

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law & Equity Division

2014/CLE/gen/00890

BETWEEN

JEAN HELENA BAIN  
AND  
CHERYL PATRICIA LIGHTBOURNE

Plaintiffs

AND

WENDY SABRINA BAIN

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Malcolm Adderley Jr. for the Plaintiffs

Alecia Bowe for Defendant

15 and 16 August 2017, 16 January 2018 and 20 April 2018

**JUDGMENT**

## WINDER, J

This is an application by the plaintiffs' seeking to set aside conveyances made by the late Eugene Bain on the ground of undue influence.

### Background

[1.] The chronology of events are as follows:

- |           |   |
|-----------|---|
| 1998      | Eugene Samuel Bain marries the defendant Wendy Bain ("Wendy"). This is Eugene's third marriage. He is 70 years old at the time and Wendy is 35 years old. After the marriage, Wendy moves into Eugene home ("the Residential Property"). Jean Bain (Jean), Eugene's daughter, resided at the home. Eugene also owned the vacant property adjoining the homestead ("the Vacant Property"). |
| 18 Jun 03 | Eugene makes a Will devising a life interest in his residence to his wife Wendy and thereafter to his daughter, Jean Bain. The Vacant Property is devised to his son Everette.  |
| 2007      | Eugene diagnosed with Prostate Cancer.  |
| 26 Mar 08 | Eugene makes a Will revoking the 18 June 2008 Will and devising the Residential Property and the Vacant property to Wendy absolutely.   |
| 29 Apr 09 | Eugene makes a conveyance of the Residential Property to himself and Wendy absolutely as joint tenants.   |
| 8 May 09  | Eugene make a conveyance of the Vacant property to himself and Wendy absolutely as joint tenants.   |
| 12 May 09 | Eugene makes his last Will and testament which mirrors the 2003 Will. By his Will Eugene purports to devise a life interest in his residence to his wife Wendy and thereafter to his daughter, Jean. Eugene's daughters Cheryl Lightbourne (Cheryl) and Jean are named as executrices of the Will.  |
| 10 Jun 09 | Eugene dies. Shortly after Eugene's death, Everette Bain, one of Eugene's children moves into the matrimonial home and Wendy says that she is forced to move out and into rental accommodations as a result of Everette's abuse.  |
| 23 May 11 | Grant of Probate made in favor Cheryl and Jean.   |

[2.] The plaintiffs commenced this action by generally indorsed Writ of Summons on 4 March 2015 seeking the following relief:

- (i) A Declaration that the Deceased was induced to convey the said freehold properties to the defendant by her undue influence and that the said conveyances are null and void;
- (ii) Alternatively, a Declaration that the Defendant hold and held the said freehold properties for and on behalf of the first Plaintiff;

- (iii) An Order that the Defendant do execute all such documents and do all such acts and things as may be necessary to re-transfer to the 1<sup>st</sup> Plaintiff the said freehold properties;
- (iv) An injunction to restrain the defendant, whether by herself, her servants or agent or howsoever or otherwise from transferring or in any way dealing with the said properties;
- (v) An injunction to restrain the defendant whether by herself, her servants or agents or otherwise howsoever, from entering or crossing or interfering with the said first Plaintiff possession of the said Hanna Road residence;
- (vi) Further and other relief;
- (vii) Costs.

[3.] The plaintiffs allege that the circumstances which give rise to undue influence are:

- (a) A presumption of undue influence by the person or persons who benefited from the two conveyances;
- (b) (i) The non-disclosure of the two conveyances until after the death of the Deceased despite the request by the deceased for whatever documents should pass to another Attorney strengthen the presumption of undue influence.  
(ii) The failure by the Defendant to disclose to the first Plaintiff and the other siblings also supports the Presumptions of undue influence.
- (c) Because of the failure to disclose the Plaintiffs have not had the benefit of communicating with the deceased and consequently of knowing whether he had the benefit of medical or independent legal advice before executions of the two conveyances which made no provision for the 1<sup>st</sup> Plaintiff at all.

[4.] The plaintiffs called Jean Bain, Maxine Fox, Melvin Saunders and Dr Theodore Turnquest as witnesses in their case. Wendy Bain, Ingrid Brooks, Jennifer Mangra and Charles Clarke gave evidence on behalf of the defendant.

