

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2006/03599

BETWEEN

RAJENDRANATH SEERAJ

Claimant

AND

BARBARA SEERAJ

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. Robin Montano for the Claimant

Ms. Leisa Kisto for the Defendant

Judgment

Background

1. The Claimant claims, inter alia, to set aside a deed dated 1st of May 2001 made by his now deceased mother Basdai Seeraj (the deceased) in favour of his eldest sister Barbara Seeraj.
2. The subject matter of the deed is property which is situated at 143 Southern Main Road, Curepe (the said property).

3. The claimant seeks an order vesting the premises in the claimant and the plaintiff (though it appears otherwise from his submissions and pleadings that he may in fact be seeking an order that the property be vested in the names of all the children of the deceased).

4. The basis of the claim as appears from the Statement of Case is that “at the time of her death the deceased had told all of her children separately and in each others’ presence (that is, the plaintiff, the defendant and their four siblings) that she was seised and possessed of the property at 143 Southern Main Road, Curepe and that she intended to leave the said premises to the defendant and the five remaining children in equal shares”. Unknown to all of the children except the defendant, the deceased had by deed of gift dated the 1st of May 2001 purported to transfer the premises to herself and the defendant as joint tenants.

5. The claimant alleged that the execution of the deed of gift and an associated Statutory Declaration dated 8th February 2001 that her other five children had all benefited from her during her lifetime, were obtained by the undue influence of the defendant.

6. The allegation of undue influence is based upon further allegations that:

- (1) The 82 year old deceased, a widow, lived with the defendant and was dependent on her for all her needs.
- (2) The deceased was by reason of old age and infirmity unable, without the defendant's assistance, to leave the premises at the time of execution of the affidavit (statutory declaration), and the said deed until her death.
- (3) The defendant made use of the deceased’s complete dependence upon her for everyday necessities of life, to force her to make the deed contrary to her own wishes.

7. It is common ground therefore, that the main issue in this matter is whether or not the defendant exerted undue influence upon the deceased by the operation of which the said deed was executed.

8. The defendant of course denies this and avers that the execution of the said deed was the product of the free and independent exercise of judgment of her deceased mother.

Issue

9. The issue therefore is whether the subject deed of gift was the product of undue influence and therefore liable to be set aside.

Disposition

10. Having considered the totality of the evidence I find on a balance of probabilities that the subject deed was not procured by undue influence.

11. Accordingly the claimant's claim is dismissed with costs to be paid by the claimant to the defendant. On the basis prescribed by the Civil Procedure Rules

Analysis and Reasoning

The Evidence - Witnesses

12. The following witnesses testified:

- (1) Dr. Ashford Mathura, the deceased's medical practitioner.
- (2) The Claimant.
- (3) The Claimant's brother.

Dr Mathura

13. Dr. Mathura's evidence was to the effect that,

(1) He was the regular physician of the deceased and he knew that the deceased was suffering from:

- (a) Various physical infirmities; and
- (b) Depression

(2) That the physical infirmities did not, because of her age, improve, but that her depression did improve as a result of his treatment.

(3) Dr. Mathura also testified however that he had prepared a medical report dated 2nd of August 2003 to the following effect:

"This is to certify that the above named was seen on the 2nd of August 2003. At that time she was in good mental and physical health and fit to prepare a deed."

This medical report was tendered into evidence.

The Claimant

14. The claimant's evidence was to the effect that the defendant would not allow other children of the defendant to be present alone with the deceased and would therefore deprive them of the possibility of individual time with their mother. The majority of the claimant's witness statement referred to vague generalizations, speculations and conclusions devoid of specific reference to facts and matters which would demonstrate that the defendant either actually exerted undue influence or was in a position to exert undue influence over the deceased.

15. In fact his own evidence suggested that the deceased was of sound mind and capable of independent thought. For example, he testified that when the deceased became concerned over the crime situation and the possibility of the claimant's business on the subject premises exposing the occupants of the premises to increased risk, he had to persuade her that he would implement increased security measures to allay her concerns. This he was able to do.

