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# Floyd E. Harmston v. T. R. Harmston : Brief of Defendant/Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| FLOYD E. HARMSTON, | ) | |
| Plaintiff/Appellant, | ) | |
| vs. | ) | |
| T. R. HARMSTON, | ) | No. 19297 |
| Defendant/Respondent. | ) | |

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# BRIEF OF DEFENDANT/RESPONDENT

---

Responding to Plaintiff Appeal from the Judgment of the Seventh Judicial District Court for Uintah County

---

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FILED

SEP 28 1983

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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| FLOYD E. HARMSTON, | ) | |
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IN THE SUPREME COURT
OF THE STATE OF UTAH

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| FLOYD E. HARMSTON, | ) | |
| Plaintiff/Appellant, | ) | Supreme Court No. 19297 |
| vs. | ) | |
| T. R. HARMSTON, | ) | |
| Defendant/Respondent. | ) | |

BRIEF OF DEFENDANT/RESPONDENT

## NATURE OF THE CASE

On October 2, 1980, plaintiff Floyd E. Harmston deeded a remainder interest in certain mineral rights to his brother, T. R. Harmston, the defendant/respondent. Plaintiff seeks to have said deeds cancelled. Respondent seeks to have title quieted in his name.

## DISPOSITION IN LOWER COURT

The trial court found plaintiff's contentions to be without merit and ordered title to the mineral interests in question quieted in respondent pursuant to the deeds of October 2, 1980.

## RELIEF SOUGHT BY RESPONDENT

Respondent seeks to have the judgment of the trial court affirmed.

## STATEMENT OF FACTS

Plaintiff, Floyd E. ("Nick") Harmston, and defendant/respondent T. R. ("Ted") Harmston, are brothers, who prior to October 12, 1980, always had a good relationship (See Transcript, page 197, lines 20-25). Both of them grew up in Roosevelt, Utah. Plaintiff is thirteen (13) years older than [illegible]ndant, but [illegible] until the late [illegible]'s, plaintiff and [illegible] were the [illegible] two (2) children of their family to [illegible] and were always close (See Transcript, [illegible] 196 line 13 [illegible] page 197 [illegible] 19). Plaintiff had no children of his own, although he [illegible] one child, [illegible] Blumer, by a previous marriage. [illegible] never adopted Mr. Blumer until November, 1982, more than two (2) years after the conveyance in question, and more than a year and one-half (1/2) after this action [illegible] (See Plaintiff's Deposition, page 28, lines [illegible]-10, and Transcript, page 8[illegible], lines 4-18). In February or March of 1980, some [illegible] wife's [illegible], plaintiff [illegible] back to Roosevelt to live. [illegible], 1980, plaintiff retained Roosevelt attorney, Dennis [illegible]. [illegible]ney, to probate the estate of his wife (See Transcript, [illegible], lines [illegible]-11). Both before and after plaintiff's return [illegible], plaintiff and defendant

continued that warm brotherly relationship, which had characterized them all of their lives (See Transcript, page 197 line 20 through page 198, line 5). Other than one sister, defendant was plaintiff's closest living relative (See Transcript, page 196 lines 16-21). Plaintiff has not remarried since the death of his wife.

In September 1980, plaintiff decided to give defendant a remainder interest in certain of his mineral rights, while retaining a life estate for himself. To accomplish this result, plaintiff consulted his attorney, Dennis L. Draney (See Transcript, page 169, lines 11-18). Mr. Draney, desiring to make certain that his client was completely sure of what he wanted to do, asked the plaintiff to go home and think about it, and if plaintiff was sure that he wanted to proceed, then to bring Mr. Draney the legal descriptions (See Transcript, page 168 line 19 through page 169 line 4). Plaintiff and defendant returned with the legal descriptions approximately one week later and plaintiff asked Mr. Draney to prepare the deeds (See Transcript, page 169, lines 7-11). On this occasion, Mr. Draney again cautioned plaintiff to be certain of what he was doing, and explained to plaintiff the legal effect of such a conveyance (See Transcript, page 169, lines 13-15). On a third occasion, which was between the time Mr. Draney prepared the deeds and the date they were executed, Mr. Draney met alone with plaintiff in his (Draney's) office to be sure plaintiff completely understood the transaction, and if to convey the remainder interest to the

defendant, was what plaintiff really wanted to do (See Transcript, page 171, line 20 through page 172, line 5). Defendant was usually present when plaintiff visited his attorney, because plaintiff did not drive and defendant provided plaintiff transportation for plaintiff (See Transcript, page 33, line 23 through page 34 line 5). Finally, on a fourth occasion, namely October 2, 1980, plaintiff returned to Mr. Draney's office and executed the deeds in front of Mr. Draney, who also served as the Notary Public (See Transcript, page 173 line 21 through page 174 line 10).

Mr. Draney would not allow plaintiff to execute the two (2) deeds in question until Mr. Draney had thoroughly [illegible] himself of the following factors:

1. Plaintiff [illegible] the nature and extent of his property (See Transcript, page 176 line 21 through page 177 line 8).

2. Plaintiff had a correct understanding of the natural objects of his bounty (See Transcript, page 172 lines 1-5; page 187 lines 19-23; and page 177, line 23 through page 178 line 5).

3. Plaintiff desired to make a present conveyance of specific mineral rights for the benefit of his brother, the defendant (See Transcript, page 173, lines 18-20).

4. Plaintiff completely understood the nature of the proposed conveyance, especially that it was irrevocable, and that a will would not change it (See Transcript, page 168, lines 11-25).

5. Plaintiff had adequate time to consider, reconsider, and reflect on whether he really wanted to go ahead with the conveyance (See Transcript, page 174, lines 1-4).

6. No discernable pressure was being applied to induce plaintiff to make the conveyance (See Transcript, page 170 line 15 through page 171 line 5, and page 171 line 25 through page 172 line 1).

7. Plaintiff completely understood what was happening, and that the conveyance was what plaintiff really desired to do (See Transcript, page 177 lines 17-19, and page 187, lines 3-13).