[5.] The evidence of Jean was that her father always told her that when he died he would give a life interest in the home to Wendy and the fee simple would go to her. When Eugene was diagnosed with Prostate Cancer in 2007 she saw significant change in him in that he ate less and complained of severe pain. She says that in early 2009 he was hospitalized and received blood transfusion and signs of memory lapse. In 2009 Eugene expressed a desire to change attorney and retained Ruth Bowe Darville to represent him. On 12 May 2009 he prepared a will leaving the Residential Property to Wendy for life or until remarriage and thereafter to her. Wendy voluntarily moved out of the homestead between January and February 2010. She learnt of the conveyances after her father's death.

- [6.] Dr Theodore Turnquest gave evidence that Eugene became his patient in 2009 when he was referred to him at Doctors Hospital. At the time he was at an advanced stage of prostate cancer and was in significant pain. He was prescribed pain medication which left him sedated for most of the time. When he saw Bain he was able to give informed consent in that he had his mental capacity. Eugene however was physically incapable of performing much of the basic activities of daily life and required assistance for everything.
- [7.] Wendy's evidence was that:
- (1) She was not privy to Eugene's legal affairs and unable to comment directly as to the circumstances of his execution of the conveyances the subject matter of this action. She was aware that Eugene executed the Will which is dated the 12<sup>th</sup> day of May, A.D., 2009 but she does not know the circumstances surrounding the preparation nor execution of the will. Eugene never discussed any of his legal affairs with her and as a result she was not aware of the conveyances the subject matter of this action until after his death.
  - (2) She first met Mrs. Jennifer Mangra when she came to their home to speak with Eugene in 2008. She is also aware that Eugene visited Mrs. Mangra at her office on occasions. During her visits to the home her discussions with Eugene were conducted in the privacy of the bedroom. She was not present on those occasions to know what was discussed and certainly whether any documents were signed. On the occasions she saw Mrs. Mangra she was accompanied by a lady.
  - (3) Notwithstanding Eugene was diagnosed with Prostate Cancer, his mental capacity, despite the physical challenges caused by such a disease, did not deteriorate and he was competent to manage his affairs up to his death. The fact that Eugene executed his Last Will and Testament approximately 30 days before his death illustrates his competence to understand the nature of the documents he signed.
- [8.] Charles Clarke's evidence was
- (1) At the time of Eugene's death in 2009, he had known Eugene for 70 years. Eugene was born in Mastic Point, Andros and although he knew Eugene in Andros he became a close friend after he moved to Hanna Road where they both lived until his death. Until his death they would visit and or speak with each other 3 to 4 times per week. He says that Eugene always knew what he wanted for himself and his family although he knew him to be a stubborn man with his own agenda. He introduced Eugene to Mrs. Jennifer Mangra as Eugene had spoken to him about needing a lawyer because he said he needed to protect his wife Wendy. Eugene told him that he knew that his family would fight her for the property after his death. Wendy always appeared to him to be a devoted wife to Eugene.

- (2) At the meeting Eugene, in his presence, told Mangra that he wanted Mangra to fix up some papers for him so that Wendy would be secure after he passed. At no time during the meeting was Wendy present in the bedroom. After this initial meeting he visited Eugene along with Mrs. Mangra on approximately 2 occasions but the visits were social in nature. After all of the years visiting with Eugene, he stopped going to visit him approximately 9 to 10 months before his death because of the attitude of his children and also due to his declining health.
- (3) During Eugene's life and especially after retirement there were many occasions where he had to go to Eugene's home to diffuse situations created by his son Everette where he would threaten Eugene with bodily harm while brandishing a shotgun. On these occasions the Police had to get involved as well.

