

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
Sub-Registry San Fernando

No. S 871 of 2002

Between

CORNELIA MARIE JAMES
JENNIFER FELLIS

Plaintiffs

And

JACQUELINE CYNTHIA GEORGE

Defendant

JUDGMENT

Before the Honourable Mr. Justice V. Kokaram

Appearances:

Mr. Nizam Mohammed instructed by Mr. Prem Persad-Maharaj for the Plaintiffs

Mr. Ronnie Bissessar instructed by Ms. S. Rampersad for the Defendant

1. INTRODUCTION:

1.1 Iona Williams nee Fellis¹ departed this life on 25th June 2001. At the time of her passing her children surviving her were Cornelia Marie James², Jennifer Fellis³, and Jacqueline Cynthia George⁴. The Defendant, Jacqueline George, was the half sister of the Plaintiffs being born of a different father.

¹ Hereinafter referred to as “the deceased”.

² The first named Plaintiff.

³ The second named Plaintiff.

⁴ The Defendant.

- 1.2 At the time of her death, the deceased occupied the property at 14 Claudius Street, Battoo Avenue, Marabella⁵. Upon the property was a two-storey home in which the deceased occupied the upper floor and Jennifer Fellis and Jacqueline George occupied two apartments respectively on the ground floor with their own families until their mother's death.
- 1.3 The deceased was the owner of this property by virtue of a deed dated 9th January 1979⁶. She was previously a tenant occupying these lands when she acquired this property from Pearl Lena Battoo, her landlady, by virtue of the said deed.
- 1.4 It is this property, which unfortunately is now the source of controversy between the surviving daughters of the deceased.
- 1.5 Prior to her death, by a deed of gift dated 19th October 2000 and registered on 24th July 2001, the deceased transferred her share and interest in the said property to the Defendant.
- 1.6 It is accepted that the deceased's health was declining before her passing. With Cornelia James emigrating to the United Kingdom in 1963 and Jennifer Fellis employed as a cook at the San Fernando General Hospital on a shift system, the job of looking after and caring for their mother was left in the main to Jacqueline George, their youngest sibling.
- 1.7 However it is no secret that the relationship between these sisters had become poisoned over the years after the passing of their mother. Indeed, no doubt aided by this litigation in which serious allegations of impropriety were leveled against

⁵ The property was described in the Statement of Claim as situate in the ward of Naparima in the island of Trinidad comprising Five Thousand Two Hundred and Eighty Square Feet (5,280 sq ft) and bounded on the North by Lot 267a on the South by Claudius Street 33 feet on the East by Lot 268 and on the West by Lot 266 and known as 14 Claudius Street, Battoo Avenue, Marabella and upon which land there stood a wooden house on pillars comprising three bedrooms, a concrete kitchen with indoor bathroom and toilet and drawing room (hereinafter referred to as "the said property").

⁶ Registered as no 1196 of 1976.

one another, the relationship took a very tragic turn since the death of their mother when the Plaintiffs contend they were first told of the existence of this deed of gift.

1.8 Such news came as a shock according to Cornelia James. She alleged that with regard to the said property, her mother's intention was that "*everybody should pass through until they have their own*". As is discussed below, much emphasis was placed by the parties in this case on this and other declared expressions of intention of the deceased as to the disposition of the said property. The two sisters, Cornelia James and Jennifer Fellis contend that the house was intended by the deceased to be maintained as family property for all the siblings to have a share and interest in same. Accordingly they launched these proceedings against their sibling Jacqueline George to set aside this deed of gift alleging that it was executed by fraud and/or undue influence by the Defendant on the deceased.

1.9 In the "*letter before action*" to the Defendant dated 1st March 2002 Attorney-at-Law for the Plaintiffs contended that:

"...your mother died and you have falsified a Deed of Conveyance purporting to convey the family property to yourself. ...your deceased mother never made an "X" mark nor finger printed the said will; ...she was in such a feeble condition that she was not capable of understanding what she was doing if in fact her fingerprint was placed on the Deed. In the circumstances we are calling upon you to execute a deed of conveyance to have our clients share equally in the said property failing which we shall be advising them to commence Court action against you without any further notice."

1.10 At the date of the trial Cornelia James was still resident in the United Kingdom. Jennifer Fellis had moved out of her downstairs apartment from the said property to occupy a property owned by her also in Marabella, leaving behind one of her

daughters. Jacqueline George rented her downstairs apartment at the said property and moved to the upper floor, which was previously occupied by her mother.

- 1.11 Shorn of the overt and covert allegations of fraud, forgeries and manipulations in this case, this action involves a simple story of a caring mother and a devoted daughter and whether a gift to that daughter in all the circumstances cannot be readily accounted for by the ordinary motives of ordinary persons in that relationship, or whether the Defendant betrayed the trust and confidence of a feeble mother, embattled with declining health, to execute a deed of gift contrary to her express wishes.

2. THE ACTION AND COUNTERCLAIM:

- 2.1 By writ dated 22nd May 2002, the Plaintiffs commenced these proceedings claiming inter alia:

1. *A declaration that the deed of gift dated the 19th day of October, 2000, and made between Iona Williams ne Fellis and Jacqueline Cynthia George is void as between the parties thereto and that the said Deed ought to be set aside on the grounds that the deed was executed by fraud and/or undue influence of the Defendant.*
2. *A declaration that that the Plaintiff's have a legal right and/or equitable right and/or estate and/or interest in **All And Singular** that piece or parcel of land situate in the Ward of Naparima, Trinidad, in Trinidad and Tobago comprising **FIVE THOUSAND TWO HUNDRED AND EIGHTY SQUARE FEET** more or less shown coloured pink on the plan marked "A" annexed to Deed No. 1196 of 1979 and bounded on the **North** by Lot 267a on the **South** by Claudius Street 33 feet wide on the **East** by lot 268 and on the **West** by Lot 266 or howsoever the same may be bounded butted or described together with the building thereon and the appurtenances thereto belonging.*

3. *Further or alternatively a declaration that the Defendant hold the said property in trust or part thereof for or on behalf the Plaintiffs and /or either one of them;*
4. *An order that the Defendant do convey the said property and/or such share and/or interest to the Plaintiff's within twenty-eight (28) days from the date of the Court's order and in default the Assistant Registrar be empowered to execute same.*
5. *An account of all profits and rents collected by the Defendant and/or all dealings by the Defendant with the said property and all monies received by her in respect of the same and payment of the amount found due in the taking of such accounts;*
6. *Damages for detinue and conversion of the following items to wit, a cooker, paint tins, a parkernoll recliner, space saver and a five-piece living room set.*

2.2 The Plaintiffs' action is in essence a two-pronged attack on the Defendant's interest acquired by virtue of the said deed of gift. Firstly they contend that the deed should be set-aside on the ground of fraud and/or undue influence. Second, they seek a declaration that they have a legal or equitable right or estate or interest in this said property.

2.3 Not to be outdone, the Defendant counterclaims inter alia:

1. *Possession of the downstairs apartment occupied by the second named Plaintiff.*
2. *An injunction restraining the Plaintiffs whether by themselves their servants and or agents or howsoever from interfering and or molesting and or in any way threatening and or assaulting the Defendant.*
3. *An order requiring the Second-named Plaintiff to forthwith return all the cushions belonging to the Defendant or pay their value.*

- 2.4 From the pleadings and the evidence adduced in this case the following story emerges:
- 2.5 The deceased had four children. Jennifer Fellis⁷, Cornelia James⁸, Vincent Fellis (“Leroy”), and Jacqueline George⁹ their half sister. For the majority of the Defendant’s life the deceased was a single parent. Prior to the birth of the Defendant, the family lived in rented accommodation at Jarvis Street, Marabella. When the Defendant was born in 1957 the family took up residence (squatting) at Bay Road, Marabella. The house which was largely a wooden structure was then moved to 14 Claudius Street, Battoo Avenue Marabella in 1969 when the deceased eventually purchased the said property from Mrs. Battoo. Whether or not the deceased in purchasing this property obtained assistance from her estranged husband or her children there is no denying that the deceased had diligently saved her earnings as a domestic helper to acquire this property for her family.
- 2.6 Soon after the family took up residence at Battoo Avenue, Cornelia James left for England to undertake studies as a nurse. She would return to Trinidad to visit her mother thereafter only infrequently prior to the death of the deceased.
- 2.7 Subsequently the residence underwent two distinct stages of renovations. In or about 1972 the downstairs portion of the property was converted into apartments. In or about 1992 the upstairs portion was converted from a wooden structure to a concrete structure. The Defendant was in charge of the second stage of renovations and supervised this project. It was funded in part by the Plaintiffs and their mother.

⁷ Born on 1st December 1944.

⁸ Born on 11th December 1946.

⁹ Born on 7th October 1957.

