

1964

## Helen D. Oelerich v. Joan Eoelerich : Brief of Respondent

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

APR 7 - 1964

IN THE MATTER OF THE  
ESTATE AND GUARDIANSHIP OF JOAN OELERICH,  
Incompetent.

HELEN D. OELERICH,

*Petitioner and Appellant,*

Case No.  
10005

vs.

JOAN OELERICH,

*Respondent.*

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JUN 30 1964

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## BRIEF OF RESPONDENT

**Appeal From a Judgment of the Third District Court  
For Salt Lake County  
Honorable Stewart M. Hanson, Judge**

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*Respondent.*

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

The facts, as presented by the appellant, although seemingly true, do not clearly portray what the record shows with respect to the issues involved in this matter. Moreover, the appellant's Statement of Facts indeed goes far beyond what is necessary for this appeal. What is contemplated by Rule 74(p)(2), U.R.C.P. is a concise statement of the facts of the case which are relevant to the errors asserted for reversal and appellant has

recited facts which have nothing to do with the appeal. By way of illustration, on pages 4, 5 and 6 of Appellant's Brief, there is a history of the respondent from the time she was born until the time the petition for appointment of guardian in this matter was filed. In addition, on pages 9 and 10, quotations from an affidavit by one Virginia Kelly can be found hinting of emotional instability. As clearly pointed out by appellant, page 10 of her brief, there was no hearing on the merits of the petition for letters of guardianship. Therefore, there is no reason for including the above mentioned statements relating to respondent's alleged incompetency. What is important are the facts surrounding the dismissal of this petition by the court below and so we move on to consider them.

The procedural steps as outlined by the appellant were followed as stated. There are, however, significant omissions which must be supplied to present the matter fairly. In that connection we mention that settlement negotiations between the parties involved and their attorneys occurred between December 21, 1961, and April 17, 1962, the day the respondent testified. (R. 157-158). A trust agreement (R. 43-48) was executed on March 13, 1962, by the respondent in an effort to settle this case. (R. 152). However, the appellant stated there would be no settlement. (R. 154 and 158). Yet on April 17, 1962, which was the last hearing before the hearing on July 29, 1963, counsel for both the appellant and the respondent represented in open court "that they were in the process of working out this trust agreement

and that if the trust agreement was worked out satisfactorily, . . . that this proceeding could be deemed dismissed." (R. 139). On May 8, 1962, in Chicago, Illinois, the respondent and the appellant as the Conservator to Collect the Estate of respondent, signed a Trust Agreement with the First National Bank of Chicago. (R. 76-83).

On June 28, 1963, counsel for respondent filed a motion to dismiss the petition (R. 74) on two grounds and one of these was "that a trust agreement had been executed by Joan Oelerich, the petitioner, and the First National Bank of Chicago." An order of dismissal was signed by the court on August 12, 1963, after a hearing on July 29, 1963. (R. 91).

Counsel for petitioner moved to vacate the order of dismissal on August 20, 1963. (R. 94). A hearing was held on August 26, 1963 to argue this motion. (R. 134-148). On September 11, 1963, the court issued a Further Memorandum Decision (R. 127) in which it denied the petitioner's motion for a rehearing and reaffirmed the grounds for dismissal.

## POINT I.

THE COURT DID NOT ERR IN DISMISSING THE PETITION ON THE GROUND THAT A TRUST AGREEMENT WAS ENTERED INTO.

*A. The court did not err in dismissing the petition on the ground that the parties, through counsel, in open court agreed to a dismissal if the trust agreement was entered into by the parties and a bank.*

On April 17, 1962, counsel for both parties to this action represented in open court that this petition would be dismissed if a trust agreement was consummated. The trust agreement was signed on May 8, 1962, in Chicago. No action was taken to dismiss the case until June 28, 1963, when the respondent moved for dismissal. The court granted a dismissal on the basis that the parties, through their counsel, had consummated an agreement for dismissal.

It is well settled that parties of record to a suit who are under no disability and are suing or defending for themselves alone may agree at any time to the dismissal of the action or defense, with or without prejudice, because they have the absolute control of the litigation at every stage of the proceeding, from its inception to, and after, the final judgment. 17 Am. Jur. 103.

