

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No: CV 2012-05109

BETWEEN

SHAHAIDA KAMTA as the Administratrix Ad Litem  
Of the Estate of Muntagin Mumtazan Khan  
Also called Muntazan Khan who died on the 19<sup>th</sup> October, 2010  
By Order dated 15<sup>th</sup> May, 2012 of Mr. Justice Rampersad

Claimant

And

HANIFF KHAN

Defendant

**Before the Honourable Mr. Justice R. Rahim**

Appearances:

Mr. A. Manwah for the Claimant

Mr. A. Khan for the Defendant

## Judgment

1. The claimant seeks an order that the Defendant holds the quarter share interest of her deceased mother, Moontazan Khan also called Muntagin Khan (“the deceased”) on trust for the estate of the deceased. The property is described in a Deed of conveyance number 20183 of 2000 (“the 2000 Deed”) as situate at 147 Naparima Mayaro Road, Craignish Village, Princes Town (“the property”). It is the case for the Claimant that the execution of the Deed was procured by the undue influence of her brother, the Defendant, on the deceased who died on the 19<sup>th</sup> October, 2010. The Claimant has several other siblings and brings this claim on behalf of the estate of the deceased. The property has a house situate thereon.
2. The deceased’s mother (the Claimant’s grandmother) Macitan, also called Masitan, owned the property and by Deed of conveyance 343 of 1956, vested the property in herself and her children, namely, the deceased, James Christopher West, John West and George West as joint tenants. Macitan died in 1984 without severing the joint tenancy. The property became seised and possessed by the deceased, James, John and George as joint tenants under the principle of the right of survivorship upon the death of Macitan.
3. By the 2000 Deed dated 5<sup>th</sup> September, 2000 the deceased, James, John and George conveyed the property to the Defendant for the sum of One Hundred Thousand Dollars (\$100,000.00). Cheques in the sum of twenty-five thousand dollars each were made out to the deceased, James, John and George and allegedly accepted by them as consideration for the conveyance which was done by way of purchase. The Claimant alleges that the fact of this conveyance was only discovered by her attorneys in the year 2011 during proceedings in relation to another property between the Defendant and she.
4. In addition, and as a corollary to the challenge on the ground of undue influence, the Claimant alleges that no consideration passed between the deceased and the

Defendant and that the deceased received no independent legal advice prior to entering into the transaction. In particular, the Claimant further alleges that the deceased was at all material times illiterate, suffered from diabetes and not in a sound or proper state of mind to understand the nature of the transaction and enter into the conveyance. That the deceased executed the conveyance under the undue influence of both the Defendant and that of John West on the Defendant's behalf. In relation to this the Claimant claimed that the deceased lived with Defendant and his wife and was dependent on them.

5. Consequently, the Claimant seeks a declaration that the deceased share in the property by the Deed forms part of the deceased's estate, severance having occurred and seeks an order that the property either be sold at a public auction and the proceeds of the deceased share be paid into the deceased's estate or that the property be surveyed and divided and that the Defendant be prohibited from interfering with that part owned by the estate of the deceased.
6. Further, the Claimant alleges that Macitan while alive made promises to her sibling Zanifa Abraham and seeks to invoke the doctrine of promissory estoppel in respect thereof.
7. The Defendant denies the allegations of undue influence. The Defendant avers that the Claimant has no claim in the property since the Deed was done with the consent of the deceased, James, John and George in an open, transparent and legal manner for valuable consideration. The Defendant claims that the deceased returned the cheque for the sum of twenty-five thousand dollars (\$25,000.00) to him freely and voluntarily immediately upon their return home after execution of the conveyance at the attorney's office. It is the Defendant's case that the cheque was returned because the deceased recognized that he had taken care of his parents. It is also his case that the Claimant was fully aware of the transaction from its inception and so were his other siblings. He avers that none of them objected to the transaction and it was only some ten years later that the Claimant objected because of the bad relationship he

shared with the Claimant which resulted in other legal proceedings in relation to another property.

### **Issues**

8. The following issues fall for determination:
  - i. Was the deceased operating under undue influence either presumed or actual or was the deceased deprived of independent legal advice when she executed the 2000 Deed.
  - ii. If the answer is yes, then did the act of undue influence and/or deprivation of independent legal advice result in severance of the joint tenancy.
  - iii. If so what is the appropriate remedy.

### **The Evidence**

9. The Claimant gave evidence herself and called no other witnesses. It is the evidence of the Claimant that the Defendant went to live with the deceased in 1975 at the deceased's home at 52A Bushe Street, Curepe. The Defendant's wife did not cook or clean for the deceased as the deceased was quite capable of so doing up until shortly before her death. The Claimant further testified that she, the Claimant washed and cleaned for the deceased.
10. According to the evidence of the Claimant, the Defendant, his wife and children were not allowed in the room of the deceased because the deceased would lose items of cash and jewelry. Further, the deceased was the one who provided money for groceries and bills for the home.