- 2.8 Prior to effecting this second phase in the renovations, “Leroy,” their brother, married and left the home in or about 1981 taking up residence at 323 Boodoosingh Drive, Battoo Avenue, Marabella. He also eventually migrated to the United States and died subsequently in 1998.
- 2.9 In 1984 the Defendant married Godfrey George and took up residence in the downstairs apartment at the said property. Jennifer Fellis at this time was occupying another apartment downstairs at the said property as well.
- 2.10 From the evidence it would appear that the deceased suffered declining health in the late 1990’s. She became bedridden in 2000. She did at this time suffer from the swelling of the hands and feet due to circulatory problems. There is no medical evidence however to demonstrate whether the deceased suffered a stroke in 1989 nor the extent of her physical health. It is more likely however that the deceased’s physical and mental condition worsened in February 2001.
- 2.11 The Defendant during this time took care of their mother’s needs as Jennifer Fellis was working and Cornelia James was resident abroad. Accordingly the Defendant took the deceased to the bank to cash her pension cheques. After consulting Jennifer, the Defendant became the nominee of the deceased in order to cash the cheques and withdraw money.
- 2.12 In her unchallenged evidence in chief the Defendant stated: *“She would be seated in the bank and the teller would come to her to obtain her thumb print as she could no longer sign for herself, and she would tell the teller how much money she wanted. My mother would remain seated and I would go to the counter to present my nominee card whereupon the teller would present me with the money. After cashing her cheques my mother and I would go to the supermarket, which was right next to the bank, to do her monthly groceries. When my mother became bedridden, she would send me to the bank with her thumbprint, to cash her pension cheques. Her instructions would always be to leave \$100.00 in the bank*

and use the money to buy groceries which she needed. I always presented her with the grocery bills. This is what was always to be done. Any left over money after buying groceries was given to my mother.”

2.13 There is no allegation against this Defendant that she did not take care of her mother or that she was fleecing her mother of her money. It is in this state of affairs that the deed of gift was executed on 19th October 2000.

2.14 The deed of gift was prepared by Mr. Wilson Campbell, Attorney-at-Law who from his unchallenged evidence conducted a number of transactions for the deceased prior to 2000. He was introduced to the family by the Defendant's husband (his wife's cousin) when he became the god father of the Defendant's second child. The deceased was well known to Mr. Campbell's secretary, Judy Mclean, who interacted with her as is the norm in small intimate law offices. Indeed the office was a regular recipient of punche a crème and black cake from the deceased in the Christmas season.

2.15 The Defendant told Mr. Campbell in 2000 that the deceased wanted to see him. Mr. Campbell attended her home and took her instructions to prepare a deed of gift in favour of the Defendant. The deed was prepared by Mr. Campbell and he returned on the 19th October 2000 with a witness, his legal secretary Dennis Thomas. Judy McLean also attended as well, no doubt as this Court finds, consistent with her friendly relationship with the deceased. The deed was read over and explained to the deceased by Mr. Campbell. She appeared to him to have understood what he was saying and signified her consent to the transaction. She then executed the deed with her mark and left thumbprint. The execution was duly noted on the deed. They remained a while chatting briefly. Ms. Mclean cleaned the deceased's hands of the ink and then they left. The Defendant took no part in the execution save to observe the proceedings.

2.16 The deed was registered several months later as Mr. Campbell explained he was awaiting receipt of his fees for the transaction. It is more probable that this is the explanation for the late registration of the deed. As is explained below the Court does not accept that the deed is a forgery and certainly if Mr. Campbell was part of a plot to cheat the Plaintiffs out of their share in the property that would have been more cause for haste than delay in the registration of the deed.

2.17 Shortly after the death of the deceased, Cornelia James commenced further renovation work to the upstairs apartment with a view to renting out that portion of the property, when she was informed by the Defendant that her consent was necessary as the property was hers. There followed a string of correspondence from the Plaintiffs' attorneys-at-law to the Defendant and Mr. Campbell, contesting the Defendant's "interest" in the property, which resulted in the production of the deed of gift.

2.18 It is in these circumstances that the Plaintiffs claim that the deed was procured by undue influence and fraud. The main planks of the Plaintiff's case are set out in the following paragraphs of the Statement of Claim:

"24. The said execution was procured by the undue influence of the Defendant."

PARTICULARS

"(a) The deceased was eighty-two (82) years of age and was not in a proper mental and physical state of mind. She was suffering from memory lapses and had a stroke and was unable to move about. The Defendant lived at the home and was her daughter and was in a position of dominance and exercised and exerted influence over the deceased and by reason thereof existed a relationship of trust and confidence.

(a) The Defendant would cash the deceased's pension cheques and would not give the deceased monies.

(b) *The Defendant encouraged the Attorney-at-Law who prepared and executed the conveyance to allow the deceased to dispose of her bounty despite the knowledge by both the Defendant and the Attorney-at-Law that other kin were entitled thereto.*

“ 27. Further and/or alternatively the Plaintiffs will maintain that the deceased did not execute the said deed of gift and that her mark and thumbprint are not the true and proper handwriting and /or signature of the said deceased and that the same was procured by fraud.

(a) *The said deed was not executed in accordance with the requirements of the Deed Act Chapter 19:02 of the Laws of the Republic of Trinidad and Tobago.*

(b) *The mark and thumbprint on the jurat of the said deed is not the mark and thumbprint of the deceased.*

(c) *The donor did not sign or affix her mark and thumbprint to the deed in the joint presence of the attesting witness.”*

2.19 From these pleadings the Plaintiffs assume the burden of demonstrating on a balance of probabilities the existence of fraud and undue influence in the procurement of this deed of gift in the manner alleged.

2.20 In its Defence, the Defendant denies the allegations of fraud and undue influence and alleges that *“the deceased knowingly and purposefully transferred the said property to the Defendant”*¹⁰

2.21 In support of her counterclaim for possession and an injunction against the Plaintiffs the Defendant contends inter alia:

“On or about the 25th August, 2001 the second named Plaintiff threw the Defendant’s chain outside thereby destroying same and she also took away certain cushions belonging the Defendant.

The second-named Plaintiff persistently makes threats to the Defendant alleging that she will kill the Defendant and poisons the water in the Defendant's water tank. The first name Plaintiff has also written a threatening letter to the Defendant, who she also threatens to beat up.

The second named Plaintiff persistently harasses and torments the Defendant and her tenant who occupies the apartment adjacent to the one occupied by the second named Plaintiff.

Unless restrained by this Honourable Court the Plaintiffs will continue their unlawful acts of intimidation against the Defendant.

By reason of the conduct of the second-named Plaintiff/who is a licensee the Defendant finds it stressful, uncomfortable and dangerous to have her under the same roof and has served the said Plaintiff with a Notice to Quit dated the 12th day of October, 2001.”¹¹

2.22 However, at the trial, no evidence was led by the Defendant in support of any of these allegations¹². In the circumstances there is no evidence before this Court to substantiate these pleas. The Defendant therefore has by her own lack of evidence disentitled herself to any such relief as claimed in the counter claim.

2.23 In their reply and defence to counterclaim the Plaintiffs maintain that the Defendant has retained ownership of all the items of furniture outlined in the

Statement of Claim and that the Defendant filed ejectment proceedings against the second Plaintiff which were subsequently withdrawn.

3. THE ISSUES:

3.1 The following issues therefore arise for determination:

(a) Whether the deed of gift was procured by fraud.

¹⁰ See paragraph 11 of the Statement of Claim.

¹¹ Paragraphs 18-22 of the Defence.

¹² See the witness statement of Jacqueline Cynthia George dated and filed 7th April 2006.

- (b) Whether the deed of gift was procured by undue influence exerted over the deceased by the Defendant.
 - (i) Whether the deceased and the Defendant was in a relationship of trust and confidence;
 - (ii) Whether the deceased exercised her own free will in the execution of the deed of gift;
 - (iii) Whether this transaction of this gift by a parent to the daughter is one which calls for an explanation or is consistent with the relationship between the two?
- (c) Whether the Plaintiffs acquired an equitable interest in the property by reason of the financial contributions made towards the household during the life of the deceased.

4. SUBMISSIONS OF THE PARTIES:

4.1 The Court considered the parties' respective written submissions and also considered the oral submissions made by the parties expanding upon and explaining the written submissions and their respective positions.

4.2 In summary the main respective submissions of the parties are as follows:

For the Plaintiff it was submitted that:

- (a) The deed of conveyance should be set aside on the grounds as pleaded namely fraud, undue influence, non execution or lack of same, lack of instructions, lack of independent advice and lack of mental capacity.
- (b) It is important to note the Plaintiffs' submission upon which their entire case rests:

“Their whole case is that it is inequitable for the Defendant to become the sole owner of the property when they have expended considerable money and put equity into the property. Their case has always been that their mother’s intention was that the property be considered family property and should not pass to one individual. The evidence put forward is that 4 pieces of paper were existing to show the distribution of the

property and consequently the intention of the deceased was to give all of her children a share in the property.

The Plaintiffs case is therefore that not only have they proven their case on a balance of probabilities under the various legal heads but that sufficient suspicious circumstances are apparent from the evidence adduced in Court to excite the suspicion of the Court, sufficient enough to have the deed of gift set aside.”

This is indeed a telling submission as the foundation of the Plaintiffs’ entire claim in this action appears to be the alleged intention of the deceased that the property was to be considered family property. This will be discussed in detail below. However it must be noted at the outset that this is the real basis upon which the Plaintiffs cast doubt and suspicion on the transaction. Furthermore as was clarified in the Plaintiffs’ oral submission rather than assert an equity in the property through the traditional route of a proprietary estoppel, although none it is admitted has been pleaded, the allegations of contribution to the household is no more than evidence, it was submitted by the Plaintiffs of the surrounding circumstances to cast doubt and suspicion on the transaction gifting the property to the Defendant and not a positive assertion of acquiring some equitable interest in the property.

- (c) That there are suspicious circumstances in which the preparation and execution of the deed of gift took place.
- (d) The Court must draw adverse inferences against the Defendant for her failure to supply the original of the deed.
- (e) The execution of the deed was done with the deceased’s left hand when she was a right-hander. The evidence with regard to the thumbprint and the “X” mark is suspicious and weak. This is not the deceased’s mark.

There was conflicting evidence as to how the thumbprint was placed on the deed whether on her own will or with the assistance of Mr. Campbell.

