S.C.A. No. 01965

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Macdonald and Pace, JJ.A.

**BETWEEN:**

| | | |
|---|---|---|
| MARGARET MACDONALD<br><br>Appellant | ) | R. Malcolm MacLeod<br>for the appellant |
| | ) | Gerald P. Scanlan<br>for the respondent |
| - and - | ) | Appeal Heard:<br>January 23, 1989 |
| KATHLEEN JEANETTE CREELMAN<br><br>Respondent | ) | Judgment Delivered:<br>January 23, 1989 |

THE COURT: Appeal dismissed with costs per oral reasons for judgment of Jones, J.A.; Macdonald and Pace, JJ.A. concurring.

The reasons for judgment were delivered orally by:

JONES, J.A.:

This is an appeal from a decision of Mr. Justice Davison dismissing the appellant's action for a declaration that a deed given by the appellant to the respondent was void. The appellant is the respondent's mother.

The deed was drawn by a solicitor and executed in his presence. The appellant pleaded **non est factum** and undue influence. With regard to the plea of **non est factum** the trial judge stated:

> "It is the position of the plaintiff in this case that she signed a document which was 'radically different' from that which she intended to sign.
>
> With respect, I cannot agree with the position taken by the plaintiff. I accept the evidence of Mr. Kennedy who stated several times that there was no doubt in his mind that the plaintiff knew what she was doing when she signed the deed.
>
> Mrs. MacDonald was not a novice when it came to transactions involving the transfer of land and had been involved in several land transactions in the past. She was an alert woman who looked after her own affairs including payment of taxes and other expenses in connection with the house. She conducted her own banking and was independent of others in her day to day life."

In dealing with the plea of undue influence the trial judge stated:

> "As expressed earlier in this judgment, the plaintiff was independent and looked after

her own needs including her financial affairs. Shopping together did not connote any more than a normal mother-daughter relationship of affection and companionship.

The burden is on the plaintiff in the first instance to adduce evidence which establishes that the type of relationship exists whereby the donee is in a position to exercise 'undue' influence. Obviously, most people are influenced by those in close proximity but the influence has to be 'undue' in the sense the influence is being exercised for an unfair advantage either by reason of the dominant role of the expectant donee or the servient role of the donor or a combination of both factors.

In my opinion, the plaintiff has failed to prove that a relationship as described existed and has failed to prove any undue influence was exercised by the defendant on the plaintiff."

An examination of the evidence clearly shows that the appellant knew what she was doing when she signed the deed and that there was no undue influence exercised which led her to execute the document. As we agree with the conclusions of the trial judge the appeal is dismissed with costs.

J.A.

Concurred in:

Macdonald, J.A.

Pace, J.A.