11. During cross-examination, the Claimant testified that she brought this action on behalf of the estate of the deceased. According to the Claimant, the beneficiaries of the estate of the deceased are Zanifa Abraham, Zahaida Khanpradie, Haniff Khan, Shah Khan, Latiff Khan and herself (“the beneficiaries”). The Claimant testified that she received no instructions from any of the beneficiaries to bring this claim.
12. The Claimant also testified in cross-examination that the deceased was relatively healthy in the year 2000 during the month of September, however in 2010 she was not as healthy as in the year 2000. She stated that her siblings, the family members and she did not have knowledge of the Deed and that it should be set aside because it is only fair that each sibling receive their share of the property.
13. The Claimant further testified that the deceased was unduly influenced because she, the deceased was not allowed by the Defendant to speak freely to the Claimant and that the Defendant physically abused the deceased. According to her evidence she did not make any effort to take the deceased to her home because the deceased would never leave her home at Curepe.
14. The Claimant testified that she drafted the deceased’s Will in 2009 and at the time she knew the property was owned by the deceased but made no effort to inquire as to why it had not been included in the Will. At the time, according to the Claimant, Zanifa Abraham lived at the property and in her view Zanifa would have first preference to the property.
15. The Defendant gave evidence and called his uncle John West.
16. The Defendant testified that in the year 2000, an offer was made to him for the purchase of the property from the deceased, James, John and George for the sum of one hundred thousand dollars. His uncle John West informed him that he and his siblings would give the necessary instructions to an attorney, Mr. Surujdeo Nanan.

In pursuance of the agreement to purchase the property, in August, 2000 he cut four cheques in the sum of twenty-five thousand dollars (\$25,000.00) each to be paid to the vendors James, John and George and the deceased. The Defendant withdrew seventy-five thousand and forty-five dollars (\$75,045.00) from his Republic Bank account for three of the cheques and twenty-five thousand dollars (\$25,000.00) from his Credit Union account for the fourth cheque.

17. The Defendant testified that in September, 2000 he presented the cheques to Mr. Nanan who subsequently handed over the cheques to the deceased, James, John and George upon execution of the Deed. It is his evidence that the deceased, James, John and George voluntarily executed the Deed at the office of Mr. Nanan and James executed the Deed before a Notary Public in Canada, his country of residence. Mr. Nanan received proper instructions to prepare, execute and register the Deed.
18. The Defendant testified that sometime in September, 2000, the deceased returned her cheque to him freely and voluntarily without any undue influence. Under cross-examination, his testimony quite interestingly went as follows;

*“When I carried back my mother from the lawyer’s office she gave me back the cheque because I take care of my parents all the time and never ask for anything. I didn’t think it was important to say that because I gave her the cheque and she gave it back. She gave me back the money. She gave me because I did everything for her. Before I did the witness statement I told everybody that my mother gave me back the money. I read the documents the last time the matter called. I didn’t see that in any of my documents in the witness statement. I did not put that in any of the other documents which I filed in this case before the witness statement.”*

19. The court notes that heavy weather was made by attorney for the Claimant in his submissions in relation to this bit of evidence as the Defendant has admitted not having said this before trial, but this is not the case. Paragraph 9 of the witness statement of the Defendant clearly sets out that the deceased returned the cheque and

the reasons for the return. However, paragraph 9 does not specifically state that the cheque was returned to the Defendant on the very day that they returned from the lawyer's office after having executed the Deed. So that in the court's view the admission can only be to having not stated the time of the return prior to testifying. The court shall therefore return to this aspect of the evidence later.

20. It is the evidence of the Defendant that he never struck the deceased or ill-treated her. The Defendant testified that he, his wife and children treated the deceased well at all times. His wife cooked, washed and cleaned for the deceased from 1984 to 2010 until she passed away. During cross-examination, he testified that he never asked his wife to cook, wash and clean for the deceased but his wife did it on her own. He further testified that the deceased got her meals from his wife and sometimes would prepare something for herself. That the deceased depended on him to go to the grocery and to the market and for maintenance in the home.
21. The Defendant further testified that his sister Zahaida took the deceased to the bank on most occasions since Zahaida was a signatory to the account. The Defendant testified that he took the deceased to the bank no more than five times. During cross-examination, the Defendant testified that he never wanted anything to do with the deceased's money transactions and would call his sister Zahaida to take the deceased to the bank.
22. **John West** testified that his mother Macitan purchased the property from the Craignish Estate in 1956 and vested it in herself and her children. He, James and George lived with her on the property from birth. In 1957 James migrated to Canada for his education. In 1962, West rebuilt the old house, paid all the bills for utilities, rates and taxes and solely maintained the property. Sometime before he rebuilt the house, the Defendant and his brother Latiff Khan, sons of the deceased came to live with them on the property.

23. West got married in 1963 and moved out of the house and George left soon after. The Defendant and Latiff eventually left the property to live once again with the deceased. According to the evidence of West, his mother's health deteriorated so she too went to live with the deceased, leaving the property vacant. At one time the Defendant's sister was having some marital problems and took the opportunity to move into the vacant house on the property with her three grown children. He further testified that she eventually left unannounced with her children to reside in Canada and left the property vacant once again.
24. It is his evidence that his mother died in 1984 at Bushe Street, Curepe where she lived for several years with the deceased and her children without severing the joint tenancy of the property. He was then solely responsible for the upkeep and maintenance of the property and it was becoming a financial burden to him. Thus in the year 2000, he offered the property for sale to the Defendant. He, James, George and the deceased all agreed to sell the property to the Defendant. George contacted a retired government valuator who visited the property and gave a verbal estimate of one hundred and twenty thousand dollars (\$120,000) so they settled on a price of one hundred thousand dollars (\$100,000.00).
25. West then contacted his attorney, Mr. Nanan and gave him the necessary instructions to prepare the document for the sale. During cross-examination, West testified that he took the lead in having the property transferred to the Defendant. Mr. Nanan then contacted all the parties. During cross-examination, West testified that he knew all parties were contacted because he also contacted all the parties.
26. West testified during cross-examination that he visited Mr. Nanan's office on two occasions. Once with James, the Defendant and the deceased, to sign the Deed and on another occasion by himself to settle the monetary details concerning the Deed.