8. Plaintiff's execution of said deeds were of his own free and voluntary acts (See Transcript, page 174, lines 11-15).

At the time the deeds were executed, Mr. Draney was aware that the plaintiff had serious concern about his step-son, Howard Blumer's, apparent failure to account for how he was dealing with plaintiff's assets. Mr. Draney had been directed by plaintiff to make inquiries and prepare to file suit. (See Transcript, page 167 line 14 through page 168 line 8). Still Mr. Draney testified that in his extensive conversations with plaintiff, plaintiff's desire to benefit his brother was the chief motivating factor for the conveyance (See Transcript, page 172, lines 1-5, page 173, lines 18-20, page 187, lines 6-10, and 14-23). Mr. Draney was, at all relevant times, representing plaintiff, and not defendant. Mr. Draney had never represented defendant nor done any work for him, with the possible exception of the assistance in the preparation of a will several years prior, but which event Mr. Draney could not even recall (See Transcript, page 167, lines 1-5).

After the mineral deeds were executed, notarized, and recorded, plaintiff and defendant remained on good terms until plaintiff was taken up to the farm house of George and Virginia

Houston to live (See Transcript, page 197, lines 23-25). Mr. and Mrs. Houston were close friends and relatives of Howard Blumer (See Transcript, page 98 lines 7-11). Despite defendant's requests to see or just to talk to his brother, Mr. and Mrs. Houston denied the defendant permission to have any contact with the plaintiff whatsoever (See Transcript, page 44, lines 3-24). While plaintiff was thus being isolated from society and from his brother, attorney James Hall was directed to draw up an affidavit from a draft apparently prepared by Mrs. Houston, attempting to retract the mineral interests conveyed to the defendant some eleven (11) days earlier (See Transcript, page 152, lines 1-5, and page 157, lines 1-2). Thereafter, Mr. and Mrs. Houston continued to keep the plaintiff in their custody and away from the defendant, which situation continued for two (2) years (See Transcript, page 137, lines 14-15).

## ARGUMENT

### I. ABSENT FRAUD, DURESS, MISTAKE, OR THE LIKE ATTRIBUTABLE TO THE GRANTEE, A COMPETENT GRANTOR WILL NOT BE PERMITTED TO ATTACK OR IMPEACH HIS OWN DEED

The rule in Utah and other jurisdictions, is set forth in *Desert Centers, Inc. v. Glen Canyon, Inc.*, 356 P.2d 286 (Utah 1960), at 287:

> Absent fraud, duress, mistake, or the like attributable to the Grantee, a competent Grantor will not be permitted to attack or impeach his own deed.

A Grantor of a deed is presumed to be legally competent to make a

conveyance. Hatch v. Hatch, 148 P. 433 (Utah, 1914). The trial court specifically found that there was "No showing of incompetency on the part of the plaintiff" at the time of the execution of the deeds in question." (Findings of Fact No. 15). No evidence of any nature was introduced in this matter that plaintiff was not competent on October 2, 1980, when he executed the mineral deeds in question. The test applied by the Utah courts in determining whether a Grantor has sufficient mental capacity to make a deed is:

> A Grantor is deemed to have been incompetent if his "mental facilities were so deficient that there was not sufficient power to comprehend the subject of the deed, its nature and probable consequences, and to act with discretion in relation thereto, or with relation to the ordinary affairs of life. Petersen v. Carter, 579 P.2d 329, at 331 (Utah, 1978); Anderson v. Thomas, 159 P.2d 142 (Utah, 1945); and O'Reiley v. McClean, 37 P.2d 770 (Utah 1934).

Plaintiff's attorney Dennis L. Draney, testified that on October 2, 1980, plaintiff did comprehend the subject of the deeds (see Transcript, page 176, line 17 through page 177, line 8), their nature and probable consequences (Transcript, page 177, lines 9-19), and their relation to the ordinary affairs or whole context of plaintiff's life (Transcript, page 177, line 23 through page 178, line 5).

In light of the presumption of competency, Mr. Draney's unequivocal testimony, and the finding of the trial court, plaintiff has the burden of establishing "fraud, duress, mistake, or the like, attributable to the grantee," T.R. Harmston, in order to have the said mineral deeds cancelled or rescinded.

Defendant submits that there was not even one scintilla of affirmative evidence produced to show that the defendant acted fraudulently, misrepresented any fact, exercised a dominating influence over his brother, subjected the plaintiff to any duress, or otherwise behaved improperly in any way.

## II. IF PLAINTIFF MISTAKEN AS TO DEALINGS OF STEP-SON WITH HIS ASSETS, SUCH MISTAKE WAS NOT MATERIAL, NOR ATTRIBUTABLE TO RESPONDENT.

### A. Step-Son Not Adopted By Plaintiff Until Two (2) Years After Conveyance, And Then Under Suspect Circumstances.

Plaintiff's recital of facts states that "the conveyance of the deeds in question had the effect of depriving plaintiff's natural heirs, his adopted son and grandchildren, of a substantial portion of his estate." Throughout his brief, plaintiff continues to refer to "plaintiff's adopted son." Defendant maintains that these references are highly misleading. On October 2, 1980, the date of the mineral deed conveyances in question, defendant, together with one sister, were the closest living relatives of plaintiff (See Transcript, page 196, lines 16-22), and were therefore, the "natural objects of plaintiff's bounty." Howard Blumer testifed that he was thirteen (13) years of age when plaintiff married his mother, but he only resided in plaintiff's home for a year or two, except for summer visits (See Transcript, page 77, lines 6-24). The adoption took place in November of 1982 (See Transcript, page 80, lines 12 and 13), when Mr. Blumer was sixty-four (64) or sixty-five (65) years of age

(See Transcript, page 75, line 5). This adoption took place more than fifty-one years after the marriage, two (2) years subsequent to the conveyance of the mineral deeds, and eighteen (18) months subsequent to the commencement of this litigation. Furthermore, it took place after the plaintiff had been residing with the Houstons, close friends and relatives of Howard Blumer, for two (2) years, during which time plaintiff was isolated from defendant and other family members. In fact, defendant was completely prohibited from having any contact whatsoever with plaintiff (See Transcript, page 44, lines 8-24). Furthermore, even if we assumed it were possible to disinherit a person who at the time was not a legal heir, the court specifically found that plaintiff's conveyance of a remainder interest in his mineral rights to the defendant involved only a portion of plaintiff's estate and that by making the conveyance, plaintiff did not disinherit his step-son and/or his step-grandchildren (Findings of Fact, Nos. 19 and 20, and Conclusions of Law No. 7).