Since the terms of the agreement for dismissal were presented by counsel for the respective parties, the crucial question becomes did counsel for the petitioner have the authority to dismiss or to settle the case?

An attorney of record is generally held to have implied authority to enter or take a dismissal, discontinuance, or nonsuit that does not bar the bringing of



another suit on the same cause of action. These procedural steps have been described as a dismissal or other termination without prejudice. 7 Am Jur 2d 126. The order issued in this case does not state whether the dismissal is with or without prejudice. (R. 91). There-  
there, it would seem to be a dismissal without prejudice. Rule 41(a) (1) U.R.C.P. See also 56 ALR 2d 1290.

In the case of Gagnon Company v. Nevada Desert Inn, 45 Cal. 2d 448, 289 P. 2d 466, the California Supreme Court held that an attorney had authority to commence an action and to dismiss it *with prejudice*. The discussion of that phase of the case at pages 474 and 475 includes concepts supporting respondent's contention. There the court stated:

“With reference to an attorney's authority to dismiss his client's action with prejudice it is said: ‘An important problem is related to the distinction between voluntary dismissals or nonsuits which are without prejudice to the cause of action, and dismissals or nonsuits with prejudice, the last mentioned type being referred to in the cases by the common-law term ‘retraxit.’ *It is clearly within the attorney's authority to dismiss the client's action without prejudice.* (Emphasis added). However, a series of early cases held the general authority of an attorney even sufficient to empower him to effect a retraxit, amounting to a renunciation of the client's substantive right or cause of action. It is hardly possible to reconcile this rule with the established principle that the implied general authority of an attorney does not include any power or authority to dispose of the client's substantive rights, and it would there-

fore seem doubtful whether, or to what extent, the early cases would now be followed.' (6 Cal. Jur. 2d, Attorneys at Law § 164.) And further in that connection: 'In civil litigation, the attorney, as the client's agent, and in the absence of fraud, has authority to bind his client in all matters pertaining to the regular conduct of a case. \* \* \* In the absence of such special instructions, the conduct and management of the action is entrusted to the attorney's judgment; he decides what should be contested, what points should be taken, and what should be abandoned. This authority is, however, subject to the qualification that an authority ordinarily does not have implied authority to do an act which will effect the surrender or loss of a client's substantial rights, for the client determines 'the objectives to be attended.' . . . There is, however, a presumption that he has authority to compromise his client's action which he is prosecuting. . . . Defendant Burke points out that there are authorities in California and Nevada which hold that on collateral attack the presumption of the attorney's authority is conclusive . . . and it has been held that an attorney has authority to dismiss an action with prejudice, the modern name for retraxit . . . contrary to the rule at common law. . . . While the above cited cases may appear to conflict with the rule that ordinarily an attorney has no authority to surrender his client's rights (see quotation, supra, from 6 Cal. Jur. 2d, Attorneys at Law, § § 156, 164), they may be reconciled on the theory that there is a rebuttable presumption that he had such authority."

The court went much further in the Gagnon Company case than the trial court did in the case now before

the Supreme Court. The California court was concerned with an attorney's authority to dismiss an action with prejudice but along the road to its final conclusion the court made it clear that an attorney has the authority to dismiss a suit without prejudice. Counsel for respondent believe that the above cited case is well reasoned and justifies fully the contention that the appellant's attorneys had authority to stipulate and agree to a dismissal without prejudice.

Respondent is not unmindful of Section 78-51-32, Utah Code Annotated 1953, which provides:

“An attorney and counselor has authority:  
... (2) To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise.”

Although this section deals with an attorney's authority to bind his client under certain circumstances, it does not exclude other powers or authority necessarily involved in the attorney-client relationship. *State v. Froah*, 220 Iowa 840, 263 N.W. 525. It is respondent's position that this section is inapposite to the case at bar, because the agreement was made in open court before the District Judge with jurisdiction to hear and dispose of the issues before him and the appellant's attorney had authority to move for or agree to a dismissal without prejudice.

