Neutral Citation Number: [2009 IEHC 199

THE HIGH COURT

1999 941 P

BETWEEN

KEVIN PRENDERGAST AND MONICA JOYCE (SUING BY HER NIECE AND NEXT FRIEND EVELYN PRENDERGAST)

PLAINTIFFS

AND

DERMOT JOYCE, THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND AND ALLIED IRISH BANKS PLC

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 13th day of February, 2009

1. These proceedings centre around a series of banking transactions which occurred on the 21st January, 1998, in the Bank of Ireland and Allied Irish Bank branches in Claremorris, County Mayo, when the late Monica Joyce, transferred into joint accounts with the defendant Dermot Joyce, the sums of IR£94,974.22, IR£17,853.63 and IR£63.01 to a total of IR£112,890.86 being €143,341.82. That sum has since increased to approximately €157,000 through the accrual of interest.

2. The persons involved are the late Jack and Monica Joyce, Evelyn Prendergast, who is Monica Joyce's niece and the plaintiff in the proceedings [pursuant to order of this Court dated 29th July, 2008, made pursuant to O. 15, r. 37 of the Rules of the Superior Courts], and Dermot Joyce, the defendant herein who is a nephew of the late Jack Joyce. The second and third defendants have been permitted to withdraw from these proceedings on their undertaking to abide by the ruling of this court.

3. Jack Joyce (Jack) was born in 1919 and his wife Monica Joyce (Monica) in 1928. There was no issue of their marriage and in the 1950s Jack Joyce ran a small petrol station at Hollymount, which is located midway between Ballinrobe and Claremorris in the County of Mayo. The business was doing poorly and Jack and Monica emigrated to the United States of America where they remained until they returned to Ireland in 1973. Initially, they lived in a mobile home adjacent to the petrol station in Hollymount. In or about 1993, Jack and Monica constructed a house which was approximately eight miles from the garage premises, in Ballinastanford, Claremorris, County Mayo where previously they had had a second mobile home. It is clear that Jack and Monica Joyce were a very close couple and that Monica was effectively totally dependent on Jack.

4. The petrol business was not very successful earning approximately IR£500 gross per week. It appears that in the mid 1990s Monica became forgetful and when the new house had to be furnished in 1993, it was necessary for Mrs. Patsy Dalton, a family friend who met the couple daily on an ongoing basis, to undertake the work. She recalls, in evidence, that Monica did not always remember her name. She noticed from 1993 onwards that Monica's situation got progressively worse. Around Christmas time 1997, there was an incident when Monica was alone in the mobile home at Hollymount adjacent to the garage and Mrs. Dalton found her in a completely exasperated and agitated state. She had two gas rings on without them being lit and when Mrs. Dalton arrived she could not remember who she was. Mrs. Dalton recalled that she was annoyed with Jack because she had a serious concern that the mobile could have gone on fire. She had a discussion with Jack and he intimated to Mrs. Dalton that Monica did not know what she was doing. Her overall view was that between 1993 and 1997, Monica had deteriorated rapidly.

5. Jack was taken into hospital in early January, 1998, and suffered a heart attack after his admission. It was initially anticipated that he should go on to make a recovery but unfortunately, he died on 14th January, 1998. Mrs. Dalton described Monica at her husband's funeral as being in a state of complete shock. She appeared to be unaware that her husband had died and asked on a number of occasions as to where he was. At that time, Monica and Jack had moved to his niece Annie Walsh's house and Mrs. Dalton was very concerned that something should be done about looking after Monica.

6. As regards Monica's mental capacity, Mrs. Dalton, who had worked in the retail business all her life, stated that she would not at that time have let Monica look after the till in any of her shops. Monica was in her opinion "doolally" or out of her mind. From about the end of January, 1998, Monica was receiving 24 hour care from members of her family. By February she had commenced attending Ballindine Respite Home for people suffering from Alzheimer's disease.