- (f) The deceased was feeble, weak, and prone to memory lapses, had no control over her body and was suffering from dementia. It must be pointed out at this stage however that this Court questioned Attorney-at-Law for the Plaintiffs as to the submission that the deceased was suffering from dementia, which is a medical condition of which no proof was admitted before this Court. At best the Plaintiffs submit that the deceased was in a weakened state of mind and body in the year 2000 without ascribing any medical diagnosis of her condition.
- (g) Mr. Campbell exercised dominance over the deceased.
- (h) The Defendant was very secretive about her transaction with the deceased and only revealed the nature of the transaction to the sisters after the death of the deceased.
- (i) The Deed was registered after the death of the deceased and in abuse of the power to register the deed.
- (j) The Plaintiff made a substantial contribution to the household and it would be inequitable of the Court to hold that the Plaintiffs have neither claim nor interest in the property. It is noted that no authority has been cited to this Court by the Plaintiff to support its contention that it is entitled to an equity to the property by reason of their contributions to the deceased to maintain the household simpliciter. The Plaintiffs' position was articulated forcefully that the contributions are evidence that the household was 'family property' thus casting doubt on the "secret" deed of gift.
- (k) It was submitted that not one of these allegations are to be taken in isolation but that they all cumulatively build a case of suspicious circumstances, a backdrop of doubt which excites this Court's suspicion and raises the presumption of undue influence.

4.4 For the Defendant it was submitted that:

- (a) There are inconsistent pleadings in the Plaintiff's Statement of Claim.
- (b) The Plaintiff has no locus standi. The Court is however of the view that these points do not arise for determination having regard to the final disposition of the case.
- (c) The Plaintiffs have failed to prove fraud.
- (d) The Defendant has rebutted the inference of undue influence by an examination of the relationship of the donor and donee, the conduct of the donor, the profit motive of the Plaintiffs to acquire an interest in the property for the purposes of rental and not to maintain it as a household for the family and children.
- (e) The deceased obtained independent legal advice in the circumstances of this case.
- (f) There is no plea of any proprietary estoppel to give rise to an interest in the property. Indeed there can be none where there is no representation made by the Defendant to the Plaintiffs upon which they acted to their detriment to acquire an interest in the property. The monies expended by the Plaintiffs if at all, were in the form of an unconditional gift to the deceased.

4.5 In the main, whether a transaction was brought about by fraud or the exercise of undue influence is a question of fact for determination by the Court. These issues fall to be determined from examining the oral and documentary evidence with particular reference to the events surrounding the execution of the deed of gift.

5. **FRAUD:**

5.1 This can be dealt with quite easily. An allegation of fraud is not lightly to be made. Indeed it is indicative of the poisoned relationship that had enveloped the children of the family subsequent to the discovery of the deed of gift that such an allegation can be made in light of the bare evidence that was led to support it.

5.2 Fraud must be specifically pleaded and proven. The Court agrees with Attorney for the Defendant, that the Plaintiffs assume an onerous burden to demonstrate that the deceased did not execute the deed. The degree or standard of proof which they are required to discharge is higher than merely on a balance of probabilities; it need not be beyond a reasonable doubt, as may be called for in a criminal prosecution, but it must be satisfied to the extent that the element of doubt is substantially reduced.

“Further it must be remembered that the onus of proving forgery in this case lies upon the Plaintiff and the degree or standard of proof which she is required to discharge is higher than merely on a balance of probabilities: it need not be beyond a reasonable doubt, as may be called for in criminal prosecution, but it must be satisfied to the extent that the element of doubt is substantially reduced i.e. that the signature in question cannot reasonably be concluded to be that of Mr. Thomas”. See CA Cv 83 of 1982 Dolly Sookram v. Merle Sookram.

5.2 Fraud must be distinctly alleged and strictly proved. It is not allowable to leave fraud to be inferred from facts.¹³ The allegation of fraud in this case however is made within a very narrow compass. The pleading of the Plaintiff puts forward a case of fraud on the basis that:

- (a) The deed was not executed in accordance with the “Deed Act”.
- (b) The mark and thumbprint on the jurat of the said deed is not the mark and thumbprint of the deceased.
- (c) The deceased did not affix her mark and thumbprint to the deed in the joint presence of the attesting witness.
- (d) The deceased never gave any instructions for the preparation of the alleged deed.

¹³ See Supreme Court Practice 1995: Paragraphs 18/12/7. *Lawrence v Norreys* (1890) 15 App. Cas 210.

5.3 The burden is on the Plaintiff therefore to demonstrate that it cannot be reasonably concluded that the deceased executed the deed of gift or that the mark and thumbprint cannot be reasonably be concluded to be that of the deceased.

5.4 On considering the evidence in this case, this Court has come to the conclusion that the quality of the evidence falls far short of that required to establish a case of fraud against the Defendant. The Plaintiffs submit that the only conclusion that can be drawn from the evidence is that the circumstances surrounding the execution and the execution itself are indeed suspicious.¹⁴ While this may be a proper argument in support of the Plaintiff's plea of undue influence it is misplaced in so far as proving that an actual fraud had been committed in this case in the manner as alleged by the Plaintiffs.

DUE EXECUTION:

5.5 This Court finds as a fact that the deceased affixed her left thumbprint to the deed and made her "X" mark on the deed of gift. Accordingly this Court finds that the deceased duly executed this deed.

Section 6 of the Registration of Deeds Act sets out as follows:

"As to the personal acts required for execution of a deed in the Colony it is hereby declared that it is and always has been necessary and sufficient that the person executing do sign and as his act and deed deliver the deed. This section does not apply to the execution of a deed by a corporation."

Section 7(i) a of the Registration of Deeds Act provides:

"...if the execution thereof by every party who, in Trinidad and Tobago, executes the same is made and attested as follows; that is to say, the deed must be executed in the presence of one witness at least not being a party thereto and of a qualified functionary, and the signing and delivery thereof must be attested by one such witness at least subscribing his name with the

addition of his place of abode of business and his profession, occupation or condition in life, and by the qualified functionary subscribing his name with the addition of his qualification under this section.”

- 5.6 In law there is no requirement to place any particular thumbprint on a deed save that the jurat must describe which thumbprint was actually used. Moreover Mr. Campbell is correct to say that deed equally could be executed by affixing an “X” mark to the deed or a thumbprint. It appears that either an “X” mark or a thumbprint can be a sufficient signature. See *Baker v Denning* (1838) 8 A and E 94 and *Eileen Fyfield v Myrtle Baptiste*.¹⁵
- 5.7 This Court cannot ignore the clear, unequivocal and cogent evidence of Mr. Wilson Campbell, the attorney at law who prepared and witnessed the execution of the deed; Ms Judy McLean, Mr. Campbell’s secretary; Mr. Dennis Thomas, Mr. Campbell’s legal secretary and the Defendant all of whom were in the bedroom of the deceased when she executed the deed of gift on 19th October 2000. They all gave very frank and straightforward evidence with regard to the actual execution of the deed. There was no hedging by these witnesses in relation to the material facts that the deceased fully well knew what was happening and that her consent was freely given.
- 5.8 They all observed the deceased make her mark and affixed a thumbprint to the deed. Dominant in the minds of the Plaintiffs was the stroke the deceased suffered in February 2001, which paralyzed the left side of the deceased including her left arm. However this was long after the execution of the deed. The Court accepts the evidence of the Defendant that at that time of execution of the deed the deceased suffered from circulatory problems, which will account for some swelling of the hands and feet. It is more probable that at the time of the execution this would

¹⁴ See page 3 of the Plaintiff’s written submissions.

¹⁵ HCA S 1591 of 1985

have been the cause for the deceased to use her left and not the right hand, even if aided by Mr. Campbell.

- 5.9 Furthermore the Court accepts as a fact that Ms. Williams gave instructions for the preparation of this deed. There is no doubt that the deceased did give the instructions to prepare the deed of gift. The unchallenged evidence of Mr. Campbell was that when he read over the deed to her explaining that she can acquire a life interest, she said “*I dead already give it to Jacqueline.*” Indeed this witty remark of the deceased portrays a woman still in control of her capacities and fully aware of what she was doing.

THE EXPERT EVIDENCE:

- 5.10 Far from arousing the suspicion of the court, the forensic expert evidence adduced by the Plaintiffs do not detract from these conclusions.
- 5.11 Mr. Louis Andrews, a forensic fingerprint expert gave evidence on behalf of the Plaintiff. He was a retired assistant police officer. Twenty-six of his thirty-one years as a police officer was spent as a finger print expert. He was commissioned by the Plaintiffs’ Attorney-at-Law to examine the said deed and in particular the thumb print thereon.¹⁶This expert examined the thumbprints of the deceased on encashed cheques, the deed of the deceased at the Registrar Generals office, a completed receipt book received from Jennifer Fellis and an old purse owned by the deceased.
- 5.13 The findings of this expert recorded at page 2 of his letter/ report is as follows:
“That the thumb impressions on the encashed cheques were not decipherable for the quality of the friction ridge characteristics is not good enough for positive identification.
That the left thumb impression on the Protocol of Deed was badly taken and displayed a paucity of ridge characteristics, the pattern area being obliterated.

That having processed the old purse and the receipt books using ninhydrin and a combination of super glue and magnetic power respectively, no workable impressions were found.” On its face the report is therefore of little utility. The following however is noted:

“We conclude that the thumbprint on the protocol of deed is a whirl type pattern and because of the slant of the impression and the direction of flow of the ridge characteristics one can deduce that the print is as indicated.”