B. Mistake Of Fact In Mind Of Plaintiff Not Proven.

Throughout plaintiff's brief, the assumption is made that there was a "mistake of fact" in the mind of plaintiff at the time of plaintiff's conveyance of said mineral interests to defendant. The alleged mistake is that plaintiff's step-son, Howard Blumer, was "stealing" plaintiff's assets. However, Dennis L. Draney, plaintiff's attorney, testified that plaintiff "was concerned that he had not received an accounting of the proceeds of the sale of his home in Provo, Utah, that his son was

handling, or his step-son was handling, and he also had some concerns about some savings certificates, whether he had those or where they were." (Transcript, page 167, lines 20-24). The plaintiff testified in his deposition that there were five (5) house payments which he did not know what happened to (See Plaintiff's Deposition, page 23, lines 13-20; and page 36, line 21 through page 37, line 3). Howard Blumer testifed that up until June of 1980, the monthly payments from the sale of plaintiff's house had gone into a specific bank account in the joint name of plaintiff and Howard Blumer (See Transcript, page [illegible]9, lines 10-20). But then, Mr. Blumer went on to admit that: When the account--my name was taken off of it and Mr. T.R. Harmston's name was put onto the account, I arranged the house payments go into a savings account with Nick's name and my name on it" (Transcript, page [illegible]9, lines [illegible]1-24). Then Mr. Blumer went on to testify that he had not embezzled those payments, but that in October of 1980, the five (5) payments that had gone into that new account were redeposited into money market certificates in the joint names of Mr. Blumer and plaintiff (See Transcript, page 90, lines 6 through 14). Mr. Blumer testified that he had a Power of Attorney to transact business on behalf of plaintiff (See Transcript, page 102, lines 3-9). With said Power of Attorney, Blumer handled all the paperwork connected with the sale of plaintiff's home in Provo, Utah (See Transcript, page 80, lines 15-17). Mr. Blumer further testified that following the return of plaintiff to Roosevelt, Utah, he did not have any

discussions with plaintiff concerning what plaintiff wanted done with his assets (See Transcript, page 87, lines 15-18).

Under the foregoing circumstances, where five (5) monthly payments from June through October, with no explanation, stopped coming to plaintiff's account, and Mr. Blumer, with a Power of Attorney to deal as he wished with plaintiff's assets, was not communicating with plaintiff as to those dealings, plaintiff could well have had a "well founded concern" as to what was happening with his assets rather than an "obsessive belief that his step-son was stealing from him," as plaintiff's brief characterizes it. The treatise Dobbs Remedies, (West Hornbook Series), addressing the definition of mistake of fact, states the following:

> "The idea that a mistake is a state of mind not in accord with facts is at least a good beginning place for this purpose.
>
> One who acts, knowing that he does not know certain matters of fact, makes no mistake as to those matters. He is consciously ignorant and thus has no state of mind at variance with facts" (At page 718)

In the case at hand, it is by no means clear that there was any mistake of fact in the mind of the plaintiff whatsoever. The fact that the monthly payments from the sale of plaintiff's home, without any notification to plaintiff, suddenly ceased coming to his account, with no explanation from the fiduciary party involved, would seem to be sufficient explanation of plaintiff's displeasure with such fiduciary, regardless of whether plaintiff actually believed embezzlement was taking place. On his cross-

examination of plaintiff's then attorney, Dennis L. Draney, the trial attorney for plaintiff asked:

> "and he (plaintiff) was mad at Howard for not having accounted to him; is that right?"
>
> Answer: "Yes, I think that's a fair characterization of his feelings toward Howard." (See Transcript, page 181, lines 9-12).

The court's Findings of Fact in this regard are amply support from the evidence.

> Findings of Fact No. 9: "For several months prior to October 2, 1980, the plaintiff's step-son Howard Blumer, was not communicating with the plaintiff as plaintiff desired. During this period, the said step-son had a Power of Attorney from plaintiff, which power Blumer used to transact business for and on behalf of plaintiff."
>
> Findings of Fact No. 10: "Because of Blumer's lack of communication, plaintiff may have felt justified in transferring a "future" interest in said mineral rights to the defendant."

Thus, it is probable that no mistake of fact was influencing plaintiff at all, but rather, an understandable concern and anger at the failure of a fiduciary, possessing great power over plaintiff's property, to account to plaintiff concerning such property. But one thing is absolutely clear. If plaintiff was operating under a mistake of fact, that mistake was the sole responsibility of Howard Blumer and not the defendant.