7. To the best of Mrs. Dalton's knowledge, the only monies Monica had available to her were her social security pension which was approximately US$500 per month. Mrs. Dalton indicated that she never saw the defendant in the vicinity of Jack Joyce's petrol station.

8. Evelyn Prendergast, the plaintiff in these proceedings, and the niece of Monica Joyce, gave evidence that she lived just outside Claremorris. Kevin Prendergast was her uncle. She visited Jack and Monica over the years on a very regular basis. By 1997/98 Monica had become very forgetful. She remembers calling over one Friday in 1994/95 and she found Monica generally in a bad way. She was panicking, and did not remember what day it was.

9. The plaintiff attended at both the removal for Jack and his funeral, and said that Monica Joyce did not appear to realise what was going on. By the end of January or early February, 1998 Monica was receiving 24 hour care from her surrounding family. She had initially been staying with Annie Walsh and then went back to her own house for a few days, and then went to live for the rest of her life with her sister, Marian Prendergast, until she died on 5th January, 2005. It was necessary for the entire family to rally around her. Evelyn Prendergast confirms that within a short time of Jack's death Monica was attending at Ballindine Respite Home for people suffering from Alzheimer's disease.

10. The plaintiff recalled that the only monies which Monica had access to was the sum of US$500 per month, which came to her by way of a United States social security pension. She never saw the defendant working in Jack's garage. She was of the view that Monica was always anxious when left on her own, but when she was with Jack she was alright.

11. Seamus Hughes, an electrician by occupation, was a neighbour of Jack and Monica Joyce. From 1993 onwards, he was of the view that "Monica was not with it". She used to go to the shop and forget the articles which she wished to purchase. Kevin Prendergast used to work the pumps at the petrol station for Jack and while he did see the defendant in the vicinity of the petrol pumps from time to time, he appeared to be there to carry out repairs to his car and the like. Mr. Hughes never saw him dealing with customers. When the defendant came down from Dublin he stayed at the Rectory and Mr. Hughes was the caretaker and had the keys to the Rectory and his view was that the defendant used to come down every couple of months. He never saw him as such, working the petrol pumps. Mr. Hughes often had tea and sandwiches with Jack and Monica in the mobile home and on these occasions Jack used to do all of the preparation.

12. Ms. Catherine Burke was a tax adviser to Jack Joyce and completed his VAT returns every two months. In essence, she says that she was friends with Monica and Jack and every time Jack came to her for the purpose of doing the VAT returns, Monica accompanied him. This would have been a continuing situation from 1989 onwards. However, in 1995/1996, Ms. Burke became aware that Monica used to stay out in the car, while Jack came in to her with the books. On occasions when Ms. Burke used to go out to the car, she became aware that Monica did not realise what was going on. She often did not call Ms. Burke by her name and Jack indicated to her that he could not leave Monica alone at home. She attended at Jack's funeral and was of the view that Monica was in a daze.

13. The defendant gave evidence that he was a nephew of Jack Joyce's on the Joyce side. He enjoyed a close relationship with his uncle, his father having arranged an apprenticeship for Jack as a mechanic and having assisted him financially in the construction of the garage. The defendant lives in Sandymount, Dublin and is a retired stock controller by occupation. He describes Jack's business as being the sale of petrol, diesel, gas and agricultural diesel. He used to visit him very regularly and at weekends helped him with the pumps and he used to tidy up the showroom and he says that he also brought food for Jack and Monica. Since the early 1990s, he described how he could be down in Hollystown at the petrol pumps for twelve weekends during the summer. Some of the visits were simply to see how Jack and Monica were getting on and others were for the purpose of helping out with the petrol pumps. He says that he often took a week's holiday to let them get away and that on one occasion in 1994, he was on holidays in Morocco and he came back early to assist them. He describes how Jack and Monica used to come to Dublin to visit him and would often stay for a week to ten days.