There has been one Utah case where the Utah Supreme Court considered this section. In *McWhirter*

v. Donaldson, 36 U. 293, 104 P. 731, defendant claimed an oral stipulation had been entered into between counsel for the respective parties extending the time for answering the complaint. The court held that since the stipulation was neither filed with the clerk nor otherwise made a matter of record, the defendant could not rely upon the stipulation. However, in the McWhirter case, the stipulation was not entered into in open court but was between the counsel outside the court. Certainly it appears to counsel for respondent that had an extension been requested in court in the presence of both counsel and an agreement effectuated a different result would have been reached. It is to be remembered that in the present matter, counsel for both parties agreed to a dismissal before the Judge in court. Although the trial Judge did not enter this agreement upon the minutes of the court at that time, the Judge recalled the agreement and dismissed the petition upon the basis of counsel's representations. (R. 140). While the Utah Supreme Court has not discussed the purpose of this section, it did quote a California case, Borkheim v. N. B. & M. Ins. Co., 38 Cal. 623, which stated that without such a rule "the court would be frequently annoyed by disputes between counsel concerning their agreements, and thus forced to try innumerable side issues more perplexing than the case itself, attended, also, with delays to its business, and the detriment to the public service." The trial judge in this matter did not have to worry about what the parties through their attorneys stipulated about because he was present when

the agreement was made. When the reason for a rule fails, the rule fails.

For a discussion of the purpose of this statute, a look to another state would be appropriate. An identical provision appears in the Montana statutes, Section 93-2101(1), Repl. Vol. 7, Revised Codes of Montana, 1947. The Supreme Court of Montana in *Bush v. Baker*, 46 M. 535, 129 P. 550, 553, stated that "the purpose of such a rule is to promote orderly procedure and protect the rights of litigants, and may not be invoked to perpetrate a wrong. The rule in question here was enacted to relieve the presiding judge of the necessity of determining controversies between counsel as to their unexecuted agreements, often more perplexing than the case itself."

Since the Montana Court takes the same view as the California Court as to the purpose of this statute, respondent contends the statute should not be extended to include in-court agreements because the trial judge did not have to determine a controversy between counsel where he was present when the agreement was made.

The agreement involved in this matter was not filed with the clerk nor was it entered upon the minutes of the court. However, in the case of *Rackham v. Rackham*, 23 P. 2d 566, the Utah Supreme Court recognized an oral stipulation entered into in open court. Of course, the party, who later objected to the stipulation, was present at the time the stipulation was made and the court inferred she acquiesced in the action by her coun-

sel. Certainly, it should be inferred that the appellant in this case acquiesced in her counsel's representations. From the time the petition was filed on December 21, 1961, until April 17, 1962, there was great activity on the part of both parties. From April 17, 1962, when the court ordered that the matter be taken under advisement (R. 68) until April 16, 1963, when petitioner's attorneys withdrew (R. 72), appellant took no action to proceed. It would seem when she signed the trust agreement on May 8, 1962, that she ratified and acquiesced in her attorneys' oral agreement.

As pointed out in *Bush v. Baker*, *supra*, this statute was enacted to relieve the presiding judge of the necessity of determining controversies between counsel as to their unexecuted agreements. The Judge could not possibly remember all agreements entered into in open court. Therefore, the theory of entering such agreements on the minutes of the court is a sound one. However, the respondent should not be denied a dismissal, where counsel agreed in open court to dismiss the petition if a trust agreement was consummated (R. 139-140), merely because the court inadvertently failed to have such agreement entered on the minutes, especially in view of the fact that the court remembered clearly what counsel represented.

