

through June 1990 unless the plaintiff discontinues pursuit of her education.

In addition, the court orders the the defendant add the plaintiff to his medical and health insurance coverage at his place of employment, since it will not cost him any additional money to have her included under his health insurance.

#### ORDER OF COURT

October 4, 1988, the court having found that the plaintiff has a net weekly income of \$50 and the defendant has a net monthly income of \$811.40 and upon consideration of plaintiff's petition for child support, the following relief is granted:

1. Defendant is ordered to make weekly support payments of \$7.00 to plaintiff via the Collection Officer of this court, plus a 50 cent service charge each Monday. These payments shall continue through June, 1990 unless plaintiff discontinues pursuit of her high school education;

2. Defendant is ordered to add plaintiff to his medical and health insurance coverage at his place of employment.

FACCHINE, BY WHITSEL, GUARDIAN V. BIGLER, C.P.  
Franklin County Branch, E.D. Vol. 7, Page 445

#### *Equity - Deed - Fraud - Undue Influence - Confidential Relationship*

1. In order to prove that a transfer of property is not a gift the burden of proof is on the challenging party to produce evidence of a clear, strong and compelling nature.
2. The existence of a confidential relationship shifts the burden to the alleged donee to prove that the gift was the free act of the donor.
3. A confidential relationship will be found only when the parties are not on equal terms and one side exercises overmastering influence over the other.
4. The fact a couple resides together unmarried for 26 years does not, of itself, establish a confidential relationship.

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George E. Wenger, Esquire Attorney for Plaintiff  
Forest N. Myers, Esquire Attorney for Defendant

OPINION AND ORDER

WALKER, J., February 7, 1989:

This action in equity involved plaintiff, Ethel H. Facchine, and defendant, David L. Bigler, Jr., who purchased a property at 225 Brumbaugh Avenue, Chambersburg, Pennsylvania in July of 1958. Although they purchased the property with Mr. Bigler's money, the deed to the property was recorded solely in Ms. Facchine's name in order to avoid creating an interest in Mr. Bigler's wife at that time. Shortly thereafter, Mr. Bigler began construction of a house on the lot and completed construction in 1960. The couple resided at this residence in an unmarried status from 1960 until July of 1986 when Ms. Facchine was removed from the home by her daughters, Helen Whitsel and Judy Phillips. Ms. Facchine was then placed in a nursing home and subsequently adjudicated incompetent by the Bradford County Clerk of Common Pleas.<sup>1</sup>

Helen Whitsel, daughter and court appointed guardian of Ethel Facchine, instituted the present action to invalidate a deed dated March 28, 1984 by which Ms. Facchine conveyed the property at 225 Brumbaugh Avenue to Mr. Bigler for no consideration. Mrs. Whitsel alleges that her mother executed the deed while in a weakened state of mind and under undue influence. She also claims that Mr. Bigler was in a confidential relationship with Ms. Facchine and that the deed was a result of fraud.

The general rule in Pennsylvania is that, in order to prove that a transfer of property, such as the type involved herein was not a gift, the challenging party has the burden of proof which is only met by production of evidence of a clear, strong or compelling nature. *Shupp v. Brown*, 293 Pa. Super. 412, 439 A.2d 178 (1981); *Dzierski Estate*, 449 Pa. 285, 296 A.2d 716 (1972).

The Supreme Court stated, however, in *Young v. Kaye*, 443 Pa. 335, 342, 279 A.2d 759, 763 (1971):

<sup>1</sup>By decree dated September 18, 1986, the Bedford County Court of Common Pleas adjudicate Ms. Facchine to be an incompetent person and appointed her daughter, Helen Whitsel, to be the legal guardian of Ms. Facchine and her estate.

When the relationship between persons is one of trust and confidence, the party in whom trust and confidence are reposed must act with scrupulous, fairness, and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage. [Citations omitted] . . . This well settled doctrine, founded on strong considerations of public policy, renders inapplicable the general rule requiring an affirmative showing of fraud.