[9.] Jennifer Mangra's evidence was:

- (1) Eugene became her client in March, 2008, and remained her client until his death. During this period she met with and spoke with Eugene as the need arose on legal matters that he had given instructions for her to act on his behalf. She was referred by Deidre Maycock who advised that her father Charles Clarke, had a friend who was looking for an Attorney.
- (2) She attended at Eugene's home where he instructed her to prepare a Will for him. He was concerned about a specific devise to his wife Wendy Bain and wanted the devise to be specific as felt his children would put his wife out as they had no respect for her. He wanted to make sure that they did not bother her when he died. He wanted his daughter Jean to leave the house immediately when he died. She worked on other matters for Eugene including a matter involving his son Everette Bain.
- (3) Mr. Bain later visited her at her home and advised that he was in negotiations with Mr. Tennyson Wells to give Mr. Wells a right of way over his private road. She set up a meeting with Mr. Wells at Eugene's home and they came to an agreement as to the value of the right of way. She drafted the relevant documents for execution which Eugene executed. At all material times Mr. Bain was competent and appeared through his discourse with Mr. Wells to appreciate what was being discussed and engaged in discussions fully appreciating the circumstances and the nature of the documents required to be signed by him.
- (4) Eugene on 2 occasions gave her instructions to convey properties he owned to his wife Wendy. She asked Mr. Bain why he wanted to convey the properties to her. He responded; "If I did not then my wife would not have any peace. My children would never let her have anything. They wouldn't even give her food to eat." She advised him that it would be a wise thing to convey it to himself and his wife jointly so that if something happened and she decided to divorce him, then she could not kick him out, but if he passed away then she would become the owner. He agreed.

(5) She prepared both conveyances. With Eugene's permission she consulted with his doctor, Dr. Evans who advised that Eugene was competent to conduct his affairs. Eugene's instructions were at all times clear, precise and lucid. Eugene executed the conveyance in the presence of Mrs. Ingrid Brooks Deputy Registrar of the Court of Appeal. He read through the conveyance and to confirmed it was correct. On several occasions she questioned Eugene as to why he did not tell his wife or children what he was doing and he would say: "They are my wife and children. They don't need to know my business."

[10.] The crux of the plaintiffs case is set out in paragraph 12 of their skeleton argument when it said "because of the close relationship between the deceased and his children, the deceased constant assurances that Jean would own the fee simple in the homestead, the deceased reputation as a man of his word and commitment to his daughter Jean, the plaintiffs felt strongly that the deceased would never willingly disinherit his daughter Jean or his son Everette especially since he had ensured that the defendant would be able to continue to reside in the homestead.

[11.] The relevant law on undue influence was canvassed by this court in **Antonio (by next friend Aneka McKinney) v. Poitier - [2015] 2 BHS J. No. 35**. At paragraphs 30-36 it was stated:

30 According to the learned editors of Hanbury and Maudsley Modern Equity 12th ed page 800, undue influence cases represent equity's recognition of

"a wide variety of situations in which intervention is justified by reason of a defendant's influence of dominance or influence over a plaintiff in procuring his execution of a document (such as a settlement) or his entering into an obligation... Equity intervenes in such cases, not because, as is the case with misrepresentations, the defendant has positively (albeit innocently) misled the plaintiff on a particular and relevant point of fact, but because the defendant has caused the plaintiff's judgment to be clouded, with the result that the plaintiff has failed to consider the matter as he ought."

Further, at page 801, the learned editors continued:

"...in all cases the question is whether a defendant has taken advantage of his position, or, per contra, has been assiduous not to do so. The question can only be answered in each case by a meticulous consideration of the facts. In some specialized situations, the facts speak for themselves. Contracts between employers and employees which restrict the future freedom of operation of the employee may be unenforceable, even in the absence of proof of undue influence, on the ground that the restriction is unreasonable. Many cases turn, as is natural, on whether a defendant discouraged independent legal advice or proceeded in such a way as to make it unlikely that the plaintiff would think of taking it. For, as with many of the flexible remedies of equity, a defendant is not placed under an absolute bar by virtue of this equitable obligation, but has to adopt

proper steps, in view of the obligation, if he wishes to proceed in certain ways. So a genuine insistence on independent legal advice is a natural means of repudiating a charge of having exerted undue influence, even in a case where the possibility of influence was strong, and especially where there is a conflict of interest and duty. But the presumption of undue influence is not rebuttable only by establishing insistence on independent legal advice; it may also be rebutted by showing that the gift was a "spontaneous and independent act."