## The First Issue

### Law

27. Their Lordships of the Court of Appeal of the Eastern Caribbean States in the case of **Stoute and Others v Firstbank Puerto Rico (2013) 81 WIR 266 at page 276** paragraph 19 of the judgment of Justice of Appeal Mitchell in erudite manner set out the mischief that is undue influence as follows;

*"The essence of undue influence is the unconscionable abuse of influence that one person has over another applied so as to preclude the exercise of free and deliberate judgment. It has a connotation of impropriety. In the eyes of the law, undue influence means that an otherwise unobjectionable influence has been misused."*

28. There are two ways which undue influence may be proven, namely by proof of actual undue influence or proof of the existence of a relationship which raises a presumption that undue influence has been exercised and which said presumption has not been rebutted by the other party: **Halsbury's Laws of England. Volume 22 (2012) 5th Edition, para 294.**

### Actual Undue Influence

29. In cases of actual undue influence, it is necessary for B to prove affirmatively that A exerted undue influence on B to enter into the particular transaction which is impugned: **Halsbury's Laws of England. Volume 22 (2012) 5th Edition, para 295.**

## Submissions

### The Defendant

30. It was contended on behalf of the Defendant that the Claimant has failed to prove that there was any actual undue influence. Counsel for the Defendant submitted that the Deed was dated 5<sup>th</sup> September 2000 and registered on 21<sup>st</sup> September 2000. That the deceased passed away ten years later on 19<sup>th</sup> October 2010. Therefore, it was the argument of Counsel for the Defendant that at the time the Deed was executed, the deceased was not weak, ill, isolated or vulnerable and there was no evidence of any overt act of improper pressure or coercion by the Defendant in and around September 2000 or at any time.
31. Counsel for the Defendant relied on the authority of *Royal Bank of Scotland v Etridge (No. 2) [2001] 4 All ER 449 at 458* where Lord Nicholls opined that a relationship of ascendancy would exist where there was control over another or where one person depended on another for money, food, medication, transportation and daily requirements.
32. Counsel for the Defendant argued that in or around the year 2000, the deceased was not ill. Further, Counsel for the Defendant argued that the deceased did not depend on the Defendant for her transportation, food, medicine or money. The Defendant submitted that the Defendant in his evidence stated that his wife provided food for the deceased which the Claimant denied. Therefore, it was the argument of the Defendant that according to the Claimant, the deceased was not dependent on the Defendant for food.
33. Counsel for the Defendant argued that the deceased was not isolated from the rest of her children and that all her children had complete access to her. It was the argument of the Defendant that the deceased was the dominant person in the mother son

relationship. Counsel for the Defendant submitted that control over finances is a strong indicator of a relationship of ascendancy. Counsel for the Defendant contended that this was not the case with the Defendant and the deceased.

### The Claimant

34. The Claimant submits the evidence as given by the Defendant is wholly against his pleaded case in respect of this issue. That it is clear that the Defendant was cooking and caring for the deceased and so it must be that she was dependent on him.

### Finding

35. This issue can only be determined by way of recourse to the evidence. The court must ask itself whether the Defendant had control over the deceased or whether the deceased depended on the Defendant for money, food, medication, transportation and daily requirements.

36. Having considered the issue, the court is of the view that there is no satisfactory evidence before it that in the year 2000 prior to execution of the Deed, the Defendant exercised control over the deceased or that the deceased was dependent on the Defendant for money, medication, transportation and daily requirements. It may well be the case that in her later years the deceased became so dependent but those circumstances would not affect the issue under consideration.

37. In this regard it is the evidence of the Claimant that the Defendant went to live with the deceased in 1975 at the deceased's home at 52A Bushe Street, Curepe but the Defendant's wife did not cook or clean for the deceased as the deceased was quite capable of so doing up until shortly before her death. This is somewhat consistent with the evidence given by the Defendant who stated that his wife cooked and cleaned not because she had to but because she wanted to. The implication is that the deceased was not dependent on the Defendant or his wife in this regard. One could well surmise that it was the case from 1975 and up to 2000 and perhaps even beyond

that time, up to shortly before her death that the deceased was her own woman so to say. That the Defendant and his family were staying at her residence at her behest and so they would have felt an obligation to assist is a reasonable inference.

38. The Claimant further testified that she was the one who washed and cleaned for the deceased so that even on the Claimant's evidence there was no dependency by the deceased on the Defendant or his wife at that time.

39. Further, according to the evidence of the Claimant, the Defendant, his wife and children were not allowed in the room of the deceased because the deceased would lose items of cash and jewelry. It is her testimony that the deceased was the one who provided money for groceries and paid the bills for the home.

40. The Defendant testified that he never asked his wife to cook, wash and clean for the deceased but his wife did it on her own. He further testified that the deceased got her meals from his wife and sometimes would prepare something for herself. That the deceased depended on him to go to the grocery and to the market and for maintenance in the home.