- 5.14 This witness however goes on to qualify this statement by expressing his opinion for which no explanation was given in his evidence in chief that *“all official documents where thumbprints are to be used as a means of identification for persons unable to sign their names the right thumb print is used and not the left thumb print. This is so by convention/precedence in the history of science.”*
- 5.15 There was no attempt by this witness to support this statement either in chief or in cross-examination. Indeed it is noteworthy that this expert accepts that a reason must accompany the decision to use the corresponding thumb impression. In this case, on the face of it, the reason advanced was that her right hand was swollen. Furthermore the witnesses to the execution all spoke with the same voice that the deceased’s right hand was swollen and so that her left hand was the one she used to execute the deed notwithstanding the fact that she was right handed. In cross-examination Mr. Andrews confirmed that he couldn’t say with any degree of certainty that the deceased did or did not affix her thumbprint. He was not even able to tell from the National Insurance Board’s documents furnished to him that the thumbprints appearing there was that of the deceased as well.
- 5.16 The fingerprint analysis of Peter Swann advances the Plaintiffs case no further. Although the Defendant made no objection to the tendering of this document into evidence¹⁷, it would be dangerous for this Court to attach any or any significant

¹⁶ See exhibit LA2 letter dated 16th October 2003.

¹⁷ Exhibit CMJ 11. There were no admissions by the Defendant as to the content of the report.

weight to this report on such a critical area of the Plaintiffs' case in the absence of cross-examination. In any event, no light was shed on the expertise or experience of this Mr. Swann. Indeed the weight to be attached to any expert depends upon the skill of the expert. See *Halsbury Laws of England* 4th Ed Vol 17 paragraph 89; *Phipson on Evidence* 14th Ed paragraph 32-37; *R v Silverlock* [1994] 2 QBD 771.

- 5.17 However, even if the Court takes Mr. Swann's report into account, it is equally inconclusive. Mr. Swann is in the same position as Mr. Andrews in that he cannot exclude the thumbprint on the deed as that of the deceased. On a balance of probabilities it equally can confirm that it is her thumbprint as Mr. Swann states:

“As a result of no marks having developed then no comparisons are possible to prove or disprove whether this is the left thumb impression of Iona Williams”

In any event Mr. Swann concedes, “I have to say that from experience, that examinations of this nature very rarely produce positive results.”

- 5.18 This exercise conducted by the Plaintiffs therefore ultimately proved futile. For this reason the Plaintiffs have resiled from strongly asserting a case of fraud on the strength of these reports to meekly asserting in their written submissions *“the fact that the Plaintiff attempted and did obtain two experts opinions is proof in itself of her deep concern and how strongly she felt that the thumbprint and the execution and preparation of the deed was not her mother's doing and this concern cannot be lightly discarded.”*

- 5.19 The fact that these Plaintiffs will go to these lengths to prove a forgery demonstrates no more than the Plaintiffs' enthusiasm. However it must accept that the experts whom they commissioned are of no assistance to this Court as to the merits of their case.

- 5.20 Indeed no forensic test was done to determine whether the “X”/mark was not the mark of the deceased.
- 5.21 Ultimately therefore there is nothing to displace the inference of due execution as contained in the contents of the affidavit of due execution sworn on 23rd July 2001 by Dennis Thomas who attests that the “X” mark and left thumb print is the true and proper left mark and left thumb print of the deceased.
- 5.22 This Court therefore finds no evidence of fraud as alleged in this case.
- 5.23 Even if one were to allege that apart from the pleaded case of the Plaintiff, the Plaintiff is entitled to refer to the surrounding circumstances of the execution of the deed to suggest some moral turpitude on the part of the Defendant, this Court is of the view that the anxieties over the execution of this deed are misplaced. This is more appropriately dealt with in the analysis of undue influence herein below.

6. UNDUE INFLUENCE:

- 6.1 Undue influence is a ground of relief developed by the court of equity as a court of conscience. Its focus is to prevent the abuse of trust and confidence reposed in another, the effects of unfair pressure and influence on another and to seek to ensure that gifts and transactions between persons in a relationship are chaste or are manifestations of an emancipated spirit. “*Let the hand receiving it be ever so chaste yet, if it comes through a polluted channel, the obligation of restitution will follow it*”¹⁸.
- 6.2 It is not uncommon for the elders in a family to gift property even large amounts to siblings out of genuine love and affection¹⁹. Indeed sometimes the old adage of “*a parent knows best*” rings true in some family relationships. An analysis of

¹⁸ *Royal Bank of Scotland plc v Etridge* [2001] 3WLR 1032.

¹⁹ See *Beekles v Springer* (1992) 43 WLR at p57.

undue influence must therefore be realistic and must be examined in this case against the backdrop of a simple family household run by an independent strong willed single parent who it appears had a good relationship with all her children in spite of the bickering that was apparent among the siblings. Indeed it is a story of a mother's love.

6.3 Many cases have sought to categorise relationships in analyzing the question of whether a presumption of undue influence arises as a result of the existence of the relationship itself. Although such categorizations may not be appropriate, in some circumstances it does provide a useful insight into the nature of relationships, the probabilities of the suppression of free will and the inconsistency of gifts in the context of relationships. Indeed the concept of undue influence is as wide as the convolutions of human relationships and emotions. For this reason a precise definition or categorization of undue influence is elusive: *"It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another and the manner in which influence maybe exercised vary too widely to permit of anymore specific criterion."*²⁰

6.4 There are however generally two types of unacceptable conduct which a Court of equity will disapprove of, first, are overt acts of pressure or coercion such as unlawful threats. The second arise out of a relationship between two persons where one has acquired over another a measure of influence and ascendancy of which the ascendant person then takes unfair advantage. In ***Royal Bank of Scotland plc v Etridge*** (ibid) Lord Nicholls stated:

"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. An

example from the 19th century, when much of this law developed, is a case where and impoverished father prevailed upon his inexperienced children to charge to charge their reversionary interest under their parents' marriage settlement with payment of his mortgage debts: see **Bainbridge v Browne** (1881) 18 Ch D 188.

In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The other may be such that, without more, one of them is disposed to agree a course of action propose the relationship between two individuals. 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. He abuses the influence he has acquired."

6.5 Although these two forms of influence have been described as actual and presumed influence²¹ such a labeling can be confusing with the analysis of the burden of proof. Indeed even the touchstone of influence or trust and confidence may not be an appropriate test:

*"The principle is not confined to cases of abuse of trust and confidence. It also included for instance cases where a vulnerable person has been exploited; indeed there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavor to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place."*²²

6.6 It speaks volumes that after centuries from the development of the doctrine in authorities such as **Huguenin v Baselely**²³ there has yet been no clear and ascertained test to determine the existence of undue influence. Indeed it

²⁰ Per Lord Nicholls of Birkenhead *Royal Bank of Scotland* (no2) [2001] 3 WLR at 1029 D.

²¹ See also: *Allcard v Skennek* (1887) 36 Ch 145

²² Per Lord Nicholls *Royal Bank of Scotland* (ibid) p 1030 B

²³[1803-13] AIR 6

demonstrates that human emotion and relationships are not prone to precise scientific evaluation. It also emphasizes that a proper analysis of the existence or absence of undue influence is largely fact driven and varies from case to case. Previously decided cases will therefore be unhelpful as a benchmark for determining whether a person has abused his relationship with another loved one. Vulnerability in one case may be satisfaction in another; dependence in one may be acceptance in another, disadvantage in one case may be a sacrifice demonstrating unadulterated love and affection in another.

- 6.7 One must therefore focus on the basic principles of the doctrine of undue influence. It was elucidated by Lindley LJ in *Allcard v Skinner*²⁴:

“What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimized by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction.... It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back their property which they foolishly made away with whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.”

- 6.8 This principle was neatly summarized by Hamel Smith J.A. in *Baby Khan v Farouk Khan* and ors as *“founded upon the principle that it is right and expedient to save persons from being victimized by other people and not simply to*

save them from the consequences of their own folly.”²⁵ By way of illustration, in that appeal the Court of Appeal examined an extreme form of influence which can be classified under the first group of the *Allcard v Skinner* category of “*actual influence*”. There the parent had transferred her property to her son. The evidence revealed a sordid tale of fear and violence against the parent by a son who played on that fear to compel the parent to part with the property. The evidence also revealed that the transaction was not at an arm’s length transaction between the parties and revealed a carefully thought out plan by the son to acquire the parent’s sole asset. In such compelling circumstances a Court would not hesitate to step in to protect the disadvantaged party.

- 6.9 The law recognizes the free spirit and its prone to follies. The law will not protect the ill-advised dispositions of the obstinate but protect the inexplicable dispositions of the vulnerable²⁶.

7. BURDEN OF PROOF:

- 7.1 The burden nevertheless falls squarely on the shoulders of the Plaintiff to prove on a balance of probabilities that the transaction in this case, the execution of the deed of gift on 19th October 2000 was wrought by undue influence.²⁷ This forensic tool used in this aspect of the law of raising the presumption of undue influence, is very much like the doctrine of *res ipsa loquitur* where the existence

²⁴ (1887) 36 Ch 182

²⁵ CA 101 of 1997 p 15

²⁶ “As to persons concerned in these transaction, I agree with the argument that it is not upon the feelings with a delicate and honorable man must experience, hearing these instruments, taken altogether as I think myself bound to take them, nor upon any notion of discretion in this court to prevent a voluntary gift by a man stripping himself entirely of his property, if undue influence is not imputed, that any judge sitting here has ever thought himself at liberty to interpose” Per Lord Eldom Hugenin (ibid)

²⁷ Moonan anor v Moonan (1965)7WIR 420

of certain facts may speak for themselves and raises the rebuttable presumption that one person's will was suborned and subverted by another.