C. Respondent Made No Misrepresentation, Showed No Bad Faith, Nor Contributed To Any Mistake Of Plaintiff In Any Way.

As previously cited, "absent fraud, duress, mistake or the like attributable to the Grantee," the Grantor may not attack the

validity of of his own deed. See Desert Centers, Inc., v. Glen Canyon, Inc., supra. A court of equity will not exercise the power to cancel a conveyance for a unilateral mistake against a party whose conduct in no way contributed to or induced the mistake and who will obtain no unconscionable advantage thereby. 23 Am Jur 2nd, Deeds, §156. In the present case, it is clear that the plaintiff made absolutely no mistake as to the subject matter of what he was conveying, as was the case with the Grantors in the cases of Wamble v. Mahoney, 383 P.2d 26, 29 (Okla. 1963), and Tillbury v. Osmondson, 352 P.2d 102, 104 (Colo. 1964), cited in plaintiff's brief. At most, the plaintiff was mistaken as to one of the collateral factors which may have induced the conveyance. The trial court made the following Finding of Fact in regard thereto:

> "While some evidence was introduced tending to show that plaintiff may have had concerns that his step-son, Howard Blumer, was dealing in an inappropriate manner with plaintiff's assets, and that plaintiff may have been mistaken as to the nature of Howard Blumer's dealings with his assets, the court specifically finds that defendant did nothing to cause any such mistake and that defendant did not attempt to influence the plaintiff because of any mistake." (Findings of Fact No. 18, Conclusions of Law No. 6)

Defendant submits that the record contains no evidence tending to show any misrepresentation by the defendant to plaintiff, or anyone else. Plaintiff's brief purports to show two examples of defendant's misrepresentation. First, on page 3 of his Brief, plaintiff quotes defendant's statement that "Howard has jumped the gun. Hell, it all belonged to him anyway," and, "I don't

know why he'd want to do that." Defendant urges that these statements, either standing alone or in full context are <u>not</u> evidence of misrepresentations. However, plaintiff has taken these statements out of context. The context follows. Plaintiff's counsel in referring to a previous deposition, asked defendant the following questions (See Transcript, page 18, line 24 through page 19, line 8):

> Q And go to the question that begins at line 23; and if you'll follow with me: "Did you ever have discussions with your brother, in which you told him that Howard was out to take his assets, or some of them? Did you ever tell him that?" And the answer is: "No, sir. That was his idea." Is that how you testified at that time, sir?
>
> A Yes, sir.
>
> Q And is that your testimony today?
>
> A Yes, sir.
>
> Q Then the next question: "You never told him that?" And your answer was: "No, sir." The next question: "Did you agree with him when he said that?" Answer: "Absolutely I agreed with him, when he told me what had happened. I said, 'Howard has jumped the gun.' I said, 'Hell, it all belonged to him anyway. I don't know why he'd want to do that.'" Is that how you testified at the time of your deposition, sir?
>
> A That's what I said in the deposition. I never did speak to Nick before that.

The second purported example of misrepresentation contained in plaintiff's brief was a quote from plaintiff's deposition. (See <u>Plaintiff's Deposition</u>, page 7, line 26 through page 8, line 9). <u>Question of Plaintiff's counsel</u>:

> "What if anything did he tell you about reasons for signing the mineral interests to him?"

Plaintiff's answer: "Well, as I told you, he called and told me that Howard was going to steal everything that I had. So I got to thinking about it, and I thought, well, that's what he's thinking. . . . I didn't tell him nothing. I knew what he was after."

Even taken in a context most favorable to appellant's claim (which is not the standard for appellant review) the foregoing exchange is still no evidence that a misrepresentation by the defendant caused a material mistake of fact to exist in the mind of the plaintiff. Instead of defendant making the statement, it is plaintiff who is stating that he "knew" that Blumer (not defendant) was after his assets and that plaintiff was not going to tell him anything. What defendant allegedly said would, therefore, have made no difference, because plaintiff "knew" what Blumer (or defendant) was after.

The parenthetical insertion in plaintiff's brief in the above qoutation (See Plaintiff's Brief, pp. 3-4) is probably incorrect, and should have been (respondent's) not (Howard's). Otherwise the sentence following would not make sense: "I didn't tell him nothing. I knew what he was after." It was respondent who "called and told me . . . ," and so logically it was to respondent that plaintiff was referring when he said "I didn't tell him nothing." In asking the question, plaintiff's counsel used "he" to refer to respondent. In his answer, plaintiff used "he" twice, and plaintiff's counsel admits the first "he" in the answer referred to respondent. It is inconsistent, and completely unsupported by the context, to argue the second "he" in the response referred to Howard Blumer. This being the case,

the exchange can not be used to show respondent created a "mistake of fact" in plaintiff's mind, because at the time he heard the statement, plaintiff distrusted respondent's motives in making it.

It must be remembered that on September 16, 1981, when plaintiff's deposition was taken, the plaintiff was residing with George and Virginia Houston (see Plaintiff's Deposition, page 4, lines 4-9), and had been since October 12, 1980 (see Transcript, page 137, lines 1-4). Mr. and Mrs. Houston were close relatives and friends of Howard Blumer (see Transcript, page 98, lines 7-11). Defendant testified that from and after October 12, 1980, even past the time of said deposition, Houstons denied him any contact with his brother (see Transcript, page 44, lines 3-24, and page 139, line 24 through page 140, line 1). The attitude of Virginia Houston is illustrated by this exchange (see Transcript, page 128, lines 6-20):

> Plaintiff's Attorney: I'm merely asking what she said to Nick Harmston at the time when she saw him, not what the defendant said or anything she --.
>
> The Court: She can state what she said.
>
> Virginia Houston: I went down to Uncle Nick's motel room and he said, "I'm glad to see you. I've got some things to tell you." And I said, "And I've got some things to tell you." And he said, "Howard's been stealing everything I've got." And I said, "No, Nick, there's been a thief but it isn't Howard. Your bank accounts are in T. R. Harmston's name." And I said, "if you don't look out, they're going to have your oil rights, too." And he said, "Well, there's no way that they can get those." And then I had to tell him: "I've been over to the courthouse and seen the deeds," and that he had given-up his oil rights to Ted.

After a year's isolation at the Houston farm house, with no contact with his brother, and apparently being regularly subjected to such comments from the Houstons as those quoted above, plaintiff appears to have developed a distorted and obsessive view of his own brother. Plaintiff's testimony at his deposition reflected this. Defendant asks, who was using undue influence and perhaps duress on the plaintiff?