14. At a time in the mid 1990s, Jack and Monica had the idea of buying an apartment in Sandymount to be close to him and they came to Dublin and stayed for a week, but then changed their minds, indicating that they would not be interested in leaving home. The defendant described how Jack used to indicate to him that he was better than a son to them. He described how, in the mid 1990s, Monica was forgetful. In 1996, Jack had asked him for information in relation to Alzheimer's disease and to post it on to him without any markings on the envelope. There was a reference to St. John of God's in Stillorgan, Co. Dublin and that Jack was anxious to get Monica to a doctor, but subsequently the defendant understood that Jack had brought Monica to the doctor and that it had been indicated that everything was okay.

15. He says that he never expected any payment for the work he did and that he did it because he wanted to help his uncle Jack. Around 1996/1997, Jack advised him that he had two accounts in the Bank of Ireland and Allied Irish Bank (AIB) in Claremorris, which contained approximately IR£112,000, and that he wanted the defendant to have this money. He says that Jack told him that nobody knew about the accounts, other than the two bank managers and that his intention was that the money would be transferred into the defendant's sole name.

16. The defendant indicates that in October, 1997 he was visiting again with Jack and Monica for a weekend and Jack told him again that he wanted him to have the monies in the joint accounts and that they must go to see Mr. Mellett in the Bank of Ireland in Claremorris, but this never actually happened.

17. The defendant spent New Year's Eve of 1997 with Jack and Monica and then returned to Dublin on Thursday 1st January, 1998. On Wednesday 7th January, 1998, he got a call from Michael Flynn to say that Jack was in hospital. He checked the situation and was advised that Jack was alright and on Friday 9th January, 1998, as he was driving down to see Jack, he was advised that he had suffered a heart attack. Subsequently, however, Jack appeared to be alright and the defendant stayed with Monica in The Traveller's Friend Hotel and visited Jack in hospital. On Friday 9th January, 1998, Jack asked him to stay behind at the hospital and said to him, "You have proved yourself". The defendant recalls Jack telling him that Monica would not need the money, as he had insurance with the 'Knights of Columbanus'. He says that Jack told him to go to the Bank of Ireland on Monday and see Séan Mellett and that he, Mr. Mellett, knew the arrangements and that Jack wanted the money put into the defendant's sole name. He says that he indicated to Jack that he did not want the money in his sole name, but either with Jack and Monica or with Monica and himself.

18. The following Monday, he went to the Bank of Ireland in Claremorris and met with Seán Mellett, who was already aware of Jack's wishes. He advised Mr. Mellett that he would prefer the account in the names of Monica and himself and Mr. Mellett agreed and indicated that he would telephone the defendant back the next day. A meeting was then arranged for the following Thursday 15th January, 1998. The defendant says that this had also been discussed the previous October with Monica, and Jack had said, in her presence, that these monies were to go to the defendant, and Monica was in agreement. He says that Jack had previously asked him to arrange his funeral and that he wanted to be buried with his mother and the previous October he had gone with Jack to the graveyard and checked out the grave where he was to be buried. Unfortunately, Jack died on Wednesday 14th January, 1998, and Mr. Mellett rang cancelling the meeting planned for the 15th. The meeting was rearranged for 21st January, 1998. The defendant attended the funeral, which he and Kevin Prendergast arranged. The removal was on 16th January and the funeral itself was on 17th January, 1998. He describes Monica as having been in a state of shock and at that stage she was staying with Annie Walsh. He says that Jack wanted Monica to be looked after by Annie Walsh. The only change he noticed in Monica at Jack's funeral was that she was shocked.

19. On 19th January, 1998, the defendant went to see Dr. William O'Connor, a medical doctor practising in Hollymount, Claremorris, County Mayo, who was Jack and Monica's General Practitioner. He says he went there to find out about getting a death certificate and as to how Monica was.

20. On Tuesday 20th January, 1998, following on Jack's instructions, he went to see Catherine Clancy, the manager of

AIB in Ballinrobe. He lodged approximately IR£11,500 of Jack's money to a current account and he says that he was aware that Jack had previously told Ms. Clancy that he wanted the defendant to have everything. Subsequently, on 21st January, 1998, he brought Monica into the Bank of Ireland in Claremorris, and there were interviews with Joe Daly of Bank of Ireland Lifetimes from Eyre Square, Galway. He says that Monica was in agreement that the money in the joint account be transferred into another joint account with him and invested in a Lifetimes Bank of Ireland product. The paperwork was filled out and completed and the meeting lasted approximately an hour.