The existence of a confidential relationship shifts the burden to the alleged donee to prove that the gift was the free, voluntary, and intelligent act of the donor. *Dzierski*, 449 Pa. at 289.

It is not possible to identify any specific circumstance or group of circumstances which will compel a finding of confidential relationship. See, 9 Wigmore, Evidence §2503, at 468-473 (Chadbourne Rev. 1970). Certain associations among the parties, such as parent and child or longtime friends, do not of themselves establish a confidential relationship. *Shupp*, 293, Pa. Super. at 418; *Weiberer v. Werley*, 57 Berks 26 (1964), *aff'd* 422 Pa. 18, 221 A.2d 133 (1966). rather additional facts are necessary to shift the burden of proof to the alleged donee. *Dzierski*, 449 Pa. at 289-290. The Supreme Court determined in *Zarnowski v. Fidula*, 376 Pa. 602, 605-606, 103 A.2d 905, 907, (1954) that a confidential relationship will be found ". . . only when the parties do not deal on equal terms and one side exercises an overmastering influence on the other that the law will designate the association to be that of a confidential relationship."

In an equity action, it is well recognized that the trial court is the ultimate finder of fact. *Balin v. Pleasure Time, Inc.*, 243 Pa. Super. 61, 68, 364 A.2d 449, 453 (1976). In the case at bar, the court heard extremely conflicting testimony from the witnesses for both parties. The issues of whether a confidential relationship existed between Ms. Facchine and Mr. Bigler, as well as whether Ms. Facchine was competent on the day she executed the deed in question thus turn on the testimony presented and the credibility of the witnesses.

As previously mentioned, the couple resided together in an unmarried status for approximately twenty-six (26) years, during which time both parties naturally placed some degree of trust and confidence in each other. This association, however, does not, of itself, establish a confidential relationship. Rather, additional facts are necessary.

The credible evidence indicates that Ms. Facchine was both mentally and physically independent during the relevant period of 1983 through 1984. The court determines that, during this period, Ms. Facchine cooked for herself, cleaned the house, signed her own checks, and helped Mr. Bigler with the grocery shopping. She regularly talked with her daughters on the telephone until 1983 when the calls stopped. While the daughters' claim that this was due to their mother's incapacity, they presented no substantive evidence to verify this allegation.

The court also determines that Ms. Facchine had the presence of mind to make important decisions on her own. For example, in 1983, she suggested changing her individual checking account into a joint account with Mr. Bigler. Ms. Facchine refused, on several occasions, to receive medical treatment for her various ailments. The court believes that if Mr. Bigler had an overmastering influence on Ms. Facchine, then he would have been able to persuade her to accept medical treatment.

In early 1984, just prior to the execution of the deed, Ms. Facchie discussed the idea of conveying the house with Mr. Bigler. At that time, she expressed her concern to Mr. Bigler about what would happen when her daughters became aware of the deed. Ms. Facchine therefore had a clear understanding of what was transpiring in 1984 with regard to the conveyance of the property, as well as a concern of what the consequences would be.

As to the execution of the deed, it is undisputed that Forest N. Myers, Esquire, prepared the deed in question and presented it to Mr. Bigler. On March 28, 1984, Mr. Bigler took the deed to the Brumbaugh Avenue residence to be executed. Present at this time were Ms. Facchie, Mr. Bigler, and Kimberly Kriner, a notary public. Prior to the execution of the deed, Mrs. Kriner asked Ms. Facchine certain questions from the notary public handbook. Although she could not recall the exact questions asked, Mrs. Kriner testified that these questions were standard procedure for notarizing the deed in the presence of Mr. Bigler and Mrs. Kriner. Moreover, Mrs. Kriner testified that no one urged Ms. Facchine to sign the deed and that she noticed nothing unusual about Ms. Facchine at that time.