III. NO EVIDENCE OF CONFIDENTIAL (FIDUCIARY) RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT, NOR OF UNDUE INFLUENCE

In order for a deed to be set aside by a court of equity on the ground of undue influence, the person attacking the validity of the deed has the burden of showing undue influence in the execution of the deed by clear and convincing evidence that the Grantee exercised a dominating influence over the Grantor. *Petersen v. Carter*, 579 P.2d 329 (Utah, 1978). Plaintiff's position in its brief is correct that when a fiduciary or "confidential" relationship is proved to exist between the Grantee and Grantor, the burden shifts and there is a presumption that the conveyance may have been unfair which must be rebutted by the Grantee. However, the burden of proving a confidential or fiduciary relationship was upon the plaintiff, and plaintiff did not meet that burden. The trial court, who heard the testimony, saw the witnesses, and observed their demeanor, etc., made the following Findings of Fact and Conclusions of Law in relation to the issue of confidential relationship:

Findings of Fact No. 16: There was no showing that defendant had ever given business advise to plaintiff or otherwise taken any action from which the court could conclude that a confidential or fiduciary relationship existed between the parties.

Findings of Fact No. 17: The defendant never isolated the plaintiff, or in any manner exercised a dominating influence over him or exercised undue influence over plaintiff.

Conclusions of Law No. 4: There is insufficient evidence to show a confidential or fiduciary relationship existed between plaintiff and defendant at any time material herein.

Conclusions of Law No. 5: The evidence is insufficient to show that the defendant exercised any dominating influence over the plaintiff or that the defendant exercised undue influence over the plaintiff.

The test for finding whether a fiduciary or confidential relationship exists under Utah Law is set forth in the case of Bradbury v. Rasmussen, 401 P.2d 710 (Utah, 1965). In that case he Utah Supreme Court held that for a relationship to be legally onfidential, it:

> Must be such as would lead an ordinarly prudent person in the management of his business affairs to repose that degree of confidence in the other party which largely results in the substitution of the will of the latter for that of the former in the material matters involved in the transaction (At page 713).

Kinship alone, even the parent/child relationship, is nsufficient of itself to show a confidential relationship. Bradbury v. Rasmussen, supra. Kinship coupled with undisputed evidence of affection, trust and confidence was still not enough. Bradbury v. Rasmussen, supra. The Utah case of Anderson v. Thomas, 159 P.2d 142 (Utah, 1945) involved a suit for

cancellation of deeds for undue influence. In that action, there was evidence of the following factors pointing towards the existence of undue influence:

> 1. Son lived in home of mother;
>
> 2. Son obtained, by deeds, substantially all of mother's property, in effect, disinheriting six other children;
>
> 3. Mother was 86 years old, blind, and in failing health, and the conveyance was just a few months before her death;
>
> 4. Mother was grieving considerably over recent death of one of her sons;
>
> 5. Finding by the court that mother was a person who could have been easily imposed upon;
>
> 6. No consideration.

However, in Anderson, the Utah Court found that there was still insufficient evidence to show the mother was acting under the "dominating influence of her son" and held that:

> "These circumstances alone are not sufficient to show undue influence. 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 this mother and thus, induce her to part with her property. Anderson v. Thomas, supra, at page 144. (Emphasis added.)

As is dramatically illustrated by Anderson v. Thomas, despite the existence of circumstances which might give rise to a suspicion of undue influence, the law requires that: "There must be some affirmative evidence to show that "Grantee" did exercise a dominating influence over "the Grantor" and thus, induce him to part with his property. Anderson v. Thomas, supra. In the case

at hand, the trial court from its privileged position found that there was not one shred of such affirmative evidence produced.

Plaintiff's brief makes much of the fact that prior to the conveyance "Plaintiff and Respondent had recently been spending an unprecendented amount of time together." While plaintiff points out that defendant may have only visited him five or six times in Provo, in thirty years, defendant pointed out that he usually had no occasion to go to Provo, but that he and the plaintiff would visit three to half a dozen times each year, presumably in Roosevelt, as that was their home town. (See Transcript, page 24, lines 2-9). Naturally, they would spend more time together after February or March of 1980, when plaintiff moved back to Roosevelt. It was the uncontroverted testimony of defendant that the parties had had an excellent relationship all their lives until the Houstons took the plaintiff up to their home in October of 1980 (see Transcript, page 40, line 10 through page 41, line 23). It was also defendant's uncontroverted testimony that: he did not give the plaintiff any business advise or handle any of his business; [Rather, plaintiff, prior to October of 1980, took care of his own business, did his own banking and filed his own income tax (see Transcript, page 41, lines 1-23)]; in the period from July through September of 1980, he did nothing to keep his brother isolated from family members, including Howard Blumer (see Transcript, page 191, lines 19-25); he did not keep the plaintiff from the Houstons (see Transcript, page 192, lines 1-3); and

defendant gave his brother no advise as to: what to do with his estate, (see Transcript, page 193, lines 1-3); nor how to invest his money, (see Transcript, page 193, lines 4-6) what bank he should use, (see Transcript, page 193, lines 7-8); what expenditures to make, (see Transcript, page 193, lines 9-11); nor did he exercise any control over financial affairs of the plaintiff (see Transcript, page 193, line 21 through page 194, line 2).

In the case of Gmeiner v. Yacte, 592 P.2d 57 (Idaho, 1979), cited in plaintiff's brief, the court stated that undue influence is less likely to be found where it can be shown that the grant was not made at request, suggestion or direction of Grantee (at page 64). In the instant case, the defendant testified that he did not suggest that the plaintiff ought to leave any mineral rights to him (see Transcript, page 194, lines 3-5). In response to questioning from his counsel, defendant testified as follows:

> Question: "When you went to Mr. Draney's office the first time that mineral rights were discussed, had your brother informed you before you went there as to what the meeting would be about?"
>
> Answer: "Yeah, he came up to the shop and said let's go up and see Draney about it."
>
> Question: "What was your first introduction to the subject?"
>
> Answer: "Yeah, well no. A day or two before that he came in. He says, "Johnnie" he says, "I've got these mineral rights up here in Leeton and I want you to have them." He said, "some day they'll drill on them and they'll be worth a lot of money and help you out." I says, "I'll be glad to get them. I could use it."