41. The court prefers the plausible version of events as it is the version which makes for good common sense. In the court's view, both versions carry with them high levels of plausibility as they are not necessarily inconsistent with each other. In that regard it is the finding of the court that the deceased was quite capable of cooking and washing for herself during most of the time and that the Defendant and his family lived with her from 1975 to shortly before her death. Despite this, the wife of the Defendant would sometimes cook for her. Closer to the time of her death, it was the Claimant who assumed most of the burden for cooking and washing. Prior to her health taking a turn for the worse shortly before her passing, the Defendant would take her to the grocery and pharmacy or source items there from for her, but this was a matter of practicality and convenience which would not in the court's view admit of a relationship of dependency between the deceased and the Defendant prior to execution of the Deed in the year 2000. As a matter of common sense, it may well be

the case that a relationship of dependency subsequently developed when the deceased became older and illness may have stepped in but the court is firmly of the view that on the evidence no such relationship existed at the time the conveyance was executed.

42. The court is fortified in its view by the evidence of the Claimant herself in cross-examination as follows;

*“The Deed was signed in 2000. My mother died in 2010, ten years after she did the Deed, approximately. My relationship with my mother was usually good. In 2000, during the month of September I would not have seen my mother everyday but probably weekends. During the year 2000 she was relatively healthy and normal. In 2010 she was not as healthy and normal as she would have been in 2000. In August 2000 I would not have seen her every weekend I can’t say exactly but on a regular basis. At least about four times for the month. Also in July 2000 I would have seen her for about four times for the month also in October 2000. From July to December 2000 I would have seen her about four times per month. During that period, I did not speak to her on the phone everyday, probably every other day. During the period July 2000 to December 2009 I would speak to her about once a week and visit about once a week. I would not speak with her everyday.”*

43. This evidence clearly demonstrates that the deceased was in relatively good health in the year 2000 and would have had no cause for being largely dependent on the Defendant. If this was the case one would have expected the Claimant to say so in cross-examination in keeping with the impression she tried to give the court in her witness statement but this is not the case.

44. Before moving onto the next issue there is one aspect of the Claimant’s submission which can be summarily treated with. The Claimant submitted that the deceased was suffering from diabetes at the time she executed the Deed. There is no direct

evidence of that in this case but the Claimant argues that this court can have recourse to evidence allegedly led in another case between the parties. In that regard two points must be made. Firstly, in the absence of authority this court will be loathed to transpose evidence from another case (if such evidence does in fact exist), into this case. Secondly, even if it is that the deceased was a diabetic, that, either by itself, or taken with the available evidence in this case would not have led this court to the conclusion that there existed a relationship of dependency so that this submission must also fail.

### Presumed Undue Influence

45. In order to raise the presumption of undue influence there must be established the existence of a relationship between A and B under which B placed trust and confidence in A and that the transaction entered into is one which 'calls for explanation' or 'is not readily explicable' by the relationship between the parties: **Royal Bank of Scotland plc v Etridge (No 2) [2001] UKHL 44 at [21]**

46. The necessary relationship of trust and confidence may be established in one of two ways:

- i. Certain relationships as a matter of law raise a rebuttable presumption of trust and confidence; these have been held to include the following: parent and child, guardian and ward, religious adviser and disciple, doctor and patient, solicitor and client, trustee and cestui que trust and fiancé and fiancée. The presumption may apply even after the relationship has ceased if the influence continues.
- ii. Even if there is no relationship of the type falling within head (1) above, B may *in fact* prove the existence of a relationship under which he generally reposed trust and confidence in A. The most obvious instance will be proof of a relationship in which B has reposed trust and confidence in A in relation

to the management of B's financial affairs, but it is enough for B to establish that A has acquired influence over B in relation to some general aspect of (B's) affairs. This category has deliberately been left undefined by the courts; but the necessary relationship of trust and confidence has been proved in the following: between spouses and other cases where there is an emotional relationship between co-habitees, whether heterosexual or homosexual; between a son and his elderly parents; between a bank and its elderly customer; between a manager and a young musician; and between an employer and his employee: *Halsbury's Laws of England. Volume 22 (2012) 5th Edition para 296.*

## Submissions

### The Defendant's Submissions

47. Counsel for the Defendant submitted that there was no evidence that the deceased acted under the direction of the Defendant in the year 2000. Counsel for the Defendant further submitted that the deceased was independent enough from the evidence to direct the Defendant and also give directions to her other children including the Claimant who claimed that the deceased gave her directions around 2008 to prepare her Will.
48. Counsel for the Defendant argued that at the lawyer's office, the lawyer, Mr. Nanan, could have ascertained for himself the deceased's physical condition and her mental condition, and would have satisfied himself that the Deed represented the deceased's wishes and instructions. Counsel for the Defendant further submitted that the lawyer would have satisfied himself that there was no undue influence.

49. Counsel for the Defendant relied on paragraph 839 of the Halsbury Laws of England 5<sup>th</sup> Edn Vol 76 which states:

*“There is no presumption of undue influence in the case of a gift to a child or grandchild, even where it is made during the donor’s illness and a few days before his death. However, where a child over the age of majority occupies a position of dominance over the elderly parents, there may be undue influence depending upon the facts of the individual case.”*

50. It was argued on behalf of the Defendant that there was no evidence that the Defendant had influenced or was in a position of dominance over the deceased in the year 2000 or at any time. Therefore, Counsel for the Defendant contended that there was no evidence of a relationship of influence.

51. Counsel for the Defendant submitted that there was no secrecy about the Deed since several family members were aware of it. Further, that the deceased was not isolated before or after the Deed. The Defence also submitted that the subject of the Deed was not the main property owned by the deceased but was in fact a property that she held with her brothers. Counsel for the Defendant further argued that main property (the Curepe property) in which the deceased lived with the Defendant was gifted in a Will to her three daughters with a life interest to the Defendant. This Will was executed about one month before the deceased passed away. Therefore, it was the argument of Counsel for the Defendant that the 2000 transaction was not a suspicious one.