The evidence further indicates that Mr. Bigler paid no consideration for the property, but did pay the transfer taxes on the deed. He testified that Ms. Facchine wanted him to have the house

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## LEGAL NOTICES, cont.

being situate in the Borough of Mont Alto, Franklin County, Pennsylvania, bounded and described as follows:

BEGINNING at a point in the sidewalk at the intersection of Main Street and Fir Avenue; thence by Main Street South 66 degrees 10 minutes 15 seconds West, 101.35 feet to a point; thence by lands now or formerly of Fred L. Klin, North 28 degrees 41 minutes 3 seconds West, 215.71 feet to a set iron pin; thence along the right-of-way line approximately 12.5 feet from the center of Penn Street; thence along the right-of-way line along the edge of Penn Street North 65 degrees 30 minutes no seconds East 105.20 feet to a set iron pin; thence by Fir Avenue South 27 degrees 38 minutes 34 seconds East 216.64 feet to a point in the sidewalk at the intersection of Main Street and Fir Avenue, the place of beginning. All as per survey by William A. Brindle Associates dated January 18, 1974 and entitled "Survey of Land Situate in the Borough of Mont Alto, Franklin County, PA for Dr. Gerald A. Bottorff", which survey is attached hereto, made a part hereto, and incorporated by reference herein.

BEING the same real estate conveyed to Frank J. Kocek and S. Susan Kocek by deed of Gerald A. Bottorff, dated October 14, 1976, and recorded in Franklin County Deed Book Volume 733, Page 985. Being the same real estate conveyed by Frank J. Kocek and S. Susan Kocek to Frank J. Kocek by deed dated December 8, 1986, and recorded in Franklin County Deed Book Volume 981, Page 583.

SUBJECT, HOWEVER, to the payment of a certain Mortgage from Frank J. Kocek and S. Susan Kocek, to The Mont Alto State Bank dated October 27, 1976 and recorded October 27, 1976 in Franklin County Mortgage Book Volume 355, Page 237 in the principal sum of \$30,000.00, and a second Mortgage from Frank J. Kocek and S. Susan Kocek, to The Mont Alto State Bank dated December 12, 1984 and recorded December 14, 1984 in Franklin County Mortgage Book Volume 497, Page 14 in the principal amount of \$22,000.00, interest thereon as the same may become due and payable; and the within described real estate is freely conveyed to the Grantee herein on the condition that the said Grantee continue personal liability for the payment of said Mortgage; and said Grantee does, and accepting this conveyance, assumes and agrees to pay said Mortgage. This is a transfer from husband and wife to husband.

BEING sold as the property of Frank J. Kocek, Writ No. AD 1988-437.

### SALE NO. 3

Writ No. AD 1989-25

Judg. No. AD 1989-25

First National Bank of Greencastle

—vs—

Charles H. Burr and Monika S. Burr, his wife

Atty: Patterson, Kaminski, Keller & Kiersz

ALL THAT CERTAIN lot of ground with improvements, situate on the east side of South Jefferson Street in the Borough of Greencastle, County of Franklin and State of Pennsylvania, bounded and described as follows:

BOUNDING on the north by public alley; on the east by an alley; on the south by lot formerly of William N. Dixon and Ella T. Dixon, his wife now of Lance Roscoe; on the east by South Jefferson Street aforesaid, having a frontage of thirty (30) feet, more or less, on South Jefferson Street and a depth of two hundred thirty-five (235) feet, more or less, and being improved with a two-story brick dwelling house and other buildings.

BEING the same real estate which Louise H. Westcott, Executrix of the Last Will and Testament of Susan V. Burke, deceased, by her Deed dated December 23, 1980, and recorded in the office of the recorder of Deeds of Franklin County, Pennsylvania, in deed Book Volume 827, Page 181, conveyed to Charles H. Burr and Monika S. Burr, his wife, the Defendants herein.

HAVING a street address of 134 South Jefferson Street, Greencastle, PA 17225.