7.2 However to shift the evidential burden unto a Defendant to rebut the presumption of undue influence the Plaintiffs in this case must first establish the following on a balance of probabilities:

- (a) That a relationship of trust and confidence existed between the deceased and the Defendant or that the parties are in a relationship which the Court will adopt a protective attitude towards and;
- (b) That there is transaction between those parties, which is disadvantageous to the donor or cannot be explained having regard to the nature of the relationship.

The presumption arises where the combination of the relationship and the nature of the transaction justify, in the absence of any other evidence, a conclusion that the transaction was procured by the undue influence of the dominant party. Such a conclusion, reached on a balance of probabilities, is based upon the inferences to be drawn from that combination.²⁸ Until the Plaintiff can demonstrate this, the Defendant will have no case to answer.

7.3 Lord Nicholls in ***Royal Bank of Scotland*** identified the quality of the evidence to raise the presumption as follows:

“Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here as elsewhere, the general principle is that he who asserts a wrong has been committed to prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for

²⁸ See *Royal Bank of Scotland (ibid)* per Lord Scott p 1075 -1076

by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.”

7.4 It is true that the nature of the transaction is an important consideration to raise a presumption of undue influence. One remembers the example cited by Lindley LJ in *Allcard*²⁹ highlighting the importance of the Plaintiff demonstrating something more than a normal transaction: “*But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift. So in a case like this, a distinction might well be made between gifts of capital and gifts of income, and between gifts of moderate amount and gifts or large sums, which a person unfettered by vows and oppressive rules would not likely to wish to make.*”

7.5 It is noted that in this case there is the added difficulty that the person against whom undue influence is said to have been exerted is dead. The plea of undue influence is not therefore being made by the pressured or influenced party but by some of her siblings. However, it may not lie in the mouths of these siblings to assert undue influence of a transaction by the deceased who made no apparent complaint about and embraced it. The disposition to one daughter by the deed of gift as opposed to all three daughters does not naturally translate to a transaction that is suspicious or disadvantageous or at odds with the relationship between the Plaintiff and the Defendant.

8. CATEGORIZATION OF RELATIONSHIPS:

8.1 It will appear that the Court may jealously guard special relationships from undue influence and ensure that one party has not taken advantage of another in that special relationship. See *Bank of Scotland*:

“The law has long recognized the need to prevent abuse of influence in these “relationship” cases despite the absence of evidence of overt acts of persuasive

conduct. The types of relationship, such as parents and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various.”

- 8.2 The reference to the parent-child relationship however speaks to the child gifting property or being suborned by the parent. The child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. See Halsbury Laws of England 4th Ed. reissue Vol. 16(2) paragraph 425. There is no reverse presumption that a parent may be unduly influenced by an adult child. See *Mortgage Agency Services Number Two Limited v Charter* [2003] EWHC 1462. This stands to reason as the gifting of property from a child to the parent, who holds natural ascendancy, on the face may call for explanations. There is no rule prohibiting the parent from providing for his/her child.

³⁰*“It is said that the lessor being the grandfather of one of the lessees and father-in-law of the other, there existed such a confidential relation between him and those he intended to benefit as to throw upon them the onus of proving the absence of undue influence. It is new doctrine that a parent cannot by a deed, only a few days before his death, benefit a child or grandchild. The case which has been cited in support of it, Hoghton v Hohgton (1852) 15 Beav 278 is very different. That was a case in which a son, having just attained twenty-one, gave up property for the benefit of his father, who was his natural guardian, and was therefore within that rule of this court which protects a person under the influence of others from having that influence abused. There is, however, no rule of this court which prohibits a man by a voluntary deed from bestowing a benefit upon his son or his grandson or son-in-law, even although only a few days before his death. To provide for his children or grandchildren is, or may be, a necessary duty; and, where a father discharges that duty, this court will not presume a fraud. If, therefore, fraud is alleged, it must be proved in the ordinary way. In this case no*

²⁹ *ibid*

³⁰ *Beanland v Bradley (1834) 2 Sm & G 339. See also Royal Bank of Scotland.*

fraud has been shown, and I must therefore, dismiss the bill, so far as it seeks to have the lease set aside.”

8.3 Although such characterizations of relationship may be an oversimplification of the exercise to determine whether a presumption of undue influence has arisen, it is not enough to assert in this case that the presumption of undue influence has arisen merely because of the relationship between the deceased and the Defendant. To do so will lead to an unnecessary and undesirable development of the law leading to very little uncertainty on the guarantee of transactions effected by parties in a close relationship especially from a parent to her child. The suspicious or disadvantageous nature of the transaction, which is not readily explicable, must be the touchstone for liability.

8.4 Lord Nicholls rightly rejected any widening of the principle by diluting or eliminating this prerequisite:

“My Lords, this is not an invitation I would accept. The second prerequisite, as expressed by Lindley LJ, is good sense. It is a necessary limitation upon the width of the first prerequisite. It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far-reaching. The law would be out of touch with everyday life if the presumption were to apply to every Christmas or birthday gift by a child to a parent, or to an agreement whereby a client or patient agrees to be responsible to the reasonable fees of his legal or medical adviser. The law would be rightly open to ridicule, for transactions such as these are unexceptionable. They do not suggest that something may be amiss. So something more is needed before the law reverses the burden of proof, something which call 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.”

8.5 The Plaintiffs must overcome the hurdle that in this case there was a gift by a mother to her child. The child whom all the siblings agree was the one who had the care of the mother. The only child whom it seems had the time to look after the needs of the mother. There is no doubt that the mother may have loved all equally but the mother also displayed industry and ambition and appeared keen to ensure that all her children were adequately taken care of. In this context where the Plaintiffs had “places of their own”, the special relationship between mother and daughter (the defendant) is not enough to raise the presumption of undue influence. Even so the Plaintiff must satisfy the second pre requisite previously characterized as “*manifest disadvantage*,” that the transaction is not readily explicable.

9. TRANSACTION NOT READILY EXPLICABLE:

9.1 One aspect of the requirement to demonstrate the existence of undue influence is that the transaction must be disadvantageous to the influenced person. In many if not all the cases cited to this Court the unfair or disadvantageous bargain was a main feature of the impugned transaction. Perhaps more glaringly so in the cases of *Allcard v Skinnner*, *Inche Noriah v Shaik Allie Bin Omar*³¹ and *Vale v Armstrong*³²

9.2 This was also the conclusion drawn by Lord Scarman in *National West Bank Plc v Morgan* [1985] 1 AC 704 F.

“Like Dunn L.J., I know of no reported authority where the transaction set aside was not to the manifest disadvantage of the person influenced. It would not always be a gift: it can be a “hard and inequitable” agreement (Ormes v. Beadel (1860) 2 Gif. 166, 174); or a transaction “immoderate and irrational” (Bank of Montreal v. Stuart [1911] A.C. 120,137) or “unconscionable” in that it was a

³¹ [1929] AC 127

³² [2004] EWHC 1160

sale at an undervalue (Poosathurai v. Kannappa Chettiar (1919) L.R. 47 I.A. 1,3-4). Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.”

- 9.3 However simply put, evidence must be adduced that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it. See ***Royal Bank of Scotland per Lord Nicholls*** at 1033 E.

“Lord Scarman attached the label “manifest disadvantage” to this second ingredient necessary to raise the presumption. This label has been using difficulty. It may be apt enough when applied to straightforward transactions such as a substantial gift or a sale at an undervalue. But experience has now shown that this expression can give rise to misunderstanding. The label is being understood and applied in a way which does not accord with the meaning intended by Lord Scarman, its originator.

*Which, then, is the correct approach to adopt in deciding whether a transaction is disadvantageous to the wife: the narrow approach, or the wider approach? The answer is neither. The answer lies in discarding a label which gives rise to this sort of ambiguity. The better approach is to adhere more directly to the test outlined by Lindley LJ in *Allcard v Skinner* 36 ch D 145, and adopted by Lord*

Scarman in National Westminster Bank plc v Morgan [1985] AC 686, in the passages I have cited.”

10. INDEPENDENT ADVICE:

10.1 Although pleaded separately from the particulars of undue influence, the absence of independent advice forms part of the surrounding circumstances alleged by the Plaintiffs which they contend give rise to a suspicion over this transaction.

10.2 The general rule is that the deceased must be a competent donor. More pertinently, in **Coomber v Coomber** [1911] 1 Ch 723, 730, Fletcher Moulton LJ summarized the general rule applicable to cases of persons who are competent to form an opinion of their own:

“All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advise shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing.”

10.3 Lord Nicholls concedes in **Royal Bank of Scotland** that the issue of the content of legal advice given and whether an independent legal adviser should be retained to disinfect the transaction from the presumption of undue influence would vary with the circumstances. Indeed in some circumstances the receipt of independent legal advice may not be sufficient to rebut the inference of undue influence having regard to other factors.

10.4 In *Inche Noriah v Shaik Allie Bin Oman* the Judicial Committee of the Privy Council observed:

“But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the donor that the donor was acting independently of any influence from the donor and with the full appreciation of what he was doing and in cases where there are no other circumstances this may be the only means by which the donee can rebut this presumption. But the fact to be established is that stated in the judgment already cited of Cotton LJ and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what must be proved in order to satisfy the rule in cases where the independent legal advice is relied upon further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.”