*B. Assuming the court erred in dismissing the petition on the basis that an oral argument for dismissal had been entered into in open court, the court did not err in finding that the trust agreement was a valid*

*substitute for a guardianship procedure insofar as the assets and person of the ward are concerned and dis-missing on that ground.*

The appellant in her petition for appointment of a guardian (R. 5-6) prayed that the Walker Bank and Trust Company be appointed guardian of the person and estate of Joan Oelerich. Appellant's petition was primarily concerned with protecting the money that respondent was to receive from her father's estate. The trust agreement provided that the money received by respondent from her father's estate would be placed in a trust with the First National Bank of Chicago. The bank as trustee is responsible for the safe keeping of the money and for applying a portion of the annual net income of the trust to the health, support, maintenance, and education of the respondent. If Walker Bank and Trust Company were appointed the general guardian of Joan Oelerich, what duties would it perform? Respondent contends that the First National Bank of Chicago now performs under the trust, the very functions and duties contemplated to be performed by the Walker Bank under our guardianship statutes. What more could Walker Bank do that the trustee bank in Chicago is not doing or authorized to do? Appellant through the trust already has what she seeks through the petition which should render the issues raised by these proceedings moot.

If respondent accepts appellant's argument that the motion may be regarded as one for summary judg-

ment under Rule 56, U.R.C.P., it is clear that appellant had ample opportunity to submit affidavits or to make any other appropriate showing essential to justify petitioner's opposition to the motion. The motion to dismiss was filed on June 28, 1963, (R. 74-75), and it was not to be heard until July 25, 1963. As a matter of fact, it was heard on July 29, 1963 (R. 91), a month after appellant's counsel had notice of such motion.

A copy of the trust agreement (R. 76-83) was before the court prior to the time the court dismissed the petition. The fact that the trust agreement was effective at the time of the hearing on July 29, 1963, was acknowledged by appellant's counsel. (R. 140). A reading of the trust agreement clearly demonstrates that the property received by the respondent from her father's estate is protected from artful and designing persons. That the petition for appointment of guardian was primarily concerned with the protection of the property the respondent was to receive from her father's estate is evident from the wording of paragraph 2 of the trust. (R. 5). It provides that, "The Grantors hereby irrevocably sell, transfer, assign and deliver to the Trustee the property described in the attached schedule. That property, . . . shall be held, administered and disposed of in trust upon the terms and conditions hereinafter set forth." Article I gives the Trustee power to accumulate the annual net income of the trust and add it to the principal at the end of each year. However, the Trustee *may* pay or apply for the benefit of the respondent such portion of the annual net income



in such manner and for such purposes as shall be *necessary* or *advisable* for the health, support, maintenance or education of respondent or any of her children. (R. 76). Thus, it can be seen that for at least ten years (R. 77) the Trustee has complete control of the property, which the respondent received from her father's estate. (R. 83).

The appellant at page 17 of her brief argues that the court should have taken evidence to determine what effect different fact situations would have on the question of whether the respondent could convey her interest in the trust. Article IV (R. 81) should put to rest the question of whether or not the respondent can convey her interest. Under this provision, "no beneficiary of this trust shall have the right to alienate, encumber, hypothecate or anticipate any interest in the capital or income of the trust estate in any manner."

Petitioner on page 16 of her brief states that there is nothing in the record to indicate that respondent does not own other assets or that she will not acquire other assets. The record shows (R. 66-67) that counsel for respondent petitioned the court for temporary support on April 17, 1962, because respondent and her daughter were "financially destitute" and were "required to accept the bounty of friends for the bare necessities of life." Unless this allegation was false—a charge no one makes—this statement would support an inference that respondent had no other assets at that time. Again, is it fair to assume that appellant would make a gift to

the respondent, when she asserts respondent is subject to being deceived or imposed upon by artful or designing persons? (R. 5). Should appellant be so motivated the trust funds could be increased and such gifts would be protected by the Trustee, the First National Bank of Chicago.

The trial judge's ruling was not adverse to the holdings of this court in *Kidman v. White*, 14 U. 2d 142, 378 P. 2d 898, or in *Samms v. Eccles*, 11 U. 2d 289, 358 P. 2d 344. In the *Kidman* case, the court was concerned with interpreting the provision in a contract. The provision was ambiguous and the Supreme Court declared that any doubts concerning the language should be resolved by a court and jury rather than by summary judgment. However, that holding is of no moment in this case for here the language of the trust is clear and unambiguous. Appellant has not pointed to one provision which is doubtful, or which would indicate that respondent's property received from her father's estate is not protected from artful or designing persons. The *Samms* case, as this court is well aware, involved an action by the plaintiff for severe emotional distress. This court was concerned with whether or not the plaintiff could establish a right to recovery and declared that a motion for summary judgment was not appropriate, assuming the contentions of the plaintiff to be true. The matter before the trial court here involved the dismissal of a petition for the appointment of a guardian. The appellant was not seeking to recover damages, as in the *Samms* case. The thrust of the peti-