31 The usual starting point in considering the case law on undue influence is the locus classicus of *Allcard v Skinner* 1887 36 Ch. D 145 and the oft cited passage of Lindley LJ at page 181. There it was said as follows:

The doctrine relied upon by the Appellant is the doctrine of undue influence expounded and enforced in *Huguenin v. Baseley* (1) and other cases of that class. These cases may be subdivided into two groups, which, however, often overlap.

First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor. *Norton v. Rely* (2), *Nottidge v. Prince* (3), *Lyon v. Home* (4), and *Whyte v. Meade* (5), all belong to this group. In *Whyte v. Meade* a gift to a convent was set aside, but the gift was the result of coercion, clearly proved. The evidence does not bring this case within this group.

The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made.

32 The facts of *Allcard* were that the plaintiff, a young unmarried woman, had sought a clergyman as a confessor in 1867. A year later she became an associate of the sisterhood of which the clergyman was the spiritual director and in 1871 she was admitted a full member, taking vows of poverty, chastity and obedience. Without independent advice, she made gifts of money and stock to the mother superior on behalf of the sisterhood. She left the sisterhood in 1879 and in 1884 claimed the return of the stock. Proceedings to recover the stock were commenced in 1885. The Court of Appeal held that although the gifts were voidable because of undue influence brought to bear upon the plaintiff through the training she had received, she was disentitled to recover because of her conduct and the delay.

33 Notwithstanding its vintage, *Allcard* has been cited as authority in this jurisdiction in *Cordes v Sentinel International Limited* Civil Appeal 74 of 2005 and *Johnson v Brown and Powell* CL 1777 of 1989.

34 Counsel for the Plaintiff argues that according to *CIBC Mortgage Plc v Pitt* [1994] AC 200, undue influence is a species of fraud. In *CIBC Mortgage Plc v Pitt* [1994] AC 200, Lord Browne-Wilkinson distinguished the two classes of cases identified in *Allcard* as 'actual' and 'presumed' undue influence respectively. It seems that it is the actual undue influence which is the species of fraud and not the presumed undue influence. At page 209, Browne-Wilkinson LJ says:

"Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right."

35 I adopt with approval the dicta in the Eastern Caribbean Court of Appeal decision in *Marie Madeleine Egger v Herbert Egger* Civil Appeal No.17 of 2002 which I find adequately express the state of the law in The Bahamas. At paragraphs 31 to 33 of the decision, Alleyne JA states as follows:

[31] In *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] 3 WLR 1021, para. 14, Lord Nicholls of Birkenhead had this to say:

"Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."

And at paragraph 219 of the same judgment, Lord Scott of Foscote said:

"The presumption of undue influence ... is a rebuttable evidential presumption. It is a presumption which arises if the nature of the relationship between the parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce some sufficient additional evidence to rebut the presumption."

[32] In *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 133 Lord Hailsham, L.C. delivering the judgment of the Court said in relation to the class of case where the relations between the donor and the donee have been such as to raise a presumption that the donee, at or shortly before the execution of the gift, had influence over the donor:



"The court sets aside the voluntary gift unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of the free exercise of the donor's will. ... The court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

[33] In the Royal Bank of Scotland case [2001] 3 WLR 1021 at paragraphs 9, 10 and 11 Lord Nicholls recognises that the influence one person has over another in particular circumstances provides scope for misuse without any specific acts of persuasion, typically where one person places trust in another to look after his affairs and interests, and the latter abuses his influence and betrays this trust by preferring his own interests. His Lordship affirmed the well-established need to prevent abuse of influence in these cases despite the absence of evidence of overt acts of persuasive conduct. According to his Lordship, the question is whether one party has reposed sufficient trust and confidence in the other to raise the presumption. He said the principle is not confined to cases of abuse of trust and confidence but includes, for instance, cases where a vulnerable person has been exploited. To quote the learned Law Lord, 'Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand, and ascendancy, domination or control on the other.'

36 In respect of the issue of independent advice, Nicholls LJ, at paragraph 20 of his judgment in *Royal Bank of Scotland v Etridge* stated as follows:

"Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case."