10.5 In this case the Plaintiff's case appears to go further than merely the absence of independent advice. During the course of the cross examination the Plaintiff's case mushroomed into a calculated conspiracy between the Defendant and Mr. Campbell, Attorney-at-Law to deprive the other daughters of their interest in the property. Although this Court cannot be uncritical of Mr. Campbell's approach in this case, the conspiracy theory of the Plaintiff, does not on a balance of probabilities arise.

- 10.6 Indeed one of the duties of the attorney at law in these circumstances is that he must explain the nature and effect of the transaction and ensure that the donor has a full appreciation and understanding of what the donor is doing and behave as a competent and honest advisor.
- 10.7 There is no prohibition for the attorney to act for both the donor and the donee.³³
- 10.8 It may not be necessary in all circumstances for the legal advisor to guide the donor or one party to seek independent legal advice. Indeed depending on the nature of the transaction such a course may only unnecessarily increase the costs of what may be a routine and simple transaction. See *Royal Bank of Scotland* per Lord Nicholls p1042 – 1044.
- 10.9 Again the issue of what independent advice should be given as required is fact driven and cannot be resolved by reference to reported decisions but by the peculiar facts of this case.

11. ASSESSMENT OF THE EVIDENCE:

- 11.1 In this case there were seven witnesses. For the Plaintiffs', oral testimony was led through Mr. Louis Andrews, the Plaintiffs and Mrs. Veronica Alexander. For the Defendant oral testimony was led through the Defendant, Mr. Campbell, his secretary and the attesting witness to the deed.
- 11.2 Documentary evidence were agreed between the parties and compiled in a bundle of documents filed by the Plaintiff on May 22nd 2006. There were also tendered into evidence several photographs of houses owned by the Plaintiffs.
- 11.3 A key focus in assessing the evidence is to determine whether the actual transaction, which was effected, was done in circumstances, which cannot be ordinarily explained. The identification of the "*suspect transaction*" is indeed a wide label to describe the forensic examination of the Court on the facts of a

particular case to decipher the intentions of the influenced person and to determine its consistency with normal motives and relationships, whether it is genuinely a gift of love or affection by someone emancipated from external influences, or whether it was pouched from the donor in circumstances where she would never have effected such a transaction but for the relationship and the influence.

11.4 Cornelia James:

- (a) It is clear from the examination in chief that she was of the view that she was in charge of the household. She made decisions indeed without consulting other members of the family save for the second Plaintiff.
- (b) It is important to note that the Plaintiff's submission with regard to the expenditure by the Plaintiffs on the home was more to bolster the claim that the transaction was suspicious and not to much to assert an equity in the house. The first Plaintiff sent "*small forms of monies regularly for the purpose of her having money to send for support*" The larger sums were sent "*so that I can get a piece of land in Trinidad*" "*The only reason I sent money is to make sure that she can have anything she wants.*"
- (c) It appears that there is no support to the Plaintiff's contention that she acquired any equity in the property. The money sent was solely for the mother's use and benefit. There were genuine gifts by a concerned daughter. Moreso a concerned daughter living overseas who cannot be with her mother due to her circumstances. It is reasonable to infer that these gifts of money were naturally that of a child to fill the void of her absence in times when the mother was ailing rather than with the hope of acquiring an interest in the property.
- (d) Indeed of the trips she made to Trinidad the majority were made after the death of the deceased casting doubt on the close relationship between the two. More money was spent on the home after the death of the deceased

³³ See *Clark Boyce v Mouat* [1993] 4 AER 268.

and this was to renovate the home to rent the upstairs portion not to live in it.

(e) In 1992 although renovation work was done to the home she does not know who contributed to the works. She was not aware how the Defendant was spending the money she sent. Indeed it is more probable that monies which were sent were being spent on the upkeep of the mother as well as to conduct the renovation work. It is difficult to believe that this Plaintiff wanted to use the said property as her home. Indeed the expected rental monies were not intended to be shared with the Defendant.

(f) She confirms that the mother was an independent woman in charge of a joint account. It is important that she establishes the deceased's dominant spirit:

“ Q: During the period 1968 to 2001 which of the sisters were the primary care giver?”

A: My mother was quite independent until she became immobile in October 2000.

Q: After she became immobile she required the assistance of her daughter?”

A: Yes she was bed riddled..”

This Plaintiff was adamant that the deceased was very independent in mind body and spirit until she became immobile in October 2000.

(g) Her expression of surprise over the deed of gift was that it was inconsistent with an expression of the mother made several years prior to the execution of the deed of gift with the alleged declared intent in itself vague and nebulous:

“Q: Why is it surprising?”

A: As this was not my moms decision as we know concerning the property. The property was family property. It is to be passed on. She said let everybody pass throng until they get their own home that is what she said. And she went so far

to say four pieces of appear for her 4 children and she swore that the Defendant and me would live upstairs and Jennifer and Leroy will share the apartment downstairs.

Q: Any other decisions concerning the property?

A: No I think I have said it.”

(h) Clearly this alleged expression by the mother was made under different circumstances, during the life of her son, “Leroy.” However according to the second Plaintiff this is not what was said by the Plaintiff and in any event circumstances clearly changed by the time of their mother coming to the twilight of her days: the children were older, Leroy had passed on, there was a strained relationship amongst the siblings and the other sisters had acquired properties of their own.

(j) Indeed the “*four pieces of paper,*” which Jennifer Fellis confessed that she knew nothing about, “*disappeared along with the deed.*”

(h) Importantly Cornelia James admits that there was a close relationship between the mother and the Defendant.

“Q: Do you agree that your mother felt the same amount of love and affection for the Defendant?”

A: Probably it is her child.

Q: Throughout the period the Jacqueline lived in the house your smother she loved her and treated her as a full fledge daughter of hers?

A: Yes why shouldn’t she. I still care about Jacqueline even though my feelings have changed. She was a half sister but we treated her as a full fledged sister.”

(i) Notably absent from this testimony is any allegation that the Defendant took advantage of the mother. Indeed the evidence goes sharply the other way. Not only was the job of caring for the mother reposed to the Defendant in the main, she could be trusted with the property. The renovation work was done satisfactorily. Cornelia conceded “*I was really impressed with the Defendant’s supervision. She did a good job*”.

- (j) It is noted that from her statement the first time she was made aware of the deed was in July 2001. However the evidence of the Defendant giving this information to Jennifer Fellis in 2000 went largely unchallenged. It would appear that the relationship broke down when the sister namely Cornelia James wanted to exercise dominion over the entire house for a profit notwithstanding the residency of the Defendant and her family in the building.
- (k) The Plaintiffs' evidence with regard to the health and condition of the deceased must be treated with care and circumspection for (a) firstly she was infrequently in Trinidad and could not be relied upon to give any first hand account of the deceased's health at the time of the execution of the deed and (b) In any event the information this Plaintiff obtained was through her sister, Jennifer Fellis. She had no personal contact with the deceased in October 2000. Indeed having regard to her qualifications as a nurse, she herself did not see the need to carry out a psychiatric or physical evaluation of the deceased until the deceased had her stroke in February 2001, after the execution of the deed. Indeed it is a reasonable inference that prior to that time there would have been no need to carry out any medical diagnosis of the deceased as things were "progressing normally." There were no alarm bells with regard to the deceased's mental condition. There is no doubt that the deceased was feeble in 2000 but only when the Plaintiffs' discover that the deed was executed in October 2000 does that become a material date.

"I was told that she lost weight Obviously I was not there so I don't know what her physical condition was like in October 2000."

- (l) It is important to understand the evidence given by this witness with regard to the health of the mother. No doubt lasting on this Plaintiffs' mind is her impression of her mother in her last days. It is clear that from February 2001 the deceased's condition had worsened and that it was clear that her health had deteriorated to such an extent that needed medical care in February 2001. The

Plaintiff's evidence with regard to the mother's state from her own observations was later in February 2001 of such a state that needed medical diagnosis and care, so much so the Plaintiff extended her stay to look after her mother. This is to be contrasted with the deceased's health and strength in October 2000. Although all are agreed that she was feeble in that she needed assistance, there were no contemporaneous accounts from Jennifer Fellis, from Cornelia James nor from the persons visiting the deceased at that time that she was "*senile*" or had no control over her own affairs.

11.5 Jennifer Fellis:

(a) She was a very simple woman who could not read well but like her mother worked hard. She was not around the house all of the time having to maintain herself as a cook at the hospital until her retirement. It is important to note that the evidence in chief was adduced in the form of witness statements for all witnesses. This sometimes may prevent a court from assessing a witness' credibility however in this case the witness was asked to read a portion of the statement. She labored through the exercise and the words used in the statement would not have been her choice of words.

(b) In cross-examination the following evidence was elicited:

Q: "What was the Defendants relationship with her mother was it the same living relationship?"

A: Yes sir. We lived as one big happy family."

(c) She too confirms that the mother was an independent woman a firm person.

Q: "She is someone who implements her decision.

A: Yes."

(d) She gave her mother financial assistance:

Q: " You did not expect her to repay you?"

A: No sir.

Q: It was a gift to your mother?

A: Yes.

Q: It was not for a specific reason but to assist.

A: Yes.

Q: By offering the money you did not intend to have or expect anything in return?

A: No sir."

- (e) Indeed it is from Jennifer that Cornelia understands that her mother was bedridden from October 2000. But Jennifer affixed this state to 3rd October 2000 when she fell off her bed. Notably however even Jennifer acknowledged that the deceased's state was such that did not require medical treatment:

"Q: When she became ill in 3rd October 2000 did you take her to a doctor?

A: No sir.

Q: Were you concerned for health?