tion was directed towards protecting the property of respondent, derived from her father's estate. If we assume this motion to be for a summary judgment, the trial court by dismissing, in effect found there was no need for appointment of a guardian of the property, because the trust agreement prevented the respondent from managing or taking care of the said property and protected said property from artful or designing persons.

Going one step further and assuming the trust instrument adequately safeguarded the property during the term of the trust, it did not fail to supply the needs of a guardian for the person of the respondent.

Provision for the appointment of guardians or committees for insane and other incompetent persons is quite generally made by statutes which, although possessing some similarity, vary in the different states. The *protection of property* is one of the main objects of such statutes, although they not infrequently authorize guardianship both of the person and of the estate. 25 Am Jur 17.

Section 75-13-29, U.C.A. 1953, states, "Every general guardian has the care and custody of the person of his ward, and the management of all his estate until such guardianship is legally terminated." Section 75-13-31, U.C.A. 1953, describes the duties of guardians of a person, "A guardian of the person shall be charged with the custody of the ward, and must look to his support, health and education." Section 75-13-32,

U.C.A. 1953, holds that, "A guardian of the property must keep safely the property of his ward." Of course, the Utah statutes contemplate guardians of the person and guardians of the property. However, as pointed out above, one of the main objects of such statutes is the protection of property belonging to an incompetent.

As argued above, the trust agreement meets the requirement of our law with respect to the duties of guardians of property. The trustee keeps safely the known property of respondent, the alleged incompetent. (R. 76-82). Under this trust agreement, there would be no need to have a guardian of property. And if there was such a guardian, what property would he protect? None but the property protected by the present trustee.

With respect to the guardian of a person, it is respondent's position that the trial court ruled properly, because the trustee under the provisions of the trust agreement also performs the duties of a guardian of a person as specified in Section 75-13-31. The petition contains no allegation that the respondent is physically incapacitated and if that is a future contingency the First National Bank of Chicago may pay to or apply for the benefit of respondent such portion of the annual net income of the trust in such manner and for such purposes as shall be *necessary* or *advisable* for the health, support, maintenance or education of respondent. In effect, the trustee also has custody of the respondent. Custody is defined in Black's Law Dictionary as, "The care and keeping of anything." By the terms

of the trust, the trustee is responsible for paying a portion of the trust's annual income to take care of respondent with respect to her health, support, and maintenance.

If the petition were granted and letters of guardianship were issued to Walker Bank & Trust Company and if there was any property for the bank to keep safely, it would be the same as that kept by the Chicago bank which would result in duplicate charges for the same services. And if the Walker Bank had no property to administer it would not and could not perform the duties outlined in Section 75-13-31. All of the sections from 75-13-33 to 75-13-44, which follow the sections on duties of guardians of persons and of estates, contemplate that a guardian will have property of the ward to administer. Certainly no bank and trust company is equipped to furnish nursing or custodial service for incompetents as its functions are financial.

For the foregoing reasons the trial court did not err when it decided to dismiss the petition on the ground that the trust agreement protected the respondent's property, derived from her father's estate, and consequently, there was no need for a guardian for the person or the property.

*C. Assuming that Section 78-51-32(2), U.C.A. 1953 should be complied with in order for an agreement of dismissal between counsel to be binding, the petitioner should be equitably estopped from relying on said statute.*

As pointed out by the Utah Supreme Court in *Farmers & Merchants Bank v. Universal C.I.T. Corporation*, 4 U. 2d 155, 159, 289 P. 2d 1045, quoting *J. T. Fargason Co. v. Furst*, 8 Cir., 287 F. 306, 310:

“Equitable estoppel is bottomed upon the notion that, when one person makes representations to another which warrant the latter in acting in a given way, the one making such representations will not be permitted to change his position when such change would bring about inequitable consequences to the other person, who relied on the representations and acted thereon in good faith. \* \* \* The representations must be in themselves sufficient to warrant the action taken, and their sufficiency is a judicial question. It is not enough that the person who heard them deemed that he was warranted in acting as he did; the language used ought of itself to furnish the warrant. One man might consider himself warranted in acting upon representations wholly insufficient to move a more careful and prudent person.”