16. That evidence demonstrates that the deceased was capable of forming an independent opinion, of maintaining that opinion, that she was capable of exercising

independent thought and judgment, and that she was capable of being persuaded by rational argument to alter that opinion. This suggests that, contrary to insinuations made by the Claimant, she was of sound and independent mind.

Jeevan Maharaj

17. He testified, inter alia, to the effect that he would speak with his mother once every couple of months on a telephone. This indicated that his mother was capable of having conversations with him for lengthy periods. He was asked whether his mother ever complained to him in those conversations about the defendant. His response was "not really", apart from the fact that they would have usual little disagreements. This demonstrates also that the deceased was capable of having independent opinions and even disagreements with the defendant.

18. All of the evidence above tends to suggest that the deceased was capable of independent thought, and that she was able to have conversations with her other children. Nothing in the evidence suggests that the deceased was under the undue influence of the defendant, or that the relationship between the defendant and the deceased was one of ascendancy.

The Defendant

19. The defendant herself testified. Her evidence was to the effect that:

- (1) Her deceased mother was educated up to age 11 or 12
- (2) The deceased would go to some places with the defendant, but would go herself to other places. For example she was capable of going herself to the doctor. The defendant said she did not take the deceased to Mr. Capildeo but accompanied her there. Mr. Capildeo confirmed that he had no conversation with the defendant at the time of the execution of the subject deed.

20. There is no evidence therefore, that the deed was the product of anything other than the instructions of the deceased herself. The defendant contended that:

- (a) She was unmarried,
- (b) She was 70 years old,
- (c) She would have been 62 or thereabouts at the time of execution of the deed,
- (d) That she had no children,
- (e) That her other siblings all lived elsewhere and had children,
- (f) In those circumstances it was not unusual for the deceased to want to transfer the subject property to her, the eldest and elderly unmarried childless daughter, to provide some security to her in her old age,
- (g) The deed itself did not transfer ownership outright to the defendant. Rather, it transferred ownership from the deceased to the deceased and the defendant as joint tenants, and therefore did not divest the deceased of her interest in the property until after her death. It was therefore not a deed to her detriment save that it removed the freedom to dispose of the property to other parties subsequently if she so wished. It cannot therefore be said that this transaction was improvident or to her detriment.

Mr. Capildeo

21. Evidence was given by Mr. Capildeo, a senior attorney more than 40 years in practice. He testified that he prepared many conveyances. If he were of the opinion that someone may have had a difficulty giving instructions his practice was to have a medical report prepared. In the case of instructions he would have them recorded on affidavit for the protection of the office. He testified in his witness statement that he saw the deceased alone, that she appeared to fully understand what she was doing, and that he asked her whether she wanted her daughter Barbara to be the sole donee with herself as joint tenants to the exclusion of all her other children. The deceased confirmed those instructions and he took those instructions in writing in affidavit form, not only because she was transferring to only one child with herself as joint tenants, but also because the

deceased did not want a title search as she had not interfered with the title to the property. He drafted a statutory declaration in accordance with the instructions that she gave him. The Statutory Declaration was exhibited to the defence in the proceedings as exhibit "**BS2**". He testified that the deceased was fully aware of what she wanted to do and she confirmed her instructions orally and in writing by signing a Statutory Declaration.

22. I therefore must take notice of the fact that there are two independent professionals who have testified to the fact that this deceased was fit to prepare a deed, that she was in good mental health (Dr. Mathura) and that she was fully aware of what she wanted to do (Mr. Capildeo). Having heard the evidence of the defendant, I find that she was unshaken in cross-examination. Her evidence was inherently credible and I accept the evidence in her witness statement as it was unshaken under cross-examination.