Question: "He called you "Johnnie?"

Answer: "That's my nick name. The family--" (see Transcript, page 195, line 12 through page 196, line 1).

The testimony of plaintiff's then attorney, Dennis L. Draney, was that the conduct of the defendant, who provided plaintiff's transportation to the attorney's office, was very passive. Mr. Draney even recalled defendant stating to plaintiff to be sure that what plaintiff was doing was what plaintiff really wanted to do (See Transcript, page 170, lines 10-14, and line 25 through line 5 of page 171).

Finally, plaintiff clearly admitted in his deposition that he defendant exercised no undue influence to induce conveyance f the mineral rights at issue; At page 9, lines 2 through 4, laintiff's attorney asked the following question, "Did your roth say anything to you about why you were signing those (mineral deeds)?" Plaintiff's answer: "No."

Page 17, lines 11 through 23, defendant's attorney asked, "Did anyone force you to sign the deeds?" Plaintiff, "No." Then plaintiff's attorney asked, "Did your brother ask you to sign the deeds?" Plaintiff, "No, I don't think so, he never." "I don't think he asked me to sign them, no. One way or the other."

Page 21, lines 16 through 21, plaintiff's attorney asked, "Has your brother ever asked you to be included in (your will)?" Plaintiff, "No." Plaintiff's attorney, "Or receive any of your assets?" Plaintiff, "No." Plaintiff's attorney, "Did he ask for the mineral rights?" Plaintiff, "No, he didn't ask for them. He

just stole them."

The case of Gmeiner v. Yacte, supra, cited by plaintiff states that the court will look closely at situations where the recipient of a deed or bequest has apparently been responsible for alienated affections of the Testator/Grantor from other members of his or her family; and such situation is further aggrivated if Grantee has isolated the Grantor from all contact with family or with disinterested third parties (at page 64). It is clear from the testimony that, contrary to the conduct of the relatives of Mr. Blumer, defendant never isolated the plainiff, never took him into custody, nor in any way attempted to influence his opinion of his other family members (see Transcript, page 194, lines 20-23).

Gmeiner pointed out that a conveyance would be suspect if it appeared unnatural (at page 63). Here, plaintiff's own attorney testified that the plaintiff stated to him he felt he wanted to take care of his brother and that he had taken care of his step-son and step-son's children (see Transcript, page 187, lines 19-23). Plaintiff knew that defendant "could use" said mineral interests after his death and that Mr. Blumer had already been provided for and in addition, Blumer had "plenty of money of his own . . . so damn much more than I've got that there is no comparison." (Plaintiff's deposition, page 29, lines 10-12).

Plaintiff's entire argument is based upon inference upon inference upon inference, etc., none of which were found to exist by the trial court. There is no direct or indirect evidence that

defendant exercised a dominating influence over the plaintiff, or that a legally confidential relationship existed between them.

## IV. INDEPENDENT ADVISE SUFFICIENT TO REBUT PRESUMPTION OF UNFAIRNESS

Even supposing that the plaintiff had met its burden in establishing that a confidential relationship existed between the parties, thereby giving rise to a presumption of unfairness in the transaction, this presumption is rebutted by a showing that the Grantor received independent advise before entering into the transaction in question. Matter of estate of Reiland, 604 P.2d 1219 (Kan., 1980). In Gmeiner v Yacte, supra, the Idaho court found that undue influence is less likely to be found where it c[illegible] be shown that disinterested advise was sought and third [illegible]s were informed of Grantor's intentions before the conveyance was carried out (at page 64). Similarly, the fact that a Grantor had the legal significance and consequences of the proposed conveyance thoroughly explained to him by counsel of his own choosing, prior to making the conveyance in question, has been held by the Utah court to be very significant in its finding that a Grantee did not exercise a dominate or undue influence over a Grantor. Bradbury v. Rasmussen, 401 P.2d 710 at 714 (Utah, 1965

The court's Findings of Fact in this regard provide an adequate summary of the uncontested and unrebutted evidence relating to the extensive advise and counsel which plaintiff had received from competent counsel of his own choosing prior to

making the conveyance in question. These Findings of Fact and conclusions of Law are attached to this Brief as appendix "B," and made a part by reference to the same.

Respondent maintains that even if this court were to find that a confidential relationship existed between the parties on October 2, 1980, the showing of independent advise sought and received by plaintiff from competent legal counsel of his own choosing is much more than sufficient to rebut any presumption of unfairness in the transaction in question.

CONCLUSION

Plaintiff's appeal is based on conjecture, suspicions, and inferences from "facts" which the trial court did not find. All of the findings of the trial court are supported by substantial evidence. This court should affirm the judgment of the trial court.

DATED this 27 day of September, 1983.

ATTORNEYS FOR DEFENDANT:

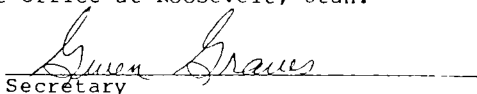
Herbert Wm. Gillespie

George E. Mangan

CERTIFICATE OF MAILING

I do hereby certify that on the ____ day of September, 1983, I did mail true and correct copies of DEFENDANT/RESPONDENT'S

BRIEF, postage prepaid, to Mark B. Cohen, First Security Bank of Utah, N.A., Trust Administrator, Conservator of Floyd E. Harmston, 79 South main Street, P.O. Box 3007, Salt Lake City, Utah 84111; and to James R. Black, Black & Moore, 500 Ten Broadway Building, Salt Lake City, Utah 84101; by depositing the same in the United States Post Office at Roosevelt, Utah.