Counsel for petitioner-appellant in open court represented that if respondent would sign a trust agreement, the petition would be dismissed. (R. 139-140). Respondent relying on the representations executed the trust agreement on May 8, 1962. Certainly, respondent could only assume, as the trial judge did (R. 140), that petitioner's counsel were authorized to make such statements. Appellant should be estopped from asserting the technicality that the agreement was not entered on the minutes of the court, especially in view of the fact that respondent relied on the representations made by

appellant's counsel in open court and that respondent by signing the trust agreement relinquished possession and control of her share of her father's estate, which was estimated to be in excess of \$250,000.00 (R. 5).

In considering an identical provision (to Section 78-51-32(2)) of the Code of Civil Procedure of California, in *Reclamation District of Sacramento Co. v Hamilton*, 112 Cal. 603, 44 Pac. 1074, the Supreme Court of that state said:

"If, under the terms of a mutual stipulation which was only verbal, one party has received the advantage for which he entered into it, or the other party has at his instance given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court."

The reasoning of the California case is applicable to this matter now before the court. It would be inequitable to allow the appellant to assert the statute and to insist that the stipulation was invalid because of a technicality where the respondent has signed a trust agreement in reliance on appellant's attorney's statements in open court, which prevents her from having control of her inheritance for at least ten years and on the other hand merely results in requiring the appellant to institute another action if she concludes there is merit in her claim.

## POINT II

THE COURT DID NOT ERR IN DISMISSING THE PETITION ON THE GROUND OF FAILURE TO PROSECUTE WITH DILIGENCE.

Rule 41(b), U.R.C.P., provides that a defendant may move for dismissal of an action for failure of the plaintiff to prosecute. The Utah rule is similar to Federal Rule 41(b). Rule 41(b) clearly places dismissal for failure to prosecute in the court's discretion. 5 Moore's Federal Practice, p. 1036. Since the order of dismissal for failure to prosecute is discretionary, it will not be disturbed on appeal unless there has been abuse of discretion. 5 Moore's Federal Practice 1039. Accordingly, the question to be determined is whether the trial court abused its discretion in dismissing the petition for failure of the plaintiff to prosecute.

What constitutes "failure to prosecute", of course, depends on the facts of the particular case, 5 Moore's Federal Practice 1037. *Neel v. Barbara*, 136 F. 2d 269. In the present case, the petition for appointment of a guardian was filed on December 21, 1961. (R. 5, 6). From that time until April 17, 1962, appellant's counsel were engaged in the prosecution of this petition, as shown by the record. For instance, on January 28, 1962, petitioner's counsel filed a notice to take the depositions of three doctors. (R. 13). Again on February 9, 1962, they filed a notice setting aside trial date and setting the matter for pretrial. (R. 21). On March



6, 1962, counsel for petitioner filed a notice to take the deposition of respondent (R. 25), and on March 7, 1962, a motion for order to compel her to submit to mental examination was filed (R. 26). Further, answers to request for admissions signed by appellant under Rule 36 were filed on March 12, 1962. Petitioner filed an affidavit with the court on March 16, 1962. On April 17, 1962, counsel for appellant appeared at a hearing concerning a number of motions. (R. 68). From that date until July 10, 1963, when Merlin O. Baker, as new counsel for appellant, filed a motion for order to compel respondent to submit to mental examination, there had been no prosecution of the action. It must be noted that the motion for dismissal on the ground that petitioner had not been diligent in proceeding with the action was filed June 28, 1963, over a year and two months after the petitioner had last proceeded and before appellant took any action to move ahead. On the basis of the above facts, it is difficult to see how the trial judge abused his discretion. In *Salmon v. City of Stuart, Florida*, 194 F. 2d 1004, the Fifth Circuit Court of Appeals held that the trial court was authorized in dismissing an action under Rule 41(b), Federal Rules of Civil Procedure, where following the filing of the suit, no action was taken in it by the plaintiffs for one year and three months. Where a petition for the appointment of a guardian has been filed and when such petition alleges that "Joan Oelerich . . . by reason of her mental condition, . . . is unable, unassisted, to properly manage and take care of her property, and