21. He then took Monica for lunch and then went to the AIB in Claremorris where they met with a Mr. Glynn, and the monies in the joint accounts as held by Jack and Monica in AIB Claremorris, were transferred into a new joint account in the names of Monica and the defendant. As in the case of the Bank of Ireland transaction, the account could not be accessed by one signatory alone; the signatures of both were required to withdraw funds. The defendant says that Catherine Clancy asked that Mr. Glynn of the AIB in Claremorris would give her a ring when he and Monica went in to the Bank to complete the transfer and this was done. The transaction lasted approximately half an hour and then the defendant brought Monica to see the solicitors Maguire and Brennan in Claremorris about Jack's will and then he brought Monica back out to Annie Walsh's. His view was that while Monica was forgetful, she understood what she was doing, both in the Bank of Ireland and in AIB. Monica was only following Jack's instructions and, in particular, Jack had indicated that he did not want the monies in these accounts to go to the Prendergast side of the family. He says that Monica went into both banks freely with him and was only doing what Jack had said to her the previous October.

22. The defendant did not see much of Monica after the monies were transferred into their joint names. He was of the view that Jack wanted him to have everything regardless of Monica and accepted that Jack could have done this by way of a will. He was of the view that Jack had made an alternative will, but this had never been located.

23. He accepts that Jack cared very deeply for Monica and was concerned for her. He also accepts that Monica, after Jack's death, never had the use of any of the money in the three joint bank accounts and derived no benefit therefrom. He accepts that the transfers of money on 21st January, 1998, were hugely important transactions for Monica. He was not able to offer any explanation as to why he had not explained to Dr. O'Connor what he was about, when he went in to see him on 19th January, 1998. He was unable to offer any clear explanation as to why the AIB joint accounts were not revealed until February, 2001 other than that he was following his uncle Jack's instructions, Jack having expressed a wish that the accounts should remain a secret.

24. The defendant states that he would not have brought Monica into the two banks if he had thought she was vulnerable. His view was that she was in a fit condition and was fine on the day. He was of the view that a person could not be described as elderly at seventy years of age. His own view was that somebody would be elderly when they were 80 to 85 years of age.

25. Ms. Clancy, the manager with AIB in Ballinrobe, told the court that the late Jack Joyce had two accounts with her: a business account and a deposit account. The business account was constantly under pressure. She did not have any significant dealings with Monica, but she did meet the defendant on two occasions, approximately four years before Jack died, in Jack's company in AIB bank in Ballinrobe. She recalled that Jack indicated that he wanted the defendant to have everything when he passed away. Ms. Clancy accepted that it happens that people indicate in her presence that they want someone else to inherit their estate, but that is not always the way it works out.

26. Seán Mellett told the court that he was the manager of the Bank of Ireland in Claremorris for six years from 1994 to 2000. He recalled Jack vividly and described him as an entertaining man. He used to talk a lot and Mr. Mellett recalled that any dealings with him always took a lot of time. He met Monica with Jack, possibly two or three times. Between the years 1996 and 1998, he was clear in his recollection that Jack wanted the money in the joint account to go to the defendant. The account was in joint names and either could withdraw the cash at any time. Jack had intimated to him that the defendant would look after Monica and that he wanted him to be the beneficial owner of the money. He did not want members of the Prendergast family to benefit from the money and was of the view that the defendant would look after Monica after he passed on. Mr. Mellett was aware that Jack and Monica were a very loving couple and that Monica agreed with whatever Jack said. On occasion when he met with Monica, he found her to be forgetful and accepted that she appeared to have memory problems.