Secretary

Appendix "A

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DISTRICT COURT
UINTAH COUNTY, UTAH
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IN THE SEVENTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

| | | |
|---|---|---|
| FLOYD E. HARMSTON, Plaintiff, | ) | MEMORANDUM DECISION |
| vs. | ) | |
| T. R. HARMSTON, Defendant. | ) | Civil No. 11,207-A |

This matter came before the Court for trial on January 17, 1983, the parties appearing together with their counsel and witnesses having been sworn and testified and the Court being fully advised in the premises now makes this

MEMORANDUM DECISION

In this case, the Court is called upon by plaintiff to find the deeds in question were invalid due to mistake, undue influence or fraud and to order a reconveyance or quieting of title of the interests in the plaintiff. Defendant is seeking to have the plaintiff's complaint dismissed and title to the mineral interest to be quieted in the defendant. Pursuant to this end, considerable evidence was presented bearing upon the actions of both the plaintiff and defendant during the time in question. Having heard the evidence and after having reviewed the entire file the Court finds as follows:

1. The plaintiff at the time of the transaction herein was elderly and very concerned with his affairs to the point of being

somewhat of a nuisance to his banker. However, there is no showing of incompetency on the part of the plaintiff at this time.

2. During that period of time, the plaintiff was not communicating with his step-son and for that reason felt himself justified in making the transfer of the deeds to the defendant.

3. The evidence is insufficient to show a confidential or fiduciary relationship between the parties and is insufficient to show undue influence by defendant to plaintiff.

4. The Court finds that while plaintiff may have been mistaken, the defendant did nothing to cause that mistake and did not attempt to influence the plaintiff because of his mistake.

5. The Court finds that the transaction questioned herein involves only a portion of plaintiff's estate and that plaintiff did not disinherit his step-son and step-grandchildren.

6. The Court finds the plaintiff had the benefit of adequate counsel at the time he signed the deeds and further that he was fully advised of the effect of the deeds prior to his execution of them.

Based upon the above findings, the Court finds no cause of action on the part of plaintiff and dismisses plaintiff's claims and further orders that title to the mineral interests in question be quieted in the defendant pursuant to the deeds executed by the

plaintiff.

DATED this 15 day of February, 1983.

District Judge

cc: Herbert W. Gillespie
George E. Mangan
James R. Black

FILED Appendix "B"
DISTRICT COURT
UINTAH COUNTY, UTAH

MAY 13 1983

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BY [signature] DEPUTY

HERBERT Wm. GILLESPIE and
GEORGE E. MANGAN
Attorneys for Defendant
47 North Second East
Roosevelt, Utah 84066
801-722-2428

IN THE SEVENTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

| | | |
|---|---|---|
| FLOYD E. HARMSTON, | ) | |
| Plaintiff, | ) | FINDINGS OF FACT AND CONCLUSIONS OF LAW |
| vs. | ) | |
| T. R. HARMSTON, | ) | Civil No. 11,207 |
| Defendant. | ) | |

The above entitled matter came on for trial before the Honorable Judge Richard C. Davidson, on January 17, 1983. The plaintiff was present and represented by his attorneys, James R. Black and Fred R. Silvester. The defendant was present and represented by his attorneys, Herbert Wm. Gillespie and George E. Mangan. The plaintiff called the following witnesses who were sworn and gave testimony: The defendant Ted (T. R.) Harmston, Verl Haslem, Howard Blumer, Mark Cohen, Virginia Huston and James R. Hall. The defendant then called the following witnesses, who were sworn and gave testimony: Dennis L. Draney and himself. Plaintiff further submitted the deposition of the plaintiff, dated September 16, 1981, to which defendant objected, and the court took under advisement. The parties rested, and the court took the entire matter under advisement.

The court being fully advised in the premises, and based upon the testimony of the witnesses, the deposition of the plaintiff, and the entire file and records herein, does make and enter the following Findings of Fact:

1. Plaintiff, Floyd E. ("Nick") Harmston and the defendant, T. R. ("Ted") Harmston are brothers who had a good brotherly relationship all of their lives up to and including October 2, 1980.

2. On October 2, 1980, plaintiff executed mineral deeds (copies of which were introduced at trial as plaintiff's Exhibits "2" and "3") which conveyed to the defendant a remainder interest in the mineral rights of two (2) tracts of land in Uintah County, State of Utah, as described in said Exhibits.

3. Plaintiff has had no children of his own.

4. Plaintiff's deceased wife had one (1) child by a previous marriage, i.e., Howard Blumer, which child plaintiff had not adopted as of October 2, 1980, who was adopted by plaintiff in 1982.

5. Plaintiff has not remarried since the death of his wife on June 5, 1979.

6. Subsequent to the death of his wife, plaintiff moved back to Roosevelt, Utah, and in February or March of 1980, plaintiff retained Roosevelt attorney Dennis L. Draney, to probate the estate of his deceased wife.

7. From that time up to and including October 2, 1980, Mr. Draney was plaintiff's attorney, and did not represent defendant

or do any work for defendant.

8. In September, 1980, plaintiff decided that he desired to gift to defendant a remainder interest in those mineral rights described in Exhibits "2" and "3".

9. For several months prior to October 2, 1980, the plaintiff's step-son, Howard Blumer, was not communicating with the plaintiff as plaintiff desired. During this period, the said step-son had a Power of Attorney from plaintiff, which power Blumer used to transact business for and on behalf of the plaintiff.

10. Because of Blumer's lack of communication, plaintiff may have felt justified in transferring a "future" interest in said mineral rights to the defendant.

11. In September, 1980, plaintiff communciated to his attorney, Dennis L. Draney, plaintiff's desire to transfer a remainder interest in certain of his mineral rights to the defendant.

12. Attorney Dennis L. Draney consulted with the plaintiff over a period of approximately two (2) weeks, during which time plaintiff made at least three (3) visits to Draney's office regarding said proposed transfer, and on at least one (1) of those visits, Mr. Draney did privately discuss the legal effects and consequences of such a transfer with plaintiff, outside of the presence of the defendant.