[12.] The presumption of undue influence is a rebuttable presumption. Under the law, where there is the presumption of undue influence the burden shifts to the

Defendant to prove that the impugned transaction represented the free will of the deceased. At paragraph 291 of the judgment Lord Scott highlighted the need for evidence of independent advice to rebut the presumption of undue influence which had arisen. The observation is certainly no less apropos in this case.

[13.] I am satisfied that there was no evidence of actual undue influence. The only witness to the circumstances leading up to the execution of the conveyance was attorney Jennifer Mangra, Charles Clark and the deceased. The evidence does not support the definition set out in *Allcard of some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor*. On the contrary, the evidence of Mangra was that the deceased was determined in his wishes and desires to transfer the properties to his wife, notwithstanding they did not accord with the views of his children. The deceased expressed a fear that his wife would not be protected immediately upon his death. Such fears apparently were not so farfetched as Wendy no longer resides in the matrimonial home. The plaintiffs say she voluntarily left the premises and sought rental accommodations, she says she was threatened and left out of fear. I am, on balance, inclined to believe the latter.

[14.] The law will presume undue influence based upon the nature of the relationship between the parties coupled with the nature of the transaction between the parties. The transaction may, on its face, call for some explanation. The conveyances were such that they cited the payment of a consideration of \$100,000 in each case, but was in fact an outright gift. The gift was not innocuous as the conveyance of his home represented a transfer of a portion of his estate to Wendy although not all of it. Additionally, he retained a life interest by way of joint tenancy. Whilst the parties here are husband and wife, and the transaction benefited the wife, there is no evidence of any involvement by her to trigger the presumption. Whilst the transaction did benefit the wife it was in keeping with the will settled by him since 2008 when he devised the property to her directly.

[15.] I am satisfied that even if this was a case of a presumption of undue influence, I would find that the presumption is rebutted on the basis of Eugene obtaining independent advice. Eugene was in fact he was the only person to obtain any advice. Wendy's case, which I accept as there is no credible evidence to the contrary, was that Wendy was unaware of the transfers to her by Eugene until after his death. Further, Eugene's initial wish and instructions to Mangra was to make an outright inter vivos gift to Wendy however Mangra advised against it and he, upon advice, conveyed the ownership into a joint tenancy. I am satisfied, upon Mangra's evidence that Eugene ***received advice from a third party before entering into the impugned transaction.***

[16.] I should state here that having observed the witnesses and their demeanor as they gave their evidence, I prefer the evidence of the defendant and her witnesses where they differed. In addition to the finding of independent advice, in all the circumstances I am satisfied, on balance, that the Defence has discharged the burden of proving that the gift to the defendant represented the true will of Eugene and was not the product of undue influence. I take note of the following: -

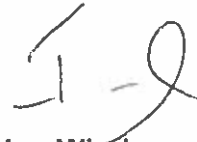
- a) The deceased was in control of his mental faculties in April and May 2009. All of the evidence points to this fact, including the medical evidence. This could not properly be a basis of contention as the standing of the plaintiffs to pursue this claim is founded on a Will executed on 12 May 2009 after the impugned conveyances were executed.
- b) The gift to the Defendant was, on the evidence, a decision made by Eugene with the intent of securing the Defendant's position against perceived threats by his children.
- c) The deceased spoke of this desire to give the property to the defendant independently with Charles Clarke, a friend of 70 years. He also spoke independently of his concern that the defendant be absolutely secure in her title to the property after his demise.
- d) The Plaintiff's desire that the defendant should have the property is consistent with his last will and testament made in March 2008. The

secretive nature of the transaction and securing them with Mangra is consistent with his belief as to the need to secure his wife's position.

- e) The outright gift to Wendy protected Eugene in the sense that he retained ownership for the rest of this life. Additionally, the fact that she was unaware of the transaction, a fact which I believe militates against any finding of any abuse of confidence or trust.

[17.] In all the circumstances therefore I dismiss the plaintiffs claim to have the conveyances of 29 April 2009 and 8 May 2009 rescinded on the grounds of undue influence.

Dated the 28<sup>th</sup> day of January 2019

A handwritten signature in black ink, appearing to read 'I. Winder', with a stylized flourish at the end.

**Ian Winder**

**Justice**