

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 : Reply Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALKER BANK AND TRUST
COMPANY, a corporation, Admin-
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NETTA WALKER, aka Nettie
Walker, deceased, and ILA MIN-
NETTA 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

REPLY BRIEF OF APPELLANT

Appeal From a Judgment of the
District Court of Salt Lake County

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FILED

DEC 10 1965

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	4
POINT I UNDUE INFLUENCE	4
CONCLUSION.....	11

AUTHORITIES CITED

<i>Erdbury v. Rasmussen</i> , 401 P. 2d 710 (Utah.....	10, 11, 12
<i>Jardine v. Archibald</i> , 3 Utah 2d 88, 279 P. 2d 454.	6, 7

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REPLY BRIEF OF APPELLANT

STATEMENT

In order to correct various **misstatements**, **innuen-
does** and **assumptions** made by **Respondents** in **their**
Brief, Appellant submits the following reply:

STATEMENT OF FACTS

Respondents' Statement of Facts recites evidence pointing to the "senility" of Minnetta Walker as though such term suggests mental incapacity. However, the term "senility" is defined by Webster's International Dictionary as being characteristic of old age. Although there is no doubt that Mrs. Walker exhibited the normal and usual signs of old age, her condition was not such as to justify the inference that she was mentally incompetent. As testified by Dr. Young (in continuation of the testimony quoted by Respondents):

"I don't remember specifically noting in my recollection of any saying "She is worse today" or "better today." She was senile. I had to give her instructions and make sure they were written down as to insure that the people taking care of her would receive them and get them correctly. I couldn't you might say trust her memory for any of that, because I would tell somebody what we were to do and then write them down or leave it on the prescription blank which would, of course, tell them what to do. I couldn't rely on just telling her what to do. *To me that is normal senility for most of us.*" (Emphasis ours) R. 316.

Certainly her "senility" was not such as to render Minnetta Walker mentally incompetent. Not only did the trial court fail to find her incompetent, but the testimony of Dr. Young is to the effect that she was competent mentally. We quote:

"Q. Now, can you tell us whether or not she in a general way during the period of time that she was not suffering specifically from these ailments

that you have indicated, whether or not she would be rational and recognize people and be considered to be competent mentally?

"A. I think so, yes, Sir.

"Q. Up until that period in her life, how long prior to her death, would you consider her to be rational and competent mentally except for specific times when she was suffering from some illness?

"A. Most of the visits I made she I felt was competent at that time except for this last illness in '59 in September." (R. 312)

Respondents' reference to the "alleged stratagem" of defendant in taking his mother to the Bank when Roma was not at home, as if to suggest that it was part of some plan or scheme to defraud his mother, is without any justification in the record, nor does the statement that Defendant "buried" the deeds until his mother's death need denial. The record is void of any testimony which would support such characterization of Defendant's conduct.

The attempt to inject the physical condition of the sister Ila into the scene, when Defendant has from the outset acknowledged his fiduciary status as to her property, could only have been, and now is, an attempt to influence the Court in considering whether a similar relationship existed between Appellant and his mother. Obviously the one situation has no relevancy as to the other, but each relationship must depend upon the particular facts and circumstances of the case.

A R G U M E N T
POINT I
UNDUE INFLUENCE

The authority cited by Respondents in their Brief and the principles of law quoted therefrom are not questioned by Appellant. It is, however, the forced application of such legal principles to the evidence in this case to which exception is taken. For instance, on page 12 of the Brief, Respondents quote from the testimony of Shirley W. Johnson (R. 395). They failed to note that the witness was talking about the condition of Mother Walker which existed in 1959 (312), some five years after the deeds were executed and a few months before she died. On page 22 of their Brief, Respondents quote from the testimony of Gladys Walker (R. 457). A true evaluation of her testimony cannot be had without an examination of the complete record thereof which included the following:

“A. My opinion is that most generally her condition — her mind — was good except when she was ill.

“Q. Well, what about it on October 8?

“A. It was very good.

“Q. She had been in the hospital earlier in that year of 1954?

“A. Yes.

“Q. She had some difficulty, of course?

“A. Yes.

“Q. Did that condition improve after she got out of the hospital?