BEING sold as the property of Charles H. Burr and Monika S. Burr, his wife, Writ No. AD 1989-25.

### SALE NO. 4

Writ No. AD 1988-415

Judg. No. AD 1988-415

Carteret Savings Bank, F.A.

—vs—

Floyd R. Sheffler and Judy L. Sheffler

Atty: Jonah D. Levin

ALL THAT CERTAIN following described real estate, lying

## LEGAL NOTICES, cont.

and being situate in Waynesboro, Franklin County, Pennsylvania, along the Westerly side of Chestnut Street, bounded and described as follows:

BEGINNING at a point on the Westerly side of Chestnut Street at the Southeastly corner of Lot No. 206; thence with the Westerly side of Chestnut Street in a Southerly direction 80 feet to lands now or formerly of Preston Strausbaugh; thence with the same in a Westerly direction 150 feet to a 12 foot alley; thence by said alley in a Northerly direction 80 feet to a point; thence by said Lot No. 206 in an Easterly direction 150 feet to Chestnut Street, the place of beginning.

BEING Lots Nos. 208, 210 and the Northerly 20 feet of Lot No. 212.

BEING sold as the property of Floyd R. Sheffler and Judy L. Sheffler, Writ No. AD 1988-415.

### TERMS

As soon as the property is knocked down to a purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, May 1, 1989 at 4:00 P.M., prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on May 5, 1989 at 1:00 P.M., prevailing time in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack

Sheriff

Franklin County, Chambersburg, PA

3/31, 4/7, 4/14/89

### FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on February 23, 1989, an application for a certificate for the conducting of a business under the assumed or fictitious name of VIDEO QUEST, with its principal place of business at 10 South Carlisle Street, Greencastle, PA 17225. The names and addresses or the persons owning or interested in said business are Richard L. Cook, 9969 McClanahan Road, Greencastle, PA 17225, and Tommie Jean Cook, 9969 McClanahan Road, Greencastle, PA 17225.

John W. Frey, Esquire  
PATTERSON, KAMINSKI,

KELLER & KIERSZ

239 East Main Street

Waynesboro, PA 17268

4/7/89

because he had built it and she did not want her daughters fighting over it. It is also evident that Mr. Bigler did not record the March 28, 1984 deed until June of that same year. The court believes that if Mr. Bigler intended to defraud Ms. Facchine of her property, then he would have recorded the deed immediately after execution.

Mrs. Whitsel and Mrs. Phillips testified to general and specific instances which they claim prove that their mother was weak-minded and incompetent both prior to and at the time the deed was executed. They stated that Ms. Facchine exhibited erratic behavior from 1982 through 1986. For example, they cite two incidents during the early 1980's when Ms. Facchine was thought to be missing. Mr. Bigler found her on both occasions, but at considerable distances from the couple's residence. While the daughters contend that these incidents were due to their mother's lack of mental capacity, Mr. Bigler claimed that alcohol was the cause.

Mrs. Whitsel and Mrs. Phillips also stated that, on several occasions during this period, their mother did not recognize who they were. In addition, they claimed that, beginning in 1982, Ms. Facchine could not hold a telephone conversation with them. The daughters testified that their mother talked gibberishly to them and ultimately stopped calling them in 1983.

As to these general allegations, the court places little credibility in them. First of all, Mr. Bigler and his witnesses<sup>2</sup> testified that Ms. Facchine had always recognized them. The court thus gave greater credibility to Mr. Bigler and his witnesses because the record indicates that they visited and observed Ms. Facchine more frequently than either Mrs. Whitsel or Mrs. Phillips. Secondly, the daughters failed to present any disinterested witnesses to substantiate their claims. The court therefore considered their direct interest in the outcome of this litigation. Moreover, these allegations are very general in nature and do not identify any specific time period during 1982 through 1986.