52. Counsel for the Defendant submitted that the evidence of the Claimant demonstrates that at the time she got instructions to prepare the Will there was no mention of the property. Therefore, the terms of the Will were consistent with the transfer that was done by the deceased ten years prior and so it can be inferred that all of the deceased’s children including the Claimant would have been aware of the 2000 transaction.



53. Finally, Counsel for the Defendant submitted that the Defendant admitted that the deceased returned her cheque to him by her own free will. Therefore, Counsel for the Defendant argued that this did not affect the consideration, since the cheque was given to the deceased and it was up to her to do as she wished with it.

### The Claimant's Submissions

54. Counsel for the Claimant also relied on the authority *Etridge* supra. Counsel for the Claimant submitted that it is trite law that the absence of independent legal advice raises a presumption of undue influence.

55. It was argued on behalf of the Claimant that the Defendant together with John West decided to convey the deceased's interest in the property to the Defendant and that John West procured his lawyer to prepare the conveyance. Further, Counsel for the Claimant argued that the deceased did not visit the lawyer to give instructions for the preparation of the Deed which was obviously prepared beforehand, since when the deceased attended Mr. Nanan's office the Deed had already been executed by another co-owner. Moreover, Counsel for the Claimant contended that the deceased was not allowed to consult her other children and that she did not receive any money for the conveyance of her interest in the property.

56. Counsel for the Claimant contended that the Defendant did not deny that there was no independent legal advice, or put forward any alternative fact. Further, Counsel for the Claimant contended that Mr. Nanan being John West's lawyer did not show that he addressed the issue of independent legal advice with the deceased by telling her and making a note that she was so advised.

57. Counsel for the Claimant submitted that the facts and circumstances that led to and surrounding the Deed should excite the conscience and suspicion of this Court and

calls for an explanation from the Defendant but none was provided. Counsel for the Claimant submitted that the following were of particular material importance:

- i. The deceased and the Defendant with his immediate family lived alone in the same house and the deceased's adult children lived elsewhere.
- ii. The Defendant and his wife took care of all the deceased's material needs.
- iii. The Defendant provided no account as to what conversation he had with the deceased, if any, led him take the deceased to a lawyer not known to her. Neither did John West provide any such account.
- iv. The Defendant took the deceased only once when the Deed was executed, therefore, there were no prior instructions.
- v. No explanation was provided why the other children were not called to support the Defendant's case that they knew of the conveyance. He who asserts must prove.
- vi. The unchallengeable documentary evidence in Mr. Anand Singh's email shows that the first time the Claimant knew of the Deed was when the Defendant's lawyer spoke of it in the year 2011 but he was uncooperative in providing a copy of the Deed. The Deed was done in the year 2000 and kept away from the Claimant.
- vii. The Claimant's Attorney letter dated 11<sup>th</sup> July, 2012 to the Defendant's former Attorney which pointed out that the Defendant's response did not deal with certain questions or issues which were raised in the Claimant's letter.
- viii. The initial claim of the Defendant was that he paid the deceased. This was later diluted when the Claimant pointed out in the exchanges by her lawyer that no evidence was seen in the deceased's bank books and an application for specific discovery was made after the defence.

- ix. No where did the Defendant disclose that the cheque was returned by the deceased. The explanation of the cheque in the witness statement for the first time places his defence poles apart. His credibility becomes shaky.
- x. The Claimant's email dated 11<sup>th</sup> December, 2012 which pointed out that all the facts relating to the property showed that it was a clear case of undue influence causing the property to be conveyed to the Defendant received no response.
- xi. The Claimant pleaded that John West procured his lawyer to prepare the Deed and at the time of preparation the deceased never gave the lawyer instructions to prepare any such Deed. To this the Defendant pleaded that John, George and the deceased went with the Defendant to give instructions.
- xii. The evidence in chief of John West was that he contracted the lawyer and gave him instructions. The Defendant in his cross-examination said everything John West said was true.

## **Discussion and Findings**

### Relationship of trust and confidence

58. This court finds that in this case, the facts set out demonstrate that the relationship between the Defendant and the deceased in the year 2000 between son and mother was the type which would raise a presumption of undue influence and the transaction is one which calls for an explanation. While the deceased and the Defendant may have not been in a relationship of dependency, the deceased certainly on the evidence would have reposed a high level of trust and confidence in the Defendant,

the deceased being an elderly parent whose adult son lived with her. It is the evidence that she was diabetic, that he would go to the crockery for her and buy medication for her. That sometimes he would take her to the bank and most importantly that she was illiterate on his own admission. In the court's view therefore, the Claimant has proven and can rely on the presumption of undue influence. The transaction is therefore one which calls for an explanation by the defence.

### Transaction calls for an explanation

#### The Documents

59. The Defendant has testified that he in fact made the cheque for the purchase price out to the deceased and handed over the cheque to the deceased as consideration for the deceased's share of the property upon execution of the Deed at the lawyer's office. It is his testimony that when he returned home, the deceased returned the cheque to him. At paragraph 9 of his pleaded case, on this issue he in fact avers that sometime after the transaction, the deceased returned the money to him. However, in his evidence in cross-examination he makes it clear that the deceased returned the cheque on the very day that they returned from the lawyer's office. His explanation for not providing this detail prior to testifying is that he did not think it important.

