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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 In Support of Petition For Rehearing

IN THE SUPREME COURT OF THE STATE OF UTAH

WALKER BANK AND TRUST COMPANY, a corporation, Administrator of the Estates of MINNETTA WALKER, aka Nettie Walker, deceased, and ILA MINNETTA WALKER, deceased, JOHN A. WALKER, deceased, and R. E. WALKER, ROMA WALKER GROCK and ALTA FAY WALKER LAKE,
Plaintiffs and Respondents,

and

J. B. WALKER,
Involuntary Plaintiff,

— vs. —

AUSTIN WALKER,
Defendant and Appellant.

Case No. 10374

Brief in Support of Petition for Rehearing

STATEMENT OF THE NATURE OF THE CASE

So far as pertinent to the petition for rehearing, this is an action brought by respondents to set aside conveyances of real property to appellant from his mother on the ground of undue influence and her lack of mental capacity. Appellant claimed ownership to the property or,

in the alternative if the court adjudged him not the owner, appellant claimed a lien upon the property for taxes paid, improvements made and services performed in connection therewith .

DISPOSITION IN THE LOWER COURT AND THE SUPREME COURT

The lower court determined the conveyances to appellant from his mother were void upon the ground of undue influence, denied appellant's motion for a new trial and refused to grant alternative relief. The Supreme Court affirmed the lower court except with respect to alternative relief. The Supreme Court made provision for an accounting be made by appellant in which he may claim various credits and be charged with various items in connection with said property.

RELIEF SOUGHT

Appellant seeks a rehearing on the propriety of affirming the judgment of the trial court with respect to avoidance of the deeds to appellant from his mother on the ground of undue influence and on the propriety in affirming the trial court in denying a new trial. In the event a rehearing is denied, appellant seeks clarification of the opinion heretofore rendered by the court in respect to the accounting which the court in its opinion authorized and directed to be had.

STATEMENT OF FACTS

Appellant does not believe that any purpose would be served in attempting to restate the facts. A full and thorough statement appears in the Briefs already on file herein to which reference is hereby made.

ARGUMENT

POINT NO. 1

THE SUPREME COURT ERRED IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT IN WHICH IT WAS DETERMINED THE CONVEYANCES TO APPELLANT FROM HIS MOTHER WERE VOID.

In its opinion this court said:

> "* * * Putting ourselves in the shoes of the trial court chancellery, as we must, in a case like this, and giving considerable consideration to the trial court's 'view of the scene,' excluding unimportant matters, we cannot say he was in error."

It would appear from the opinion that this court did give "considerable consideration" to the trial court's "view of the scene." The trial court's "view of the scene" as applied to this case has special significance. At the close of the evidence the trial court almost in a burst of feeling made the statements quoted on page 2 of the opinion indicating that his "view of the scene" was favorable to appellant, yet the ruling was adverse. We are aware of the fact that such remarks are not the appealable decision of the court. We have read with

interest but without comfort this court's treatment of the trial court's apparent change of mind. It would be helpful if a floroscopic view of the process of the change which would appear to have occurred in the trial court's mind could be had. Although this is impossible yet one of counsel for appellant made inquiry of the trial court as to what caused him to change his mind and was informed by him that he was fearful the Supreme Court would not uphold his original view of the case. It would appear therefore that the appealable decision of the trial court was not the "jewel of studious reflection" as characterized by this court in its opinion. Instead of being an "off-the-cuff facet" and a mere "gratuity from the bench," the original view expressed by the trial court is his real decision. At the time the trial court made the statement from the bench he had heard the evidence, the facts were well within his mind, he had an opportunity to observe the witnesss and to form a conclusion as to the veracity of their testimony. It is difficult to conceive of anything in the argument or in the process of "studious reflection" which could have caused the trial court to back away from his original view of the case unless it can be explained by the statement which he made to counsel for the appellant. While these views of the trial court are not a part of the official transcript they can be documented by affidavit and incorporated into the record if this court should grant a rehearing and an opportunity so to do.

By reason of the foregoing, appellant respectfully urges this court to review again the evidence with re-

spect to undue influence and evaluate the same in light of what appears to have been the real decision of the trial court. This being an equity case the appellate court has the responsibility to review the evidence, not with a view merely as to whether it sustains the ruling of the trial court but on the merits of the evidence itself. If the evidence is so evaluated, we feel the validity of the deeds from appellant's mother must be sustained. It would be inappropriate to burden this court with a repetition of the whole of appellant's argument in his original brief. However, the court will recall that the deeds were executed by appellant's mother in a bank in Midvale, Utah, in the presence of Dale Waters, Vice President and General Manager and were notarized by him (R. 317, 318). Mother Walker told J. B. Walker that it was her intention that Austin have the property because of the care that he and his family had given (R. 351). After the deeds had been executed she told J. B. she had done so. (R. 355) Apparently this court overlooked this very important fact in stating in its opinion that "Austin told none of the family about this incident, and it is obvious from the records that Mother Walker did not mention it either."