A: Yes, I was concerned but I don't have time to take her to a doctor that was because I was working shift.

Q: Later on that month did you take her to the doctor?

A: No sir the last one did because she is always some Jacqueline is a good daughter. I suppose so yes...

Q: You worked in the hospital why didn't you take her to the hospital?

A: I did not think about that she was not like going to dead so I just put her on the bed"

- (f) Absent from any of the Plaintiff's testimony was an allegation that the mother was ill treated by the Defendant. The evidence is to the contrary.

Jacqueline George:

- (a) She appeared to be a very frank speaker. She was not evasive she spoke directly to the attorneys and was very firm. She appears truthful and made certain admissions. Indeed the Court did not view her as prone to bolstering her claim. For instance she had no written record as to what was spent on the house because there was no need to keep it. This was for her mother she would least had expected any litigation to emerge from these matters. In cross-examination she was asked,

“Q: You don’t have a written record as to how the money was spent?”

A: No.

Q: So you can’t say from written record how much money you spent?”

A: Sir I did not check on the receipts.”

- (b) She quite candidly said that this was her mom’s house.

“Q: In other word you had an interest in the house?”

A: Not really it was my moms house it was up to her”

- (c) She was unshaken in her testimony that the instructions for the deed were that of her mother. That the relationship between the mother and Mr. Campbell was very much ongoing before the call to come to the deceased’s home to prepare the deed of gift. Her mother made the punche a crème and black cake for the law office of Mr. Campbell. Clearly there was an existing relationship between an elderly person and her lawyer. So much so the entire office was concerned about the deceased’s well being.

- (d) She was very strong in her answers that while the deceased may have been immobile she could call by telephone and give instructions.

- (e) Although her head and hands shook there was nothing to suggest that she was not mentally capable of giving instructions and carrying out orders. Indeed there is no dispute that the Defendant enchased pension cheques with her mother taking her to the bank where transactions were carried out dutifully. Thumbprints were used as identification.

- (f) She clearly explained how the execution took place. Admittedly there were some discrepancies amongst the witnesses as to whether the deceased did it on her own or with assistance. They all agree that the “X” mark was done on her own. It is probable that the attorney assisted her to place her thumbprint. Indeed with shaking hands that will account for the smudged thumbprint. There is no evidence of coercion or force.
- (g) It was a causal meeting. Mr. Campbell made two visits. He spoke to her and the Defendant on two occasions.
- (h) Indeed against the inconsistent stories of the Plaintiffs of the disposition of the property, is pitted the Defendants own version that Jennifer Fellis knew in 2000 that the property was to be left to her Jacqueline by her mother.

11.7 Judy McLean:

- (a) She too proved to be a strong witness unshaken in testimony and indeed very frank about the business in the law office of Mr. Campbell. The Court was very impressed with her testimony. Nothing untoward emerged from this transaction. It was the typical transaction done by a small and intimate office which promoted relationships with their clients. Her testimony was important to determine the physical and mental well being of the deceased.
- (b) She admits the deceased was feeble but not mental incompetent. Her right hand was swollen like Parkinson disease.
- (c) She began visiting the home in 1993. It is safe to infer that this was the beginning of the relationship between Mr. Campbell and the deceased.
- (d) With regards to the execution she states: *“He explained it to her. Although her voice was feeble she agreed to do the execution. Then he took her left thumb because as I said before her right was shaking and placed her thumb on the document. She seemed quite satisfied. We all just hung around a bit we cleaned up her hand and Jacqueline gave Mr. Campbell some money as part of his fees”*

11.8 Mr. Thomas:

(a) Mr. Thomas stated in cross-examination:

“Mr. Campbell told her of the deed of gift that she wanted him to do. She nodded her head in agreement and Mr. Campbell sat at her bed side and began to read the deed of gift to her. While reading he stopped and explained the deed. While reading, she would sometime nod and sometime say “yes”

Q: Having read the deed what next happened?

A: He said if that is what she wanted to do and she said yes.”

The Defendant was in and out of the room.

(b) According to him *“Mr. Campbell told her to put her hand mark at the foot of the deed and also helped her to put her left thumb print. She first placed a hand mark (demonstrates) that she did on her own. Then he has her to put a thumbprint on the side. Her right hand was kind of shaky so Mr. Campbell put the left thumbprint.”*

11.9 Mr. Campbell:

(a) Mr. Campbell was also unshaken in his testimony with regard to: (a) his professional relationship with the deceased, (b) the execution of the deed.

(b) Admittedly there are no written instructions provided to the Court by the attorney. In cross-examination curiously it appeared that the Plaintiffs changed the position to casting suspicion on the deed to the delay in registration of same. The fact that there was a delayed registration is not in itself suspicious. Coupled with the other circumstances it was the case of the lawyer awaiting fees before committing himself to a transaction. An informal transaction, ill-advised, but not illegal.

12. ANALYSIS:

12.1 It is not appropriate in these circumstances to ascribe some sinister motive to the Defendant. The relationship of the deceased and the Defendant of itself do not

raise the presumption of undue influence nor is there any restriction on the express intention of the deceased to demonstrate that the gift is otherwise an expression of her free will and desire.

The strong willed mother:

- 12.2 From the evidence in this case, despite the assertions to the contrary, this Court finds that Ms Iona Williams was on 19th October 2000 a strong willed independent person. Although she may have been declining in health her mental capacity was still alert and witty. Indeed the life of Iona Williams is a testament to the struggles of a single parent rearing four children. Two of whom migrated and two living with her on Claudius Street. The deceased died on 25th June 2001 at the age of 83.
- 12.3 Hers was a squatting family first living at Bay Road, Marabella with her children. Subsequently through the dint of hard work she acquired her own property with some financial assistance from her children. It is clear that the deceased considered the said property as a permanent residence.
- 12.4 All agreed that the deceased was smart, strong and an independent woman. By 1999 Ms Williams was bedridden. She had a circulatory problem and her hands and feet would swell. This Court finds that from February 2001 her condition worsened. This was however after the execution of the deed and is of little relevance to the issue as to whether undue influence was placed on her to execute the deed to the Defendant on 19th October 2001.
- 12.5 Would this mother have gifted this property to the Defendant? The Plaintiffs' rely upon an assertion that the mother always intended the children to have the home. However the evidence to support such a contention is vague, unreliable and of little weight. Cornelia stated in cross-examination that her mother said that this property was "for us to pass through until we got our own." Her sister Jennifer disagreed and said that her mother said that the home was for the children and the

grandchildren. Neither witness corroborated each other on this material evidence which was an important plank to further cast suspicion on the transaction. In any event that statement suggests that the daughters were not entitled to the house if they have places of their own.

- 12.6 This Court can place no or little reliance on the mysterious “four pieces of paper” alleged to have been kept in a handbag by the deceased. It is true that the Plaintiffs expended monies on the property but this as discussed below was by way of a gift and not for the expectation of any benefit.

The Three Daughters of Iona Williams:

- 12.7 Cornelia James was clearly the leader amongst the siblings. In her mannerisms in the witness box and approach she certainly felt that she was the leader of the household. She led the way in terms of making decisions and dictating the pace of events. She enjoyed a close relationship with the second Plaintiff who admired her no doubt because of her status in life. It is not difficult to appreciate in the witness box in examining both these witnesses, the nurse living in England and the simple yet uncomplicated sister, that Jennifer was “*under the spell*” of her more ambitious sister even though Jennifer was the eldest in the family. The Court obtained the impression from these witnesses that it is for this reason that Cornelia James will consult or dictate terms to Jennifer Fellis. Indeed having regard to the relationship that it is more possible than not that the Defendant did tell Jennifer Fellis of the deed of gift prior to the death of the deceased and/or that she knew that the deceased in her final days would make provision for the Defendant because of the domineering Cornelia James it is doubtful whether Jennifer Fellis will confer this knowledge to her. As far as the Cornelia James is concerned the defendant would have been too far down the food chain deserving of consultation with regard to the property. The Defendant’s job was simply to look after the deceased. Unfortunately both Cornelia James and the Defendant had a falling out of aged vintage, which to this date has not been mended and aggravated by the gifting of the property to the Defendant. For this reason it was a

surprise to Cornelia James that such a person, holding such a rank in the pecking order in the family, will have been gifted this property.

12.8 This Court is of the view that whereas the mother may have respect and admiration for her child who went aboard there were no sufficient close relationship between these two as existed between the Defendant and even the second Plaintiff.

12.9 It came as shock to Ms. James that the property was gifted to the Defendant, as indeed this Court finds, her sights on the property was for commercial gain of renting out the upstairs portion and not for the purpose of setting up a residence there.

12.10 Indeed Cornelia James had her own home in Marabella. A “*shack*” she called it but when confronted with the photographs of this shack her description seemed quite inadequate. There can be no doubt that before her execution of the deed of gift, the deceased was well aware of this daughter’s means and her home in Marabella.

12.11 Ms Fellis also had her own home in Marabella. She was a part time cook and did not have the time to take care fully of the deceased. Indeed although she claimed to have looked after the deceased to the exclusion of the Defendant, she admits in cross-examination that it was the Defendant and not her that looked after the deceased because the Defendant simply had more time. This Plaintiff did not even have the time to take the deceased to a doctor even when, according to her, she found the deceased had fallen off her bed. Her simple reaction was “ *she was not looking like she would dead*” and left her there.

12.12 It is the Defendant who this Court finds had a close relationship with the deceased devoid of any malcontent or sinister motive This is borne out by the fact that she

was unemployed for the most part, she devoted her time and energy to the deceased.