27. When the defendant came to see him on 12th January, 1998, he indicated that he was not totally satisfied about having the money in his own name. The joint account was effectively dormant and Mr. Mellett accepts that he probably did not have any written instructions. Following his consultation with the defendant, he had been in touch with Joseph Daly from Bank of Ireland Lifetimes in Galway and a meeting was set up for the following Thursday 15th January, 1998, to discuss the product. Mr. Mellett confirmed that he had never previously met the defendant, and the first time he met him was when he came in to see him on 12th January, 1998. He understood that he had Jack's verbal instructions to discuss the account with him.

28. He accepts that he did not know Monica at all and from the banking perspective he would accept that she could fairly be described as being elderly and he also accepted that, four days after having buried her husband, she was vulnerable. Mr. Mellett accepted that the transaction was completely improvident from the point of view of Monica, that there was a very substantial sum of money involved and that looking back on the situation it "looks bad".

29. Dr. William O'Connor was the first witness to give evidence and he did so on the plaintiff's behalf. In or about 1995, he describes Monica from the medical aspect as being very frail, depressed, severely anxious, suffering from poor concentration and memory, a person who was dependent on her husband for support. As early as March, 1995 he expressed the view in his medical notes that Monica might be senile. She was taking Prozac for depression, had attended a psychiatrist, and was taking Valium and sleeping pills. This situation generally continued between 1995 and 1998, with no improvement. In his opinion, she was a person who was not well physically or mentally, and following the death of her husband she made an unbelievable decline. In his view it is doubtful that she was capable of understanding the impugned transactions on 21st January, 1998, though he did not examine her on that date.

30. Dr. O'Connor remembered the defendant coming to see him on 19th January 1998, and he was of the view that he had come to discuss Monica's affairs, and there was a discussion about the necessity for ongoing care for Monica. His recollection of that meeting is that he felt uncomfortable about it. He had a discussion on 5th February, 1998, with Kevin Prendergast, and he advised Kevin that medically, Monica was not fit to live alone or make any decisions about her future. Subsequently, he got a call to visit Monica who was, at this stage, staying with Kevin, and he found her disturbed and

anxious, agitated and generally unwell, and he was satisfied that she had had an anxiety attack. Around the time of the funeral and as of 5th February, 1998, Monica would not have had the capacity to transact business. On 17th February, 1998, Dr. O'Connor, following an examination, declared Monica unfit to understand a legal document or execute a will.

Wills
31. Both Jack and Monica made wills. Jack's will was made on 15th August, 1977, and he left everything he would die possessed of, or entitled to, to Monica, absolutely. Should Monica pre-decease him, and in that event only, he left his property at Ballinastanford to Monica's nephew, Gerard Prendergast, and left his property at Hollymount to his nephew, the defendant. The balance of the estate was to be divided equally as tenants in common between eight parties, being his nephews and nieces on both the Joyce and Prendergast sides of the family, not including the defendant. In respect of this latter devise, it was specifically set out that this was only to take effect if Monica pre-deceased him. He appointed Monica and her brother, Kevin Prendergast, as joint executors.

32. Monica made her last will on 10th July, 1979, and she left everything she would die possessed of, or entitled to, to Jack, absolutely. In the event of Jack pre-deceasing her, and in this event only, she left her entire estate to be divided between the same eight nephews and nieces, not including the defendant, as set out in Jack's will and she appointed her husband, Jack, and her brother, Kevin Prendergast, as joint executors.

Submissions of the parties
33. The plaintiff contends that there was a total failure of consideration in relation to the transfer. Further, the relationship between donor and donee, coupled with the substantial benefit obtained, gave rise to a presumption of undue influence. The defendant's evidence did not rebut that presumption. The transaction was improvident. It was not based on adequate legal or other advice and the donor was elderly and vulnerable at the time.