23. Further I find the evidence of the claimant and his witnesses support my finding that the deceased was of sufficiently sound mind at the time she executed the deed to have done so as a product of her independent will and judgement. However that only partially addresses the question as to whether the subject deed was the product of actual or presumed undue influence by the defendant.

24. In the Statement of Case it is pleaded that at the time of her death the deceased had told all of her children separately and in each others' presence that she intended to leave the premises to the defendant and the 5 remaining children in equal shares.

25. I do not accept this, because at the time of her death on November 2003 the deceased had already conveyed the property 2 years earlier to herself and the defendant. Much was made of a conversation in which the deceased allegedly told all the children, save for Joan, in October 2003 at Divali that she had given the property to her daughter Barbara. Cross-examination was focussed on whether Barbara was present at the conversation. Barbara testified that she was nearby in the kitchen a few feet away, but she was cooking.

26. Mr. Heeraj gave evidence that:

- (a) He was present at this conversation
- (b) That he came after lunch
- (c) That when the conversation took place he and all the children including Barbara were sitting down. It was contended that if the conversation took place after lunch there would be no reason why cooking would be still taking place.

27. I accept that the evidence of the claimant and the defendant's witnesses contains an inherent contradiction casting doubt as to whether or not that conversation either took place or took place in the manner alleged by the defendant. I note also the defendant's initial response in cross examination that she did not have serious disagreements with the claimant (subsequently clarified to explain that she did have serious disagreements after her mother's death). Having seen the witness testify however, I have no cause to disbelieve the defendant.

28. In any event however I find nothing turns upon this evidence. I do not find this conversation material. It allegedly took place in October 2003. It was the conversation by which allegedly all the children of the deceased save for Joan became aware of the deed of May 2001. The claimant said the conversation never occurred. The defendant says it did occur and she sought to corroborate by other testimony that the conversation occurred. However the deed was executed in 2001 and there is no evidence of undue influence giving rise to its execution. I take into account that this alleged conversation would have taken place more than five years ago. Kisto is 62 years old, Barbara is 70 years old. The issue of who was standing or sitting, and the exact position of the parties at any specific point in time may not be fully recalled.

29. I do not find any discrepancies in this regard sufficient to persuade me that the defendant or her witness, are to be disbelieved as to whether this conversation occurred. Further I find whether or not it occurred, it is not relevant to the issue. At highest if it

goes to their credibility at all, (which I do not accept) it still does not amount to positive evidence, nor is it capable of giving rise to an inference, of undue influence.

Law

30. The law on undue influence has been clarified in recent decisions and is set out and summarized in Snell's Equity 31st edition as follows. The principles are set out at some length hereunder – (any emphasis mine)

[Extracts from Snell's Equity 31st Edition]

*“But in Royal Bank of Scotland plc v Etridge (No. 2) the Court of Appeal and the House of Lords have now confirmed that the basis of the doctrine is not absence of consent but **proof of wrongdoing**. Despite this clarification of the principles, however, the scope of undue influence still remains uncertain. The Court of Appeal has recently confirmed that **the presumption of undue influence can still arise even where the “wrongdoer” is able to satisfy the court affirmatively that his conduct was unimpeachable and that there was nothing sinister in it.**”*

*At page 712 “it is brought into play whenever **one party has acted unconscionably in exploiting the power to direct the conduct of another which is derived from the relationship between them;** and Etridge [6]-[7]: “The law will investigate the manner in which the intention to enter into the transaction was secured...**If the intention was secured by unacceptable means, the law will not permit the transaction to stand”***

