denies responsibility to account. Plaintiffs asked for an accounting and were met with the flat statement that the trust assets had been exhausted. This is even defendant's position in the pleadings filed in this lawsuit.

The evidence is that defendant still holds the real property and securities he received from Ila. Out of one side of his mouth, he tells the Internal Revenue Service that his expenditures for Minnetta after 1954 were out of his own resources. Out of the other side of his mouth, he tells the court and plaintiffs that those expenditures were out of trust assets.

He admits comingling of the trust assets with his own (R 427) and he claims to have acquired those assets by paying money for his mother between 1954 and 1959. Presumably, he decides whether he is buying the trust assets by these devices after he discovers whether the trust assets (realty and securities) are appreciating or depreciating.

Defendant's total course of conduct — his refusal to account, his self dealing, his comingling of assets — has violated his obligation as fiduciary. He cannot now demand compensation. Extended citation of authority on this point should not be necessary. We quote the following, however, from Scott's Abridgment of the Law of Trusts (Austin Wakeman Scott, 1960, Little, Brown And Co.), Section - 243, page 521:

“Where a trustee has committed a breach of trust, the court may in its discretion either allow him full compensation or deny him all compensation or allow him reduced compensation. . . .”

“The court has denied compensation where the trustee has repudiated the trust, or where he has misappropriated trust property, or where he has failed to keep accounts . . .”

The trial court simply denied compensation in this aggravated situation.

POINT VI

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT A LIEN FOR TAXES AND IMPROVEMENTS ON HIS MOTHER'S PROPERTY.

The evidence is that defendant contracted to occupy and occupied the pink and orange property of Exhibit 3

for paying the taxes. There is *no* contrary evidence. Defendant decided what crops to plant and what produce to sell. He refused to answer an interrogatory about his sales and income from farming — at least he never did answer it. He testified he had complete control of the pink and orange property. Any testimony that he got less than value for anything he gave the family is inconclusive and refuted.

Defendant received the use of property having a reasonable rental value of \$18,270.00 (JBW Record 297). He paid taxes totalling \$3,551.25 (JBW Exh. D-20, D-23, D-44, D-12, R. 407, 435). This was cheap rent for the use of 40 acres of land for 42 years. He has certainly shown no entitlement to reimbursement of amounts expended under these circumstances.

POINT VII

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

Rule 59(a) of the Utah Rules of Civil Procedure, covering new trials, provides a wide latitude for the trial court in actions which are tried without a jury. The rule provides:

“On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.”

Since this case involves an action tried without a jury, it is important to note the distinction between jury and nonjury trials as relates to motions for new trials.

Each case cited by Appellant in his brief involved a jury trial, and they do not assist the court in this case except for some of the general criteria for granting new trials which would be equally applicable to both types of cases.

When an action is tried without a jury, the court necessarily has greater freedom in determining what its action should be on a motion for new trial. 6 Moore's Federal Practice, p. 3772, Para. 59.07.

It has been uniformly held by this Court that a new trial based upon newly discovered evidence will not be granted unless the new evidence is of a character as is likely to change the result of the case. *Universal Investment Co. v. Carpets, Incorporated*, Utah, 400 P.2d 564; *Crellin v. Thomas*, 122 Utah 122, 247 P.2d 264; *Tanner v. Stevens*, 8 Utah 75, 30 P. 24. In a jury trial the court, in considering a motion for new trial, can at best only conjecture as to whether or not the new evidence would have changed the jury's verdict. This is not the case when the court which heard the evidence and made the finding is also considering the new evidence. In this situation, the court is able to weigh the new evidence against that presented at the trial, and will know absolutely if this new evidence would have resulted in a different finding.

The quoted provisions of Rule 59 (a) apply a distinctive procedure in the case of non-jury trials. The rule permits the court to determine if the new evidence is of such importance as to be decisive upon its findings. If it finds this to be the case, it can then have the case reopened and the additional evidence adduced. This procedure rec-

ognizes the expense involved in the trial de novo of a case. Although an entire new trial is necessary in a jury case, it serves no useful purpose in most non-jury cases.

This court has consistently followed the rule that the denial or granting of a motion for new trial rests in the discretion of the trial judge and is reviewable only when there is a plain showing of an abuse of that discretion. *Universal Investment Co. v. Carpets, Incorporated*, supra; *Uptown Appliance & Radio Co., Inc. v. Flint*, 122 Utah 298, 249 P.2d 826; *Crellin v. Thomas*, 122 Utah 122, 247 P.2d 264.

It is submitted that the review of a trial court's denial of a motion for a new trial based upon newly discovered evidence should be even more constricted than this, where the case is tried before the court without a jury. Respondents know of no case where this court has considered the distinction between motions for new trials in jury and non-jury trials. There appears to be a paucity of decisions on this point in other jurisdictions as well. 66 C.J.S. p. 71, New Trials §3, makes reference to new trials applying particularly to jury trials. The statement then goes on to say that some jurisdictions *permit* new trials after a decision by a court.

In the case of *Arias v. Springer*, 42 N. Mex. 350, 78 P.2d 153, the court states that it is unnecessary to grant a new trial in an equity case, since reopening the case to take additional testimony is adequate, and that new trials apply to law cases only. The court did not specifically discuss the distinction between jury and non-jury trials.

The point appearing to be one of first impression for this Court, Respondents urge the wisdom of a different rule for non-jury cases from that in jury cases as regards motions for new trials on the basis of newly discovered evidence. Where the motion is addressed to the Court which was the trier of the facts, the appellate court should take due note that the ruling of the trial court determines whether or not the new evidence would have been decisive in the original case. This Court should reverse a denial of such a motion only when the new evidence, coupled with that properly admitted in the trial of the cause, *requires* a different result in the case as a matter of law.