is likely to be deceived or imposed upon by artful or designing persons" (R. 5), it would seem incumbent upon the petitioner that she prosecute the action with diligence. By waiting over a year, the petitioner left the respondent in a precarious position if she is incompetent as alleged. How could the court abuse its discretion under such facts as these? The proper answer is it did not.

Respondent is not unmindful of the Utah cases cited in appellant's brief and the rationale of those cases. In *Wright v. Howe, et al.*, 46 U. 588, 150 P. 956, the court was confronted with the ruling of a trial court in denying defendants' motion to dismiss "for the reason that the plaintiff herein has failed and neglected to prosecute said action with reasonable diligence." The court said at page 589, "The defendants had the same right to press to trial that the plaintiff had, and if they were willing to permit it to remain untried, and especially in the absence of any showing of prejudice, they cannot complain." In the present matter, the respondent may have had the right to press to trial but she was unaware of it and in fact understood the petition would be dismissed when she executed the trust agreement. If the petitioner argues she was not bound by the statement of her counsel in open court, then appellant was obligated to proceed with the action. The reasoning of the *Wright* case is not applicable to the facts of this case. On application for rehearing the Supreme Court made the following observation at pages 595 and 596:

“It is contended that we erred in not reversing the judgment, for the reason that the trial court erred in not sustaining appellants’ motion to dismiss the complaint for failure to prosecute the action, and that we failed to pass or at least failed to sufficiently state our reasons in passing, upon that assignment in the original opinion. There is not the slightest merit to the contention. The case had been at issue about three years. In this state, if an action be determined otherwise than upon the merits, the plaintiff may, within one year thereafter, bring another of the same cause of action regardless of the statute of limitations, provided only that the original action was timely begun. A defendant moving to dismiss, although his motion be sustained, can gain no permanent advantage, since the plaintiff has the right at any time within a year to bring another action. *In view of that fact, the whole matter of whether a motion to dismiss for want of prosecution should be sustained or not should be permitted to rest within the sound discretion of the trial courts.* If those courts, therefore, refuse to dismiss the action on that ground, we should not interfere unless and until it is clearly made to appear that the defendant in the action has been prejudiced in some substantial right.”

In the Wright case, the court sustained the trial court’s refusal to dismiss and noted that the Supreme Court would not interfere until it appeared “that the defendant in the action has been prejudiced in some substantial right.” Following this rationale, this court should not interfere with the trial court’s decision in dismissing this case. The petitioner has not been prejudiced in some substantial right. She can always file another

petition for the appointment of a guardian, if she has reasonable grounds to believe the respondent is incompetent.

In the *Crystal Lime & Cement Co. v. Robbins*, 8 U. 2d 389, 335 P. 2d 624 case, the court held that it was an abuse of discretion to dismiss with prejudice for failure to prosecute where either party had an opportunity to obtain the relief to which it was entitled. Such a holding would not be applicable to this case, because respondent had no opportunity to proceed, since she assumed the opposing attorneys had authority to act for appellant and understood the signing of the trust agreement would result in dismissal of the petition. (R. 139-140). In the *Crystal Lime* case the court at page 392 noted respondent's argument that Rule 41(b) applies to plaintiffs and not defendants who fail to prosecute and that this rule was enacted for the benefit of defendants to save them annoyance and harassment by plaintiffs who file suits but fail to prosecute them with diligence. The court stated, "Respondents' contention might be very persuasive if they had not filed counter claims in the action. . . ." In the present matter before the court a petition was filed for appointment of a guardian, and that was the basis of the action before the court. From the above language, it would seem that this court ought to accept the argument presented by respondent in the *Crystal Lime* case when applied to the facts of the present matter. For a period of one year and two months, appellant took no action to proceed with the petition. Respondent

therefore contends that the trial court did not abuse its discretion in dismissing this case.