60. The Claimant says that all along the Defendant was attempting to obfuscate the truth by pleading that the cheque was returned but in so doing intentionally omitting an important fact. To make a determination on this issue the court must examine the exhibits relied on by the Defendant. He has exhibited his withdrawal record from Republic Bank which shows a withdrawal of seventy-five thousand and forty-five dollars (\$75,045.00) on the 29<sup>th</sup> August 2000. This he testified was for payment to the three vendors, namely the deceased, George and James and the fee for the preparation of the cheques. At the time James lived in Canada. A deposit in respect

of the sum of twenty-five thousand dollars (\$25,000.00) was subsequently made on the 14<sup>th</sup> September 2000. This sum he testified was the sum returned to him by the deceased. The Defendant has also exhibited what he refers to as a Venture Credit Union stub which demonstrates that another \$25,000.00 was withdrawn for the purpose of payment to John West.

61. The Defendant has also relied on the instructions received from the vendors and recorded by the lawyer Mr. Nanan who was not called as a witness. Those instructions revealed signatures allegedly made on the 12<sup>th</sup> September 2000. While it is not for the court to act as an expert on its own and decipher signatures it appears clearly that the deceased affixed her thumbprint. Of interest appears to be the lawyer's record of the cheques handed over. At page two of those instructions, three Republic Bank cheques are recorded, one to George, one to James and one to the deceased. They all carry the same date and carry consecutive numbers. The fourth cheque is a Royal Bank cheque but the date of the cheque is obscured and indecipherable on the instructions. Nevertheless, it is the testimony of John West that he collected his cheque on the said day and the instructions do in fact show that the Royal Bank cheque was made out to John West. The inference therefore is that it carries the same date.

62. The instructions however carry a date later than that of the Deed itself. The Deed was executed on the 5<sup>th</sup> September 2000 and is so dated but the instructions are dated the 12<sup>th</sup> September some seven days later. It appears however by way of the certificate of the Notary Public who would have taken execution by James in Canada that such execution was taken on the 8<sup>th</sup> August 2000. It follows that in the court's view, the facts show the following chain of events. The vendors agreed to sell sometime before August 2000 and John West retained his attorney to prepare and send the Deed to Canada for execution. It was executed in Canada on the 8<sup>th</sup> August and returned to the lawyer who then informed the Defendant. The Defendant had four cheques prepared which he handed over to the lawyer on the 5<sup>th</sup> September at which time the vendors who live within the jurisdiction, including the deceased were

present to execute the Deed. The cheques were handed over to the vendors present by the lawyer. On the 12<sup>th</sup> September written instructions were recorded from the vendors. The Deed was adjudged by the Inland Revenue Department on the 14<sup>th</sup> September and registered on the 21<sup>st</sup> September.

63. The court finds that the trail of documentary exhibits does not excite the suspicion of the court. The transaction appears to be a regular one even though the instructions are signed after the Deed is executed. The fulcrum of the instructions lies with the fact that they were given not necessarily with the date as in this case. It can clearly be inferred in this case that those instructions were first given orally and then affirmed in writing. In any event the instructions were given within a reasonably short period after the Deed was executed and so the explanation of the transaction provided by way of the documents relied on by the Defendant is satisfactory in the court's view. It is clear on the evidence and the court so finds that a cheque in the sum of twenty-five thousand dollars (\$25,000.00) was drawn in favour of the deceased and the record shows that the cheque was handed over to the attorney and the court so finds. It is the evidence of John West that the deceased received her cheque in his presence at the lawyer's office on the day of execution.

64. It means therefore that valuable consideration did in fact pass between the deceased and the Defendant and the court so finds. The court therefore does not accept the submission of the Claimant that the return of the cheque means that no consideration was passed. This is simply not the case. Were it otherwise, a party to such a transaction could quite readily avoid it on the basis of lack of consideration by returning the funds of his own accord even though the sale is complete and the Deed executed. Of course this is not the law.

#### The return of the cheque

65. It is this act which has excited the suspicion of the court and which calls for an explanation by the Defendant. On the evidence it can be inferred that the cheque was in fact returned to the Defendant by the deceased. This is so as a deposit of equal amount is credited to his account on the 14<sup>th</sup> September 2000. Some two days after the instructions were signed and the very day the Deed was adjudged not chargeable with stamp duty as appears by the stamp endorsed thereon. The court must therefore determine whether it is satisfied with the explanation provided by the Defendant to such an extent that the presumption is rebutted. The court is of the view that to do so without recourse to the history and societal norms applicable to this jurisdiction would be to misunderstand the tenor of the evidence in a fundamental manner. That being the case, although a transaction for consideration the facts ought not to be viewed strictly from the position of vendor/ purchaser transactions.
66. The property is ancestral property once owned by the mother of the vendors who conveyed to her four children. The children all lived in that property at one time or another and their children also benefited from accommodation over the many years. The evidence of John West who is now eighty years old, is that all of the vendors lived in the house from birth with their mother and would assist her and take care of her needs. James migrated in 1957 and John rebuilt the house in 1962. At the time he worked at the Texaco Oil Company. The evidence is that the vendor's mother Macitan took the Defendant and his brother, her grandchildren to live with her in the house prior to 1962. Eventually everyone moved out over the years and Macitan went to live with the deceased. West testified that the upkeep of the house became a financial burden on him and when the Defendant made the offer to purchase he agreed.
67. This state of affairs is not uncommon in Trinidad and Tobago. It is clear that Macitan reposed such confidence and held such love for her children that she made them joint tenants with her as far back as 1956. It was therefore their ancestral property to do with as they pleased in the year 2000. It is usual for many families in those circumstances in this jurisdiction, to give priority to a purchaser who is related

to them and who is tied ancestrally to the property so that the family association to the property is maintained. Whether one agrees with this approach or not, the fact remains that this is a common practice in this jurisdiction and it appears to this court that this is what would have occurred.