“A. Yes, with her mind it did.” (R. 451-452)

Dr. Dalrymple's report referred to on page 20 of Respondents' Brief is dated May 12, 1954, (Exhibit 9) some five months before the execution of the deeds. Dr. Young saw Mother Walker only once during the year 1954 after she got out of the hospital. This occasion was on June 2, 1954. (R. 313)

We submit that Respondents have used verbal contortion in their attempt to convert a wholesome relationship of mother and son into a confidential relationship from which they accuse Appellant of having sought to benefit himself in a fraudulent breach of such relationship.

Respondents speak of the “Strategem” of defendant. They accuse him of “burying” the deeds and after his mother's death of “promptly and triumphantly” recording them (page 5) of Respondents' Brief). They note “patience and planning” on his part in securing the deeds (page 16) at a time when his mother was “delightfully tractable” (page 19). However, a confidential relationship is not created by high sounding words. In light of the foregoing it seems appropriate to discuss some of the claims of Respondents. On page 16 of their Brief reference is made to portions of defendant's disposition. According to our understanding of the record, these pages of the deposition are not in evidence. However, we have no objection to the court considering them

as evidence. On page 34 defendant tells of an understanding between him and his mother in 1947 for him to have the property. On page 17 of their Brief Respondents refer to the time of obtaining the deeds as being "particularly auspicious." They say "Ila is in the hospital and soon to die." The fact is that Ila didn't go to the hospital until November 8, 1954, a month after the execution of the deeds (Exhibit P-1), and no one knew when she would die. It is difficult to follow the reasoning of Respondents in accusing Defendant of "contriving" to complete the transaction in secrecy" (page 18 of their Brief). It would seem that the facts justify the opposite conclusion. The court will remember that the deeds were executed in the Bank at Midvale, Utah, and notarized by an officer of the Bank (R. 317). Respondents accuse Defendant of "sharp practice" in that he "hid" the deeds by failing to record them until after his mother's death (page 18 of their Brief). It was on the advice of H. A. Smith, long-time attorney for the Walker family that Defendant recorded the deeds when he did (R. 430). Respondents discuss the absence of independent advice and cite *Jardine v. Archibald*, 3 Utah 2d 88, 279 P. 2d 454. The independent advice rule applies where there is a confidential relationship and then only under circumstances as set forth in *Jardine v. Archibald*, supra, wherein the Court stated:

"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.”

Defendant contends no confidential relationship existed in this case and therefore there is no reason to consider the application of the independent advice rule. Circumstances contemplated in *Jardine v. Archibald*, supra, do not exist here. In any event, Mother Walker was not wholly without independent advice in conveying the property to the Defendant. At the request of his mother, Defendant conferred with H. A. Smith, the attorney for the Walker family, concerning what should be done about her property. After doing so, Defendant testified:

“A. I told Mother that H. A. said that a quit claim deed could be prepared and given to me whereby it would convey this property to me, and she agreed that that was all right to have the quit claim deed prepared by H. A. Smith.” (R. 404)

Mother Walker discussed with J. B. Walker, her eldest son, what disposition should be had of her property and told him she intended Austin to have it. (R. 351)

Respondents apparently seek to uphold the trial court's finding of undue influence by attacking the arrangement whereby Defendant operated the farm over the years. They accuse Defendant of having “taken advantage of his mother for so many years.” (Page 28 of their Brief) They say the operation of the farm was a “business venture” (page 26) and that he operated it for about “1/5th of an adequate rental.” (page 28) Respondents claim Defendant had a contract for the use

of the farm in consideration of his paying the taxes (page 3) For this they rely on a letter of J. B. Walker to H. A. Smith, dated July 16, 1952, (Exhibit P-14 in J. B. Walker Case) and upon a statement made by J. B. Walker in the trial of this case, excerpts of which letter and testimony they set forth on page 26 of their Brief. Respondents failed to note that the statement made by J. B. Walker was in answer to the question, "By what agreement with *you* was that done?" (Emphasis ours) It is obvious that the property referred to, both in the exhibit and in the testimony of J. B. Walker, was the so-called "orange tract" which J. B. Walker had an interest in by reason of his having paid off the Dayton mortgage, and does not include the "pink tract" Defendant acquired from his mother. Likewise, it is just as obvious that any arrangement with Austin for the use of the property was with J. B. Walker and Austin and not between Austin and his mother with respect to her property. There is no basis in the foregoing for the court to find a contract between Defendant and his mother as claimed by Respondents. Respondents refer to Exhibits D20, D23, and D44 of the J. B. Walker case and claim they show Defendant paid taxes totalling only \$3,551.25. Defendant's cancelled checks should be the best evidence. They are Exhibits 49 of the J. B. Walker case for \$844.44. Exhibit D11 for \$438.12 and D12 for \$3,320.07, which sums total \$4,602.63. On page 27 of their Brief, Respondents refer to the testimony of Mr. Fletcher that the rental value of the property was \$18,270.00 and claim that Defendant had the use of the land for about one-fifth of its