The Crystal Lime case involved a quiet title action. The Wright case was concerned with a claim for damages resulting from negligence of the defendant, which caused the death of four horses and injured a fifth horse. This case presently before the court involves a petition for appointment of a guardian. The competency of the respondent is in question. Certainly, it is incumbent for the petitioner to proceed with the case, especially in view of the fact that she believes respondent to be incapable of taking care of herself and her property. Respondent and the court understood that the petition would be dismissed when a trust agreement was executed. Respondent signed the agreement and there was no need to move the case ahead, since she believed the petition would be dismissed. (R. 140-141). However, if appellant had no understanding concerning dismissal of the petition, she was not diligent in proceeding with the action and the court acted properly in dismissing for lack of prosecution.

### POINT III

#### PETITIONER WAS NOT ENTITLED TO AN ADJUDICATION OF THE ISSUES IN HER PETITION ON ITS MERITS.

The issue of respondent's competency was not before the court at the hearing on July 29, 1963. That

hearing was held for the purpose of determining whether or not the petition should be dismissed on the grounds that appellant had not been diligent in proceeding with the action and that a trust agreement had been signed by petitioner, respondent, and the First National Bank of Chicago. If the appellant was not diligent in proceeding with the action, the court had the power under Rule 41(b), U.R.C.P., to dismiss the action without a hearing on the merits. If the attorneys for petitioner represented in open court that the case would be dismissed when the trust agreement was signed, the court had a right to dismiss the case in accordance with such representations, because the petitioner was bound by the agreement and the court so held. (R. 140). Such action by the court does not constitute a denial of due process of law for when the court dismissed on the basis of the executed trust agreement, it was merely carrying out what petitioner, through her counsel, had agreed to do. Following Rule 41(b) certainly could not be a denial of due process.

Petitioner's counsel had adequate notice of the hearing for dismissal—from June 28, 1963, until the hearing on July 29, 1963. There was certainly time to file affidavits or prepare evidence for the hearing within that period. At least as early as July 29, 1963, appellant was aware of the reasons the Judge was advancing for dismissal and if she claims no agreement existed concerning dismissal of the petition, from July 29, 1963, until August 26, 1963, when the hearing on the motion to vacate was heard, petitioner had sufficient

opportunity to gather evidence for presentation to the effect of the trust agreement on the relief demanded by petitioner and yet she did not come forward with any evidence to support her position. Most certainly petitioner cannot now complain about lack of due process, when she had ample opportunity to produce evidence in opposition to respondent's motion and neither offered to nor introduced any.

## SUMMARY AND CONCLUSION

Trial court predicated its order for dismissal on the theory that petitioner, through her counsel, agreed to dismiss the petition if the trust agreement was signed. Such trust agreement was signed by petitioner, respondent, and a Chicago bank. Judge Hanson merely ordered what petitioner had agreed to do through her counsel in open court.

Appellant is estopped from relying on Section 78-51-32(2), U.C.A. 1953, and from contending that the stipulation for dismissal is not binding.

The trust agreement was acceptable to appellant as she operated under it for a period of 14 months. It safeguards respondent's property received from her father's estate, as required by a guardian of property in Utah. The trustee by the terms of the trust must look to respondent's support, health and education, as required by the guardian of a person under Utah law. The appellant by means of the trust has secured what

she prayed for in the petition and therefore the trial judge did not err in dismissing the petition.

Assuming the petitioner was not found by the agreement for dismissal, then she was guilty of laches in not proceeding with the action. To wait over a year before taking any action with respect to this incompetency matter is unreasonable and should not be allowed, and the trial court did not abuse its discretion when it invoked Rule 41(b).

If the petitioner is bound by the agreement for dismissal, there was no need for a hearing on the merits. Petitioner cannot complain about the denial of opportunity to be heard on the merits of the effect of the trust agreement, when counsel had one month's notice before the first hearing and another month's notice before the hearing to set aside the order issued as a result of the first hearing.

The order of dismissal should be sustained.

Respectfully submitted, this 6th day of April,  
1964.

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