Turning from the question of the extent to which this court should review the denial of the motion for new trial to the new evidence Appellant sought to introduce, it is seen that this evidence would not be decisive in any regard. As a matter of fact it would have been contradictory of Appellant's own testimony. The affidavits relate to a period around 1948-49 when the witnesses allegedly were told that Minnetta was going to keep the property for Appellant so he could place a supermarket on the property.

In his deposition, Appellant testified to a series of discussions where real estate agents and other people, in 1947 and thereafter, had sought to buy a part of the property and that shortly after this time he reached an agreement with his mother whereby he would purchase the property for \$1,000.00 per acre (Austin Walker Deposition pp. 34 to 41.) This agreement, according to Appellant's statements, was not changed by any further

discussion between appellant and his mother at least until 1954. Clearly the evidence by which Appellant sought a new trial would have been superceded by this later agreement which appellant never consummated by the payment of the purchase price.

The affidavits further fail to show due diligence on Appellant's part in attempting to adduce the evidence at the trial. As to the Ray Smith evidence, Appellant admits talking to Mr. Smith prior to the trial about Mr. Smith's negotiations with Minnetta. Appellant's affidavit only says that he failed to ask Mr. Smith the direct questions involved in the suit. It is difficult to perceive what conversations Appellant could have had with Mr. Smith relative to the case which would not involve the matter in the affidavit. In any event, it is submitted a showing of due diligence cannot be predicated upon the failure of the moving party to ask a prospective witness the only material questions which the witness could be expected to answer.

The Appellant's affidavit does not give any insight as to how he learned of the proffered testimony of Glen C. Schmidt. He merely states he learned of this in January, 1965. We can only conjecture whether or not he had any information about Mr. Schmidt before trial which through due diligence could have developed his testimony at the trial. To obtain a new trial, the Appellant must show that he could not have developed the testimony at the trial through the exercise of due diligence. Without a showing by Appellant of the steps he took to learn of the testimony, we cannot determine if due diligence could have produced the witness at the trial.

As to Rex Cole, no mention was made by Appellant during the trial that he had been unable to contact the witness, nor did he request a continuance, to obtain the presence of this witness. In *Lindsay v. Eccles Hotel Co.*, 3 U. 2d. 364, 284 P.2d 477, 478, this failure to apprise the court of the existence of a material witness and to request a continuance was held to demonstrate a lack of due diligence. Further, the affidavit of Appellant indicates that the only thing he did after the trial which was not done before trial was to telephone Mr. Cole.

As to each of these witnesses, Appellant has failed to establish due diligence in attempting to produce the testimony at the trial. The evidence sought to be adduced from the witnesses would not require a different result in the case, is remote in point of time from the 1954 conveyances, and is contrary to Appellant's testimony of a subsequent agreement to purchase the property from his mother for a fixed cash purchase price. For these reasons, Respondents submit the trial court did not err in denying Appellant's motion for new trial.

CONCLUSION

The trial court chose to grant relief to plaintiffs in this case on their proof of undue influence with the assistance of the presumption which arises upon establishment of the fact of "confidential relationship." Since the undue influence finding was a sufficient basis for affording plaintiffs all the relief they sought, the court considered it unnecessary to find either (1) that Minnetta was incompetent or (2) that defendant had de-

ceased or acknowledged, after Minnetta's death, that he held her property in trust for himself and plaintiffs.

We believe the evidence actually compels both additional findings. The plaintiffs' evidence of Minnetta's inability to recognize her children, her disorientation as to time and place, her complete failure of memory, and the development in her of all the classic physical concomitants of mental deterioration is thoroughly convincing. To refute it, defendant presented this testimony:

1. Defendant's daughter said Minnetta didn't know what day it was but could say something about the weather.
2. Defendant's wife said Minnetta was failing all the time but wasn't really "gone."
3. Minnetta's physician said Minnetta was clearly senile but he *thought* she was competent on the majority of his visits.

With reference to the acknowledgement by defendant that he took the property only to avoid probate and held it for the heirs, we have the testimony of three people who were present when he made that statement—Don Lake, R. E. Walker and Carol Lake (R. 130, 194, 263). In refutation, we have only defendant's denial.

Defendant apparently contends his testimony is more credible than plaintiffs' because he is a school teacher and was a bishop. Without commenting on these as tests of credibility, we would remind the court that defendant has admitted misrepresenting the source of

funds used for Minnetta in preparing his tax return and has admitted co-mingling trust assets with his own.

We would also point out to the court that defendant's witness, J. B. Walker, testified that he spent both Thanksgiving and Christmas of 1954 with his mother (R. 377, 378), and this testimony was denied by plaintiff Roma Walker Groek. Plaintiffs then introduced J. B. Walker's diary for 1954 which reveals that J. B. Walker was at least mistaken in his testimony (Exhibit P-10). On the whole record there is little reason to give defendant's witnesses more credence than plaintiffs', particularly when plaintiff's evidence is always corroborated by hospital records and other written memoranda.

We submit that plaintiffs should have been granted relief on every theory expressed in their complaint. It would be a rank injustice if this court were to hold that the trial judge could not reasonably have found, on the evidence, a confidential relationship in which defendant had the dominant position and of which he took advantage by procuring the signature of deeds conveying all his mother's property to him and depriving her other heirs of their just inheritance.

Respectfully submitted,

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