Paragraph 8-09 page 204-205

*“The doctrine of undue influence enables C to obtain relief where he or she has been induced by the influence of D to enter into or participate in a transaction in circumstances where the court considers that **the influence was exerted improperly or unfairly....** The kind of conduct which will attract the Court's intervention may involve threats or other overt acts of coercion. But **the Court may also intervene where D has exercised no overt pressure on C because he or she has such a power of influence that this is unnecessary....** cases where the doctrine operates are conventionally divided*

into two classes. The first class consists of cases of **actual undue influence**. The second class consists of cases of **presumed undue influence**. The legal burden of proving undue influence remains on C throughout but if C establishes the existence of a relationship of influence and the nature of the transaction is so suspicious that it calls for an explanation, this satisfies the evidential burden of proving undue influence and the burden moves to D to provide a satisfactory explanation for the transaction. *In the absence of a satisfactory explanation the inference of undue influence can be drawn and the legal burden of proof will be satisfied even if there is no direct evidence of undue influence...* Further, where the relationship between the parties falls into one of a number of recognised categories of **parent and child**, guardian and ward, trustee and beneficiary, solicitor and client or medical or spiritual adviser and patient or follower a relationship of influence is **presumed**. This is an irrebuttable legal presumption (as opposed to an evidential one) **although in order to establish undue influence it remains necessary in all cases for C to establish that the transaction called for an explanation on the basis that it was “immoderate or irrational” or cannot “be reasonably accounted for on the grounds of friendship, relationship, charity, or other motives on which ordinary men act”**.

Paragraph 8-12

*“Equity identified broadly two forms of unacceptable conduct. The first **comprises overt acts of improper pressure or coercion such as unlawful threats**. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage... In cases of this latter nature the influence one person has over another provides scope for misuses without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests.”*

Paragraph 8-13 page 208

Actual undue influence

“In cases where no overt pressure is exerted actual undue influence may be proved by adducing evidence of the relationship of ascendancy and by the court drawing the inference that C was acting under D’s direction without any independent thought... If actual undue influence is proved the transaction will be set aside even if the transaction was not clearly or obviously disadvantageous to the victim”.

Paragraph 8-14

Presumed undue influence

“But in many cases across the spectrum C cannot point to any overt acts or statements from which the court can make direct findings of undue influence and the relationship between the parties is not one of domination or complete ascendancy. Even if C is, therefore, unable to prove undue influence directly, undue influence may be presumed upon proof of (1) a relationship of influence and (2) a transaction which excites suspicion or calls for explanation. “Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant’s financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof.” The onus then shifts to D to provide a satisfactory explanation and to satisfy the court that C was free from D’s influence altogether or that any reliance placed by C upon D was not abused. If D is unable to provide a satisfactory explanation then the court may draw the inference that C was induced to enter into the transaction and the legal burden of proof is discharged”.

Paragraph 8-15

“It is also important to emphasize that the fact in issue which is the subject of the presumption is not the existence of a relationship of influence but that this relationship has been wrongfully abused. In Barclays Bank Plc v O’Brien it appeared to be suggested that proof of a relationship of influence was sufficient to give rise to the presumption of undue influence and that any exercise of influence by one party over

another (and, in particular, husband over wife) would be wrongful. This suggestion has now been rejected. Further, there is bound to be a substantial overlap between actual and presumed undue influence particularly in cases of actual undue influence which involve no overt pressure. Where the court finds on the evidence, therefore, that there has been no express or actual undue influence it is not open to the court to infer undue influence from the nature of the relationship between the parties. The claim must be dismissed.”

Paragraph 8-21

*“All transactions whereby benefits are conferred on parents by their children are objects of the court’s jealousy especially where the parent has been guardian of the child’s property. For example, where a daughter made over property to her father without consideration shortly after attaining her majority, the father was required to show that the daughter was a free agent. The presumption operates even after the marriage of the child, but normally lasts only a short time after he or she attains full age. **There is no presumption of a relationship of influence by a child over a parent and such a relationship must be established on the facts.: Avon Finance Co. Ltd v Bridger (1979) [1985] 2 All E.R. 281 (son and elderly parents).**”*

Paragraph 8-28

Nature of transaction

*“In **National Westminster Bank plc v Morgan** it was held that the presumption of undue influence will not arise unless the transaction is manifestly to the disadvantage of the person influenced. In **Royal Bank of Scotland plc v Etridge (No. 2)** the House of Lords declined to depart from their earlier decision although they considered that because of its ambiguity the expression “manifest disadvantage” should be discarded.”*

*Accordingly, **the presumption does not arise unless the nature of the transaction is sufficiently unusual or suspicious to require D to provide an explanation: “so something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the***

disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted.