rental value. Respondents failed to mention that Defendant farmed the property *for the benefit of the family* and that, after the store was closed in the 1920's, *the only income Mother Walker had was from the farm.* (R. 142, 143, 230, 287, 288, 289) Defendant is not unmindful of the fact that he and his family had some dairy products from the farm but so did his brother, R. E. Walker. Defendant sold some of the cash crops but, likewise, there was seed to buy and other expenses of operation which he had to pay. The fact is the cash crop was small R. 287) and most of the crop produced by the Defendant on the place was left on the place to feed the "livestock" *and it was placed there and used by the family.*" (R. 288) (Emphasis ours) On page 27 of their Brief, Respondents say there is "no evidence of the profit Defendant actually made from the sale of the produce from the farm." It is quite obvious there was no profit to him. No one realized more than his mother the value of Austin's contribution to the family by his operation of the farm for almost forty years. Rather than the sinister, conniving and scheming person Respondents would make of Austin in securing the deeds, Mother Walker initiated the preparation of the deeds and caused the property to be conveyed to him by way of compensation for his contribution to her and the family.

Respondents urge on page 31 of the Brief that the case at bar can be distinguished from those in which this court has refused to find undue influence upon the ground of the "Grantor's lack of ability to resist Defendant's pressures or to exercise independent judgment." The fact

is that some seven or eight years before the date of the deeds in question, and at a time when even Respondents would not question her mental ability, Mother Walker expressed to others her intention to convey the property to Austin. The deeds in 1954 were simply the fulfillment of her desire and intention of many years prior thereto. Respondents have cited instances when Mother Walker was disoriented, such as in May, 1954, when she was in the hospital, but the fact is that some five months later she did not go to a public institution and caused the deeds to be executed in the presence of a bank official who knew members of the Walker family and who observed nothing unusual in connection with the transaction. In *Bradburn v. Rasmussen*, 401 P. 2d 710, the most recent Utah case of which we are aware, in which confidential relationship was discussed, this court said:

“The doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. Mere confidence in one person by another is not sufficient alone to constitute such a relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, *and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other.*” (Emphasis ours)

Respondents have groped to find evidence of the exercise of superior influence by Austin on his mother. They say on page 19 of their Brief, “There is little evi-

dence of the actual advice defendant gave his mother." They indulge in supposition only when they say, on page 19 of their Brief, "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." They also observe on page 27, "There is no evidence of the profit Defendant actually made from the sale of the produce from the farm." The truth is, Respondents have failed to meet the test of *Bradbury v. Rasmussen*, supra, in that the evidence fails to show "a situation where, as a matter of fact, there is superior influence on one side and dependence on the other."

CONCLUSION

The plain facts revealed from a rather voluminous record are:

1. The property in question was conveyed to Defendant by his mother;
2. The deeds were not executed in secret, but openly in a public institution and in the presence of a bank official who observed nothing unusual about the transaction;
3. The conveyance of the property to Defendant was the fulfillment of the long expressed desire and intention of his mother;
4. The property was conveyed in part to compensate Appellant for a lifetime of service;
5. There was no "confidential relationship" existing between Appellant and his mother; and

6. The evidence fails to disclose any fraud or undue influence on the part of Austin Walker in connection with the matter.

Respondents would have the Court believe that Mother Walker was senile at the time she executed the deeds. As pointed out herein, "senility" is not synonymous with "mental incapacity." In any event, the evidence relied upon by Respondents is remote to the time the deeds were executed. The record contains no evidence of undue influence in fact. Respondents seek to use the principle of confidential relationship to supply the deficiency of proof of undue influence. They have failed to meet the requirements of proof of a confidential relationship. This Court has held, mere "opportunity" is not enough. Respondents have failed to prove there was "superior influence on one side and dependence on the other" as required by this Court in *Bradbury v. Rasmussen*, supra.

The evidence supporting the validity of the deeds is simple, positive and persuasive. This Court is therefore respectfully urged to reverse the judgment of the trial Court.

Respectfully submitted,

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