<sup>2</sup>Defendant's witnesses included Mrs. Kriner, the notary public, who also was Mr. Bigler's niece. She testified that, during the last five years, she visited the couple at least two times per week. Galen Bigler, defendant's brother, testified that he and his wife visited the couple three times per week since 1960. Both of these witnesses stated that Ms. Facchine always recognized them and appeared to take good care of herself.

Mrs. Whitsel also testified to a one week visit to her mother's in February of 1984, just one month before the execution of the deed. At that time, Mr. Bigler was not at home because of a brief stay at the Veteran's Administration Hospital for eye treatment. Mrs. Whitsel found the conditions of the house and of her mother to be deplorable. She testified that the house was dirty, had a terrible odor about it, and had dog feces all over. The refrigerator allegedly had moldy food in it. As to her mother's personal condition, Mrs. Whitsel stated that, throughout the entire week, her mother wore several garments at one time, would not bathe herself, did not cook or clean, ate primarily raw hot dogs, hallucinated frequently, put her hand over red hot stove burners, and walked aimlessly around the house all day.

Once again, the court does not accept Mrs. Whitsel's testimony as credible. First, she stated that this visit occurred in February of 1984 while Mr. Bigler was in the hospital for eye treatment. Yet, Mr. Bigler testified that he was not in the hospital in February of 1984, but instead was in during February of 1985 for eye cataract treatment. Mrs. Whitsel's visit probably occurred in February of 1985, eleven months after the execution of the deed. Secondly, Mrs. Whitsel testified, under cross examination, that she did not do anything about the dirty conditions of the house and did not call any physicians at that time. She and Mrs. Phillips instead called Lutheran Social Services who told them that Ms. Facchine would have to see a doctor. Yet they still did not call any physicians immediately thereafter.

Mrs. Whitsel and Mrs. Phillips testified that they subsequently tried to get medical attention for their mother. They allegedly called several physicians in the Chambersburg area, yet could not remember exactly when they called or who they called. They contend that the physicians they contacted would not take Ms. Facchine as a patient at that time. At no time did the daughters contact their family physician for a referral. In striking contrast to the daughters' attempts, Mr. Bigler scheduled a doctor's appointment for Ms. Facchine with relative ease in 1986.

In 1986, Dr. Samuel Q. Bricker examined Ms Facchine on two occasions. Dr. Bricker concluded at that time that Ms. Facchine was physically healthy, but abnormal mentally. He expressly stated, however, that he could not offer an opinion as to Ms. Facchine's mental status on March 28, 1984, the day the deed was

executed. Bricker Deposition, p.13. He stated that, in order to give an opinion as to Ms. Facchine's mental status in 1984, he would need detailed information from family members. Bricker Deposition, p. 13. Dr. Bricker never received this information from any family member. As such, Dr. Bricker's evaluation provides no valuable insight as to whether Ms. Facchine was mentally competent when she executed the deed in 1984.

The court determines that there was a serious lack of communication between Ms. Facchine and her daughters. The record indicates that they visited each other on an infrequent basis. This eventually led to the communication gap between them. For instance, Mrs. Whitsel and Mrs. Phillips did not become aware of the deed until July of 1986, more than two years after the conveyance. Furthermore, Mrs. Phillips did not know about the joint bank account until just recently. Mrs. Whitsel had knowledge of the joint bank account as early as 1984, but raised no objections or concerns at that time.

In conclusion, the court determines that Mr. Bigler did not exercise an overmastering influence over Ms. Facchine and thus no confidential relationship existed. Furthermore, plaintiff has not proven, by a clear, strong, or compelling nature, that the deed was the result of fraud. Likewise, plaintiff has not proven that Ms. Facchine was incompetent on March 28, 1984. Accordingly, the deed must be sustained and plaintiff's action is dismissed.

#### DECREE NISI

February 7, 1989, plaintiff's action is dismissed.

This decree nisi shall become absolute unless exceptions are filed thereto within ten (10) days.