Paragraph 8-30

Rebutting the presumption

*“In the case of gifts, the presumption may be rebutted by affirmative proof that “the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise **an independent will** and which justify the court in holding that the gift was the result of a free exercise of the donor’s will” Put more shortly, D must establish that the gift was made as a result of “full free and informed thought about it”*

Paragraph 8-31

*“The most obvious way for D to rebut the presumption is to prove that C received independent legal advice. **The normal standard of the advice required to rebut the presumption is that S, C’s adviser, explained the nature and consequences of the transaction to C with full knowledge of the relevant circumstances.**”*

Summary of principles

31. Applying these principles to the facts I therefore turn to consider the following:
 1. Is there evidence of actual undue influence?
 2. Was there a relationship of ascendancy?
 3. Can an inference be properly drawn on the evidence that the deceased acted under the influence of the defendant without any independent thought?
 4. Is there any basis for a finding of presumed undue influence? In other words - Is there evidence of a relationship of influence, given that the relationship between the defendant and the deceased is not in the category where there is an irrebuttable legal presumption of such a relationship and that such a relationship must be established on the facts?

5. If so is there evidence that such relationship has been abused?
6. Is the transaction one which calls for explanation or excites suspicion?
7. Was there anything suspicious or unusual about an elderly mother transferring to herself and her elderly, unmarried daughter by way of gift the property in which they both lived alone?
8. If the above are satisfied then the burden shifts to the defendant for an explanation of the transaction in the absence of which the transaction may be set aside. This can be satisfied by establishing, for example, that the transaction was the product of independent legal advice.

Findings:

32. (1) I find that the deceased gave instructions to her attorney uninfluenced by the presence of the defendant and uninfluenced by the defendant.
- (2) I find that the transaction was a rational one and not to the detriment of the deceased. It provided protection for the occupation and ownership of the deceased, only coming into effect and vesting full ownership in the defendant after the death of the deceased.
- (3) I find that the deceased was capable of speech and capable of using the telephone, capable of expressing her opinions and capable of changing her mind based on rational argument. I find that she had several children in Trinidad and she was able to converse with them, for example, at Divali when family members gathered. I find there is no specific evidence that on these occasions it was not possible for her to have independent and private conversations with any one of her children or with any one of her children on the telephone.

- (4) I find that the deceased was medically and mentally capable of preparing a deed, and in particular this deed.
- (5) I find there is no evidential basis for a finding that the defendant was in a relationship of ascendancy over the deceased.
- (6) I find that there is no evidential basis for any finding that the deceased's intention to divest herself of her sole ownership of the subject property was not the product of her own independent thought and judgement. I find that the evidence does not support any finding that the defendant was in a relationship of influence over the deceased, or further, that the subject deed was the product of any such influence.

33. In any event I find that the transaction by deed of gift of the subject property was not one such as to excite suspicion. It was one which was rational and explicable in the context of

- (a) The deceased and the defendant being the occupants of the subject property, and
- (b) In the particular context of the defendant being elderly and childless, and
- (c) Which preserved the deceased's interest in the subject property during her lifetime.

34. Further, though I find that the transaction was not one which called for explanation, I find that if it were, it was both explicable and the product of independent legal advice. I accept the evidence of both the legal advisor and the medical practitioner to the deceased that she was capable of executing a deed and that she did so with the benefit of independent legal advice.

Conclusion

35. In the circumstances I find that there is no evidence to support the claimant's claim. The claimant's claim is dismissed with costs to be paid by the claimant to the defendant on the basis prescribed by the Civil Procedure Rules.

Dated the 21st day of June 2010.

Peter A. Rajkumar
Judge.