68. When therefore, the Defendant testified that his mother returned the cheque to him because he had done everything for her, the court accepts that evidence as a full explanation of the event sufficient to rebut the presumption of undue influence in respect of these facts. It is clear to the court that the deceased would have been acting based on her good relationship with her son. It can also be reasonably inferred that the fact that her (the deceased) mother's home was being purchased by her mother's (Macitan) grandson and therefore being kept within the family, may have been a factor, although a lesser one in her decision to return the funds. This factor simply ought not to be ignored by the court. It is therefore highly plausible that a mother in this jurisdiction having regard to our local norms and way of life would return her share of the proceeds of sale to her son of her own free will in recognition of the factors set out above and the court so finds. Of course, had the deceased been afforded independent legal advice the position may have been entirely different which brings the court to the next issue.

### **Independent legal advice**

69. Where a fiduciary relationship exists between the parties to the transaction, there is a presumption of constructive fraud which is rebuttable on proof (by the dominant party to the relationship) that the transaction was at a fair price, that all the circumstances of the transaction were known to the subordinate party, *and that each party received, or was given a proper opportunity to take, independent legal advice.* The transaction is prima facie voidable at the instance of the subordinate party: **Halsbury's Laws of England, Volume 23 (2013), paragraph 138.**



70. In the case *Poorah v Lawrence (2008) C.V. Appeal No. 131 of 2001 paragraph 20,* the Court of Appeal recognized the principle that “while a transaction will not be set aside merely because it is improvident, it will be set aside if the Vendor acts without independent legal advice.” In this case the Court of Appeal allowed the appeal and set aside a conveyance by which Edna Poorah conveyed her family home to one of her daughters. Edna Poorah was at the time 77 years old, had recently lost her husband, illiterate and did not have the benefit of independent legal advice.

71. In the present case, it is the finding of the court that the Defendant owed a fiduciary relationship to the deceased and he would have been the dominant party in that relationship. It is also the finding that on the evidence no independent legal advice was received by the deceased. There is no evidence of whether she had the opportunity to receive such advice and so the court finds that she did not. The presumption of constructive fraud would therefore arise.

72. The courts view is that the price which was paid to the deceased was on the evidence a fair price in the circumstances having regard to the deceased’s share of the property. In that regard the court has considered and accepted the following evidence;

- a. That the deceased held a quarter share in the property.
- b. That John West was the one who rebuilt the house.
- c. That at the time of the conveyance the house John West was solely responsible for the upkeep and repair of the house and so may have been entitled to be compensated for his expenses.
- d. That John West caused a retired government valuator give him a verbal estimate of value of the property, namely the sum of one hundred and twenty thousand

dollars (\$120,000.00). John West was not cross-examined on this evidence so that it remains unchallenged and the court accepts it.

- e. That the property was at the time in a state of disrepair.
  - f. That as a consequence of the value the price of one hundred thousand dollars was reasonably within the range of the value of the property.
  - g. That the proceeds of sale were shared equally between all of the parties.
  - h. That all the circumstances of the transaction were known to the deceased as is evidenced by her instructions in writing and her return of the cheque thereafter for a perfectly valid reason and the fact that she was in good health at the time.
73. But be that as it may, there remains an aspect of this case which has caused the court much concern. It is a fact that no independent legal advice was obtained by the deceased nor was she afforded the opportunity to obtain same on the evidence. This is a fundamental flaw in the defence which entitles the Claimant to appropriate relief. In making that determination the court has made the following findings on the evidence; ,
- a. That the deceased was approximately seventy-six years old at the time the conveyance was executed. This can be discerned from the first four numbers appearing on the identification card of the deceased which was placed on the instructions by John West. It shows that the deceased was born in the year 1924. The court takes judicial notice of the fact that the first four numbers of national identification cards comprise the year of birth. Support for this approach is to be found in respect of John West whose identification card number shows that he was born in the year 1933. That would make John West eighty (80) years old when he gave his witness statement in 2013. At paragraph one of the said witness statement he admits to being eighty year of age. So that the deceased was of considerable age at the time of execution of the conveyance.

- b. The deceased was illiterate.
  - c. The evidence is that the deceased went to the lawyer's office and executed the conveyance and that the lawyer had spoken to her before that date. However, there is no direct evidence as to when the lawyer spoke with her or what he said to her. One would have expected that if he had spoken to the deceased and obtained her oral instructions that he would have recorded same and that recording in whatever form would have been put before this court. One would have also reasonably expected that fact may have been mentioned in the written instructions but it was not.
  - d. Mr. Nanan gave no evidence and no reason was given as to why he did not testify. It may well be that Mr. Nanan may have advised the deceased well enough to assuage any concerns the court may have had as a result of the absence of independent legal advice but there is simply no evidence before this court. Further, it is clear on the evidence of John West that Mr. Nanan was acting on behalf of John West.
74. It follows that the presumption of constructive fraud has not been displaced by the Defendant. This is so whether the court is of the view that the Defendant or John West was in fact the dominant party. It makes no difference as the deceased was not afforded the opportunity to obtain independent legal advice by either individual. The presumption having not been rebutted the court will then consider the next issue.