There is no direct evidence in the record of undue influence. At most respondents have done no more than show opportunity. We again call the court's attention to the following:

> This court held in *Hatch v. Hatch,* 46 Utah 218, 148 P. 433, that family relationship alone is not sufficient to establish confidential relationship or undue influence.

This court said in *Anderson* v. *Thomas*, 108 Utah 252, 159 P. 2d 142,

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

This court said *re*: *Bryan's Estate*, 82 Utah 390, 25 P. 2d 610:

"* * * The opportunity to exercise influence, unless combined with circumstances tending to show its exercise affords no presumption that it was in fact exercised."

POINT NO. II

THE SUPREME COURT ERRED IN SUSTAINING THE RULING OF THE TRIAL COURT WHEREIN IT DENIED APPELLANT'S MOTION FOR A NEW TRIAL.

The deeds were set aside by the trial court on the ground of undue influence. It would therefore seem that testimony from disinterested persons as to Mother Walker's intent to transfer the property to Austin would be material upon the question of undus influence. In fact, this court apparently gave considerable weight to the erroneous belief that nothing was said to anyone about transferring the property to Austin. Not only did she tell J. B. Walker, her son, but also Ray Smith, Rex Cole and Glen Schmidt, whose testimony would add further weight to the fact that Mother Walker for many years had planned to do just what she did. Such evidence is of sufficient substance that with it there is a

reasonable likelihood that the result would have been different. Undue influence was not claimed as an issue in the pretrial order. Appellant could not have anticipated that it would later be the basis upon which the trial court would set aside the transfers. Such being the case, appellant should not be charged with lack of diligence in procuring the newly discovered evidence. We respectfully submit that the standards required by this court for granting a new trial on the ground of newly discovered evidence as stated in *Universal Investment Company* v. *Carpets, Inc.*, 16 Utah 2d 336, 400 P. 2d 465, have been made.

POINT III

THE OPINION OF THIS COURT NEEDS CLARIFICATION AS TO THE ITEMS APPELLANT MAY CLAIM IN THE ACCOUNTING ALLOWED BY THIS COURT.

In the event the Court should refuse Appellant a rehearing on the case, it should nevertheless clarify its opinion to the end that a proper and adequate accounting may be had between the parties. The Court will recall that the Walker property consisted of three tracts of land, a tract of approximately 11 acres shown in pink on Ex. 3; a tract shown in orange on Ex. 3 consisting of approximately 19 acres, and a tract known as the "creek property" but not shown on Ex. 3, consisting of approximately 10 acres. The "pink" tract and the 10 acre tract are described in the deeds to appellant from his mother (Ex. P-4 and P-6). The 19 acre tract was involved in the J. B. Walker case.

Austin farmed all of the property, paid taxes on all of the property and made improvements on all of the property. It is assumed that this Court intended that Austin's claims with respect thereto shall apply to all of the property, above described, but the opinion of the Court should be clarified specifically so to state.

From approximately 1920 until the present Austin had almost the sole responsibility for the care of all of the property (R. 142). It is assumed that the accounting should cover the entire period. But here again a clarification of the matter would facilitate the accounting.

Until 1947 there were cows, horses and chickens on the property at various times (R. 418) which were cared for by Austin. Most of the crops grown on the property were used to feed the livestock and were used by the Walker family (R. 288). After the family store was closed in the early 1920s the only source of income of Mother Walker was from the sale of dairy and poultry products produced on the farm (R. 230). Except for two or three years when the property was rented, Austin produced the crops and cared for the livestock. From the language of the Court's opinion it would appear that appellant is entitled to be reimbursed not only for out-of-pocket expense but for the reasonable value of his labor and services in managing the property and producing the crops, as distinguished from his personal services. Although the opinion refers to "personal" services it does not attempt to define what are other services for which appellant should be compensated. We believe this is not only desirable but mandatory if a property

accounting is to be had. The Court should at least enlighten the parties as to the scope of the items for which appellant should be given credit as well as the items for which he should be charged.

CONCLUSION

The principal purpose of this petition for rehearing is to urge the court to evaluate the evidence with respect to undue influence. Compelling reasons for this are set forth in Point I. If the evidence is viewed on its merits it warrants but one conclusion — that the validity of the deeds from his mother to appellant should be upheld.

In determining that the deed should be avoided on the ground of undue influence, this court was apparently of the opinion that in lieu of the property Austin should be compensated for his services in connection therewith. As stated above, appellent respectfully urges that the court uphold the validity of said deeds. However, if the court rejects the foregoing, appellant respectfully urges, in order to minimize the possibility of further litigation, that this court make clarification of the items which he may claim in the accounting as suggested in Point III.

Respectfully submitted,

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