

2006

# Donald Ray Tolley v. Michael Tolley, Marie Jess : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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DONALD RAY TOLLEY,

Petitioner/Appellant,

v.

MICHAEL TOLLEY and MARIE JESS,

Respondents/Appellees.

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CASE NO. 20060489-CA

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**REPLY BRIEF**

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Appeal from a final judgment of the  
Third Judicial District Court of Salt Lake County, Utah  
Honorable Leslie A. Lewis

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**ORAL ARGUMENT REQUESTED**

**UTAH APPELLATE COURTS**

**DEC 27 2006**

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**ORAL ARGUMENT REQUESTED**

**PARTIES TO THE PROCEEDING IN THE DISTRICT COURT**

The caption of this case contains the names of all parties to the proceeding in the district court below.

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Petitioner/Appellant Donald Tolley respectfully submits his Reply Brief in this matter as follows:

### ARGUMENT

Petitioner/Appellant Donald Tolley's claims against Respondents/Appellees should not have been dismissed on Respondents/Appellees' motion for summary judgment because of the genuine issues of material facts he presented. As the non-moving party, Donald Tolley did not need to prove his legal theory while responding to the then defendants' motion for summary judgment. Rather, Donald Tolley only needed to show facts that disputed the facts of the moving party that, when viewed in the light most favorable to him as the non-moving party, adequately supported the elements of his claims. Petitioner/Appellant Donald Tolley did precisely that.

**I. Petitioner/Appellant presented facts that disputed defendants' claim that no confidential relationship existed between themselves and their grandmother that could lead to undue influence, thereby making resolution by way of summary judgment inappropriate.**

Petitioner Donald Tolley presented facts that indicate that a confidential relationship was formed between Nina Tolley and her granddaughter, Marie Jess, rendering the district court's resolution of this case on Marie Jess's motion for summary judgment wholly inappropriate.

The law will recognize a confidential relationship between family members where money is transferred from one to another. The court has found a confidential relationship where a son took his aging mother to a bank to sign a deed prepared by the son's attorney, which deed conveyed all her real estate to him. *See Walker Bank and Trust Co. v. Walker*, 412 P.2d 920, 921 (Utah 1966). Two days after his mother's death, the son recorded the deeds. *See id.* Furthermore, the court found that while the son may not have been a "purveyor of deceit," he nonetheless had unduly influenced his mother when he arranged the deed conveyance. The court noted that "[u]ndue influence well may be an

which deed conveyed all her real estate to him. *See Walker Bank and Trust Co. v. Walker*, 412 P.2d 920, 921 (Utah 1966). Two days after his mother's death, the son recorded the deeds. *See id.* Furthermore, the court found that while the son may not have been a "purveyor of deceit," he nonetheless had unduly influenced his mother when he arranged the deed conveyance. The court noted that "[u]ndue influence well may be an honest overzealousness engendered by good motives." *Id.* at 922. Thus, the confidential relationship and the ensuing undue influence, rather than any finding of trusteeship or fiduciary duty, justified an avoidance of the transfer. *See id.*

Marie Jess's own admissions give rise to a genuine issue of material fact as to the existence of a confidential relationship between Nina Tolley and her grandchildren and their subsequent undue influence. It is clear that Marie Jess' and Michael Tolley's grandmother, Nina Tolley, was becoming increasingly dependent as she aged and that the persons upon whom she became dependent were Marie Jess and Michael Tolley. It is also clear that Marie Jess called First Utah Bank to arrange for her grandmother to create an account there. (R. 424.) Marie Jess arranged for the face-to-face meeting between the assistant manager of First Utah Bank and her grandmother at her brother's home. (R. 424.) Marie Jess was present during the entire meeting. (R. 424.) Furthermore, Marie Jess admitted that the money in the First Utah Bank account was accompanied by her grandmother's explicit instructions to disperse such funds to particular relatives. (R. 606.) Even assuming that Marie Jess had nothing but good motives for having her name on her grandmother's account or confiscating the money



immediately after her death, that does not prevent a finding of undue influence based on her overzealousness.

**II. Petitioner/Appellant presented facts that presented a reasonable inference of a disputed material fact regarding the decedent's intent at the time she created her First Utah Bank account, which facts made the grant of summary judgment improper.**

Mr. Tolley undeniably presented sufficient evidence to defeat the defendants', M. Tolley and Marie Jess, motion for summary judgment with respect to the issue of Nina Tolley's intent to create a right of survivorship on her First Utah Bank account. Mr. Tolley presented evidence that at the time Nina Tolley created the First Utah Bank account she was only informed as to the rights that she and her granddaughter, Marie Jess, held while she, Nina, was still alive. However, Nina Tolley had not been informed of the status of her account after her death. Furthermore, Nina Tolley never explained that she wanted Marie Jess' name on her account for purposes of giving Marie Jess the balance upon her death. Rather, the only intention that Nina Tolley directly expressed with respect to adding Marie Jess' name to the account was that it would enable Marie Jess to "maintain bills, hospital needs, [and] whatever else would come up." (R. 1121-29.)

This absence of knowledge regarding the status of such an account is a fact that disputes Nina Tolley's affirmative intention to give the remaining sums in the account to Marie Jess after Nina Tolley's death. Furthermore, the limited purposes explained by Nina Tolley as her reasons and intentions for including Marie Jess on her First Utah Bank account

also give rise to an inference that Nina Tolley's intentions were other than a right of survivorship after death.

**III. Petitioner/Appellant presented the district court with facts, rather than bare contentions, that the court erroneously failed to view in the light most favorable to Petitioner, the non-moving party.**

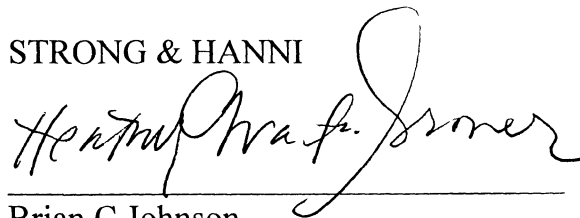
The above highlighted facts are more than bare contentions. Each fact comes from testimony available in the record. Had the court viewed these facts in the light most favorable to the non-moving party, Respondents/Appellee's motions for summary judgment would have been denied. These facts are material and they create genuine issues that preclude dismissal of Petitioner's claims on summary judgment.

**CONCLUSION**

For the reasons set forth herein, Appellant respectfully requests that the decision of the district court granting summary judgment in favor of Appellees be reversed, and that the Court reinstate Appellant's claims for exploitation of confidential relationship, contrary intent of the decedent, and the corollary claims of fraud and constructive trust.

DATED this 27<sup>TH</sup> day of December, 2006.

STRONG & HANNI



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*Attorneys for Petitioner/Appellant*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27<sup>th</sup> day of December, 2006, a true and correct copy of the foregoing **REPLY BRIEF** was served by the method indicated below, to the following:

Stephen J. Buhler	( )	Electronic CM/ECF notification
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Salt Lake City, Utah 84102	( )	Overnight Mail
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