## **The Second Issue**

### Severance

### Law

75. In the case of *Williams v Hensman [1861] 70 ER 862 at 867*, Page Wood VC highlighted three circumstances in which a joint tenancy can be severed.

*"A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such a manner as to survivorship. Secondly a joint tenancy may be severed by mutual agreement. And in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common."*

#### Submissions on the issue

#### Defendant

76. Counsel for the Defendant submitted that there is no interest in the property that can form part of the deceased's estate. That both the Claimant and the Defendant agreed that at the time of the execution of the Deed, a joint tenancy existed amongst the deceased, John, George and James. Counsel for the Defendant further submitted that one of the key characteristics of a joint tenancy is the doctrine of jus accrescendi, that is, the right of survivorship: *Panton v Roulstone (1976) 24 WIR 465*. That in a joint tenancy there are the four unities:

- a. Unity of possession;
- b. Unity of interest;
- c. Unity of title; and,
- d. Unity of time.

77. That each joint tenant is entitled to possession of the whole property. The property is vested in each joint tenant as an indivisible entity. That the Deed transferred the four unities to the Defendant. Counsel for the Defendant further argued that the joint tenancy was not severed by the Deed and by the conveyance the deceased, John, George and James sold their interest in the property. Therefore, Counsel for the Defendant submitted that the Deed did not have the effect of severing the joint tenancy: *Singh v. Mortimer (1967) 10 WIR 65.*

78. Counsel for the Defendant contended that in order to sever the joint tenancy the deceased would have had to contract to sell her undivided ¼ share and the Deed would need to state that the deceased transferred her undivided ¼ share.

#### Claimant

79. The Claimant argued that the very act of conveying without providing legal advice to the illiterate elderly deceased person is demonstrates that severance would have occurred.

#### Finding

80. The effect of the court's finding in relation to independent legal advice is that in the circumstances of this case independent legal advice was of fundamental importance to the elderly, illiterate, deceased person more so than perhaps it would be in the usual case of able educated adults. It is a possibility that with independent legal advice the deceased may have decided against the conveyance of her share or she could have made any of several informed decisions in respect thereof. The absence of such legal advice or the opportunity to receive same means though, that as a matter of law, the presumption of constructive fraud perpetrated on the deceased has not been displaced and therefore the share of the deceased would not have been

properly disposed of. The act of properly disposing of the other three shares would have alienated the fourth share held by the deceased which was not properly disposed of thereby resulting in severance of the joint tenancy.

81. It is therefore the finding of the court that the joint tenancy was severed by operation of law within the lifetime of the deceased.

### **Third Issue- appropriate remedy**

82. As a consequence of such severance a court would ordinarily set aside the 2000 Deed as the transaction becomes prima facie voidable at the instance of the deceased. However, in this case the other parties to the Deed, save and except the Claimant's estate, the Defendant have not been joined in this claim and so it would be unfair to them for the court to set aside a Deed on an issue in respect of which they have not had an opportunity to be heard.

83. In any event, through the operation of law there remains another method which would grant relief to the estate in an even more efficacious manner. The effect of the severance is that the deceased would have held her share as a tenant in common after the date upon which she executed the Deed in the year 2000. It means that, consistent with the submissions of the Claimant, the Defendant would have held the deceased's quarter share of the property on a resulting trust for her during her lifetime and then on trust for her estate. In those circumstances the appropriate remedy would be to make the declarations sought by the Claimant. In so doing the court must make such orders as are necessary to give effect to the rights of the parties as have been determined by this judgment.

## Disposition

84. The order of the court will therefore be as follows;

- a. It is declared that the quarter share of the deceased Moontazan Khan also known as Muntagin Khan held in the property known as 147 Naparima Mayaro Road more particularly described in Deed number 20183 of 2000 (hereinafter referred to as “the property”), forms part of the estate of the deceased.
- b. It is declared that the Defendant holds the said quarter share interest of the deceased on trust for the benefit of the estate of the deceased.
- c. The property is to be valued by Raymond and Pierre licensed RICS qualified valuers (hereinafter referred to as “the valuers”), the cost of which is to be borne as follows;
  - i. Seventy-five percent (75%) by the Defendant.
  - ii. Twenty-five percent (25%) by the estate of the deceased.
- d. The Defendant shall be given the first option to purchase the quarter share interest of the deceased calculated as twenty-five percent (25%) of the value set by the valuers.
- e. Should the Defendant fail to purchase the the quarter share interest of the deceased within sixty days of the date of issue of the valuation report by the valuers, the property shall be sold by public auction and the proceeds of sale divided after deduction of associated expenses as follows;
  - i. Seventy-five percent (75%) to the Defendant.
  - ii. Twenty-five percent (25%) to the estate of the deceased.

- f. In the event that the property is sold by public auction pursuant to this order, the Defendant is to execute a conveyance of the property in keeping with the terms of the sale by public auction when called upon to do so by the purchaser.
- g. In default the Registrar of the Supreme Court shall execute same on behalf of the Defendant.
- h. Parties shall be at liberty to apply to scour the terms of the order for sale by public auction.
- i. The Defendant shall pay to the estate of the deceased, the costs of the claim on the prescribed scale based on the value of the quarter share interest of the deceased.

Dated the 15th day of February, 2016.

Ricky Rahim  
Judge