12.13 This was an arrangement which the Plaintiffs were well aware of and there is no allegation of this Defendant fleecing the mother or unduly taking advantage of her.

The Mother and her caring child:

12.14 As discussed above it is difficult to simply characterize a relationship such as parent and child and contend that the presumption of undue influence arises. The child would not normally exercise dominion over the parent. In any event, the Plaintiff must go further to demonstrate that the gift was not the expression of free will and out of synch with the motives of the caring mother for her child.

12.15 The main plank as discussed above to arouse this suspicion is the alleged expression by the deceased that the home was to remain the family home. The evidence as discussed above to demonstrate this is not consistent, cogent neither clear nor credible.

12.16 It is more probable that if this is what Iona Williams said her intention was, that all her siblings should be cared for and protected, in light of her knowledge of a strained relationship between the parties, the smart parent would be alive to the complications that well arise with joint ownership of her only property may give rise to. Indeed consistent with her wishes, Jennifer “*passed through*” and obtained her own home. Cornelia “*passed through*” and obtained her home, “Leroy” passed on. All that was left was Jacqueline George. What provision should she make prior to her passing? “*I done dead already*” she said to Mr. Campbell. She intended her last child to benefit by the gift of the home. Clearly it will be consistent with a mother’s desire to live in the hope that the relationship between the sisters will improve. No doubt that now lies in the hands of the living.

The deed of gift:

12.17 This Deed was executed on 19th October 2001. The thumbprint is smudged but the evidence of all the attesting witnesses establishes that it is that of the deceased. Neither the clerk nor the secretary appeared untruthful and indeed they had nothing to hide. This was a routine transaction to them one which is not uncommon in these districts and for persons of failing health. To suggest that the use of the left hand was a deliberate ploy of Mr. Campbell and the Defendant to cheat the deceased out of her property would be to stretch the imagination to impermissible limits.

12.18 The Independent legal advice:

12.19 The Court should not be seen to countenance the action of an Attorney-at-Law who has not reduced or obtained his client's instructions in writing so as to remove all doubt as to the extent of his retainer and the nature of his advice. Indeed such a salutary principle as established in cases such as *Griffiths v Evans*³⁴ are commended to attorneys that deal with the disposition of property of their aged clients. However to the credit of Mr. Campbell he came forward together with his staff who witnessed the execution of the deed, to remove any cloud of suspicion over the transaction effected by Ms Williams.

12.20 Indeed by contrast in *Baby Khan*, the evidence revealed that the mother at the last moment when it was sprung on her by the Attorney-at-Law that she was divesting her only asset, immediately pleaded for a life interest to be reserved to her. At that point Hamel Smith J.A. commented, correctly in this Court's view, that;

“it should have been apparent to the attorney at that moment that while she may have understood the effect of the instrument, there was reluctance on her part to dispose of the only property she owned. He knew that she had no hand in its preparation. The mere

fact that she was pleading for a life interest before signing must have alerted him to the fact that either she never intended to dispose of it in the first place or at least without reserving some interest to herself. At best there was uncertainty of intention on her part and he must have appreciated that, particularly in light of the absence of actual consideration. He was obliged to make further enquiries to satisfy himself that she did intend to dispose of the property absolutely and for no reward. The attorney, in such circumstances, was under a duty to bring a halt to the proceedings and advise her to seek independent legal advice. He did not.”

No doubt the Attorney-at-Law is not a private investigator and he must carry out the instructions of his client. However where there are significant alarm bells which should bring to his mind the lack of informed consent or uncertainty in the nature of the transaction it is his duty to make further enquiries or to advise the client to seek independent legal advice.

- 12.21 The evidence in this case however goes much the other way. There was a pre existing relationship of attorney and client prior to the issuing of the instructions to prepare the deed of gift. Indeed over the years Mr. Campbell stated he became very close to the deceased and “*she confided in me.*” His close relationship with the deceased neutralized in this Court’s view any attempt to attribute any sinister motive on the part of Mr. Campbell to hatch a plan with the Defendant to deprive the deceased of her asset to ensure the security of his god son, the child of the Defendant. His relationship with the Defendant’s husband by no means of itself disintitiled the attorney from acting on behalf of the deceased. In fact, he conducted some previous transactions for her in relation to her tenants. “*I recall in particular assisting her in recovering a \$20,000.00 deposit she had made on a piece of land, on behalf of the Defendants and herself to a real estate agent named Terry Wyatt*”. The deceased had developed a friendship with Mr. Campbell’s

³⁴ [1953] 2 AER 1364

secretary. Since the early 1990's he received an intimation from the deceased that she wanted to leave the property to the Defendant and that "*when she was ready for me to prepare the paper she will let me know.*" Mr. Campbell was no stranger to the deceased and indeed the disposition of her property to the Defendant was no surprise sprung on the deceased at the last moment.

12.22 Indeed when the instructions finally came to prepare the deed of gift, Mr. Campbell advised to the deceased as to the ways in which the disposition could be effected and she insisted that it be a deed of gift. He suggested to her that she could retain a life interest in the said property but she jokingly that she "*nearly done dead give it to Jacqueline*".

12.23 Although written instructions are preferred, the demeanor of this witness and the frankness of his evidence on this material aspect of the case was convincing. This explanation of the deceased's spontaneity of spirit and willingness to transfer the property is indeed consistent with all the circumstances of the case. Indeed the Court carefully observed the demeanor of Ms. Mc Lean and Mr. Thomas. There was no hint of a "*cover up*" or that something is amiss by these witnesses. Their evidence as to the spontaneous affirmation of this deed is unimpeachable. This in the Court's view tilts the scale in the absence of any written instructions from the deceased.

12.24 Indeed in *Baby Khan* the Attorney-at-Law who prepared the transaction refused to give evidence in that case. Hamel Smith J.A. observed "*His reluctance to attend in spite of the efforts that (so we were told) were made could only have heightened an already suspicious transaction. It certainly insured that the transaction remained clouded in mystery.*"

12.25 The Plaintiffs have suggested that the attorneys failure to register the deed with dispatch gives rise for suspicion. A "*hotchpot of errors*" as Attorney for the Plaintiffs put it in his cross-examination of Mr. Campbell. The Court carefully

observed Mr. Campbell as he addressed the Plaintiffs concern with regard to the late registration of the deed. It is unfortunate that the deceased died prior to the registration of the deed but this of itself cannot suggest impropriety by the Attorney in the transaction or that there was a cloud of suspicion over the manifestation of the free will of Ms. Williams.

12.21 Rebutting the Presumption:

Even if the presumption of undue influence can be asserted on these facts, the Court holds that presumption is rebutted from the evidence of the actual execution of the deed of gift emancipated from any pressure or influence and, the receipt of legal advice as discussed above.

Contributions/Equitable interests:

12.22 There is no plea of proprietary estoppel and this Court agrees with the Defendant's Attorney-at-Law that none can arise in this case having regard to the pleadings and the frank admissions by both Defendants that the monies spent on the property was not in reliance on any representations and they expected nothing in return for their contribution. As much is admitted by the Plaintiffs' attorney at law in their skeleton submissions.

13. CONCLUSIONS AND ORDER:

13.1 The resolution of the main issues in this case is largely fact driven. Based upon the assessment of the evidence in this case and the demeanor of the respective witnesses it is more probable that the mark and thumbprint on the jurat of the deed of gift was the mark and thumbprint of the deceased, Iona Williams; that she did affix her mark and thumbprint in the presence of the attesting witness Mr. Dennis Thomas and the deceased did send for and give instructions to Mr. Wilston Campbell for the preparation of the said deed. This Court finds as a fact that this deed was not executed by fraud.

- 13.2 The plea of undue influence must be supported with evidence of a relationship of trust and confidence that was abused and a transaction that is not readily explicable. There is nothing sinister in the relationship that developed between the deceased and the Defendant. She carried out her wishes dutifully as the last sibling with the time to cater for her needs and difficulties. The deceased was ailing in health but at the time of the execution of the deed she was mentally alert, witty and much alive to her surroundings and the nature of transaction.
- 13.3 At the time of the execution of the deed the deceased was mentally competent. She was alive to the options of taking a life interest but was insistent that the Defendant have the property. Such a gift was not at odds with the relationship and the prevailing circumstances that existed in 2000 where the Defendant was the only child who had not secured an abode of her own. The deed of gift was the expression of the love and affection of the parent to her child at a time when she was emancipated from influence from the child or anyone for that matter.
- 13.4 Even if the presumption of undue influence arises, the Defendant has rebutted it by demonstrating the receipt of legal advice appropriate in the circumstances to bring home to the deceased the nature and purpose of her act.
- 13.5 For these reasons the Plaintiff's claim fails.
- 13.6 Further for the reasons set out above, the Defendant's counter claim fails as well.
- 13.7 The Plaintiffs claim is accordingly dismissed with costs to be taxed in default of agreement.
- 13.8 The Defendant's counterclaim is dismissed with costs to be taxed in default of agreement.

13.9 In this society when gifts are divested to a child in a family there is no desire in the parent for such a wish to strike at the heart of family relations. Indeed it is a wish to be respected as that of the senior member of the family. Similarly it is not a wish of the parent for any child to use such a gift to cause disharmony in the family unit. Although the deed will not be set aside on the grounds as pleaded by the Plaintiff, the Court expresses the hope that this judgment will not be flounced in the face of the other sisters, but that efforts can now be made to bring harmony amongst the family unit, recognizing as Ms Fellis put it: “*we were once one big happy family.*”

Dated this 28th day of June, 2006.

Vasheist Kokaram
Judge (Ag.)