13. Before allowing plaintiff to execute the deeds in question, Mr. Draney satisfied himself that the plaintiff:

understood the nature and extent of his property; had a correct understanding of the natural objects of his bounty; desired to make a present conveyance of specific mineral rights for the benefit of his brother; had an appropriate understanding of the nature of the proposed conveyance, (especially that it was irrevocable and that a will could not change it); had adequate time to consider, reconsider and reflect upon whether he wanted to go ahead with the conveyance; no discernable pressure was being applied to induce the plaintiff to make the conveyance; and plaintiff really desired to make a conveyance for the benefit of his brother.

14. After executing the deeds in question, plaintiff personally delivered them to the Uintah County Recorder for recording in the official records of the county. The deeds were so recorded.

15. At the time of the transaction herein, the plaintiff was elderly and very concerned with his affairs to the point of being somewhat of a nuisance to his banker. However, there is no showing of incompetency on the part of the plaintiff at that time.

16. There was no showing that defendant had ever given business advice to the plaintiff or otherwise taken any action from which the court could conclude that a confidential or fiduciary relationship existed between the parties.

17. The defendant never isolated the plaintiff or in any manner exercised a dominating influence over him, or exercised

undue influence over the plaintiff.

18. While some evidence was introduced tending to show that plaintiff may have had concerns that his step-son, Howard Blumer, was dealing in an inappropriate manner with plaintiff's assets, and that plaintiff may have been mistaken as to the nature of Howard Blumer's dealings with his assets, the court specifically finds that defendant did nothing to cause any such mistake and that defendant did not attempt to influence the plaintiff because of any mistake.

19. The transaction in question involves only a portion of plaintiff's estate.

20. The transaction in question did not disinherit Howard Blumer or Blumer's children.

21. The plaintiff had the benefit of adequate legal counsel at the time he signed the deeds and plaintiff was fully advised of the effect of the deeds, prior to their execution.

22. Plaintiff's execution of said deeds were the result of plaintiff's free and voluntary acts.

BASED on the foregoing Findings of Fact, the court makes and enters the following Conclusions of Law:

1. That the court has jurisdiction over the mineral interests at issue herein.

2. The plaintiff at the time of the transaction herein, was elderly and concerned about his assets.

3. There is no showing of incompetency by plaintiff at the



11

time plaintiff executed the deeds in question.

4. There is insufficient evidence to show a confidential or fiduciary relationship existed between plaintiff and defendant at any time material herein.

5. The evidence is insufficient to show that the defendant exercised any dominating influence over the plaintiff or that the defendant exercised undue influence over the plaintiff.

6. While plaintiff may have been mistaken as to the nature of his step-son's dealings with his property, the defendant did nothing to cause or induce any such mistake and did not attempt to influence the plaintiff because of any mistake.

7. Plaintiff's conveyance of a remainder interest in his mineral rights to the defendant involved only a portion of plaintiff's estate and that plaintiff did not disinherit his step-son and/or his step-grandchildren.

8. Plaintiff had adequate legal counsel and independent advise at the time he signed the deeds in question and that he was fully advised of their legal effect prior to his execution of the same.

9. The deeds by plaintiff to defendant were properly executed and duly recorded in the offical records of Uintah County, State of Utah.

10. The deeds by the plaintiff to the defendant are not invalid and the court has no basis upon which to order a reconveyance or quieting of the title to the said interests in the plaintiff.

11. Defendant is entitled to have the mineral interests evidenced by Exhibits "2" and "3" quieted in his name, pursuant to his Counterclaim, and to have the Complaint of the plaintiff dismissed, no cause of action.

WHEREFORE, let judgment be entered accordingly.

DATED this 4 day of ~~April~~ May, 1983.

BY ORDER OF THE COURT:

Richard C. Davidson

Approved As To Form:

ATTORNEYS FOR PLAINTIFF:

James R. Black

Fred R. Silvester

ATTORNEYS FOR DEFENDANT:

Herbert Wm. Gillespie

George E. Mangan

Appendix "C"

HERBERT Wm. GILLESPIE and
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Attorneys for Defendant
47 North Second East
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FILED
DISTRICT COURT
UINTAH COUNTY, UTAH
MAY 13 1983
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BY [signature] DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

| | | |
|---|---|---|
| FLOYD E. HARMSTON, | ) | |
| Plaintiff, | ) | JUDGMENT |
| vs. | ) | |
| T. R. HARMSTON, | ) | Civil No. 11207 A |
| Defendant. | ) | |

The above entitled matter came on for trial before the Honorable Judge Richard C. Davidson on January 17, 1983. The plaintiff was present and represented by his attorneys, James R. Black and Fred R. Silvester. The defendant was present and represented by his attorneys, Herbert Wm. Gillespie and George E. Mangan. The plaintiff called the following witnesses who were sworn and gave testimony: The defendant Ted (T. R.) Harmston, Verl Haslem, Howard Blumer, Mark Cohen, Virginia Huston and James R. Hall. The defendant then called the following witnesses, who were sworn and gave testimony: Dennis L. Draney and himself. Plaintiff further submitted the deposition of the plaintiff, dated September 16, 1981, to which defendant objected, and the court took under advisement. The parties rested, and the court took the entire matter under advisement.

The court having separately made and entered its Findings of Fact and Conclusions of Law does hereby ORDER, ADJUDGE and DECREE:

1. The plaintiff's Complaint in this matter is dismissed in its entirety, no cause of action.

2. The title to the mineral interests in question are hereby ordered quieted in the defendant pursuant to the deeds (Exhibits "2" and "3") executed by the plaintiff on October, 2, 1980.

3. Defendant is awarded costs in this matter.

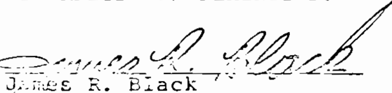
FILED this 4 day of May, 1983.

BY ORDER OF THE COURT:

Richard C. Davidson
District Judge

Approved As To Form:

ATTORNEYS FOR PLAINTIFF:



James R. Black

Fred R. Silvester

ATTORNEYS FOR DEFENDANT:

Herbert Wm. Gillespie

George E. Mangan