34. The defendant contends that the presumption of undue influence does not arise. His relationship with Monica was not sufficiently close to give rise to the presumption, and there was no evidence of actual undue influence. Even if the presumption arose, however, it was rebutted by independent advice and by evidence consistent with an explanation other than undue influence as the basis for the transfer. The defendant had not acted improperly or unfairly since he had only accepted a transfer into a joint account with the donor. Jack Joyce had intended him to have the money in his sole name, and Monica probably would have agreed. The gift was motivated by natural love and affection, as well as by a desire to recompense the defendant for his work and assistance from 1989 to 1997. In addition, he had taken monies arising from Jack's business from Annie Walsh's house, where Jack and Monica had been staying, and had used them to discharge the overdraft on Jack's business account, rather than misappropriating them for his own use. In view of these considerations, the plaintiff could only succeed if it could be established that the defendant held the monies on a resulting trust for his aunt. Such a conclusion would run contrary to her stated intention.

Joint accounts
35. Before the court goes on to consider the issue of undue influence, it should first be recalled that the money transferred to the defendant came from the joint accounts of Jack and Monica Joyce. A question arises as to whether the money transferred was in fact hers to give at the time she transferred it. In *Lynch v. Burke* [1995] 2 I.R. 159 the deceased had made a will leaving all her property to the plaintiff, her sister. Two months later however, she opened a joint deposit account with the first defendant, her niece, and lodged sums to it. The deposit book for the account was endorsed with the words "Payable to Frances McFadden [the deceased] only or survivor" (emphasis in original).

36. The Supreme Court held that the contract between the deceased and the bank concerning the joint account had the effect that during her lifetime only the deceased could make withdrawals from the account. After her death, however, the first defendant would become entitled to the balance on the accounts. While there was a presumption that she held that sum on trust for the estate of the deceased, that presumption could be rebutted by proof of a contrary intention on the part of the deceased. Because on the evidence she had intended the first defendant to have the beneficial interest in the money, that presumption was rebutted. By her presence and signature the first defendant had become a party to the contract between the bank and the deceased. She had acquired a legal interest in the money either by virtue of that fact or because it constituted a gift to her subject to the contingency of her aunt's death.

37. In the instant case similar principles fall to be applied. Legal title to the chose in action represented by the balance in the accounts would have passed to Monica on her husband's death by survivorship in accordance with the contracts governing the accounts. Furthermore, unlike the situation in *Lynch*, she had the same rights of access to the accounts as her husband, being able to withdraw funds from them without his consent. In those circumstances, although the court does not have evidence before it on the question, it is probable that she was a party to the contracts with the banks concerning these accounts, making the banks liable to both account holders. In any event, the defendant has properly conceded that the sums held in the accounts devolved to Monica as surviving joint account holder on Jack's death.

38. Even if she acquired the legal interest on Jack's death subject to a resulting trust of all or part of the monies in favour of his estate, Monica was the sole beneficiary under his will, inheriting everything he died possessed of or entitled to. Accordingly, despite the evidence to the effect that Jack Joyce had expressed a desire that his nephew, the defendant herein, should have the sums of money in the accounts, Monica was entitled to them on Jack's death. Evelyn Prendergast is therefore entitled, in her capacity as administrator of the estate of Monica Joyce, to challenge the transfer to the defendant. No argument was addressed to the court on behalf of the plaintiff as to the presumption of advancement and, in the light of Monica's clear entitlement to the monies, this aspect need not be considered.

Does the presumption of undue influence arise?
39. In determining whether the transaction in this case should be set aside for undue influence, the court must first consider whether the circumstances are such as to justify a presumption of undue influence. This issue was addressed in *Carroll v. Carroll* [1999] 4 I.R. 241, in which Denham J. (with whose judgment Lynch and Barron JJ agreed) quoted with approval (at pp. 253-254) the following passage from the judgment of Cotton L.J. in *Allcard v. Skinner* (1887) 36 Ch. D. 145 at p. 171:-

> "The question is - Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes - First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for

> the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case 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 justifies the Court in holding that the gift was the result of a free exercise of the donor's will….In the second class of cases 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."

40. The categories of relationship to which the presumption applies are neither closed nor rigid (*McGonigle v. Black* (Unreported, High Court, Barr J., 14th November, 1988)). In *McGonigle* the presumption applied in the context of a friendship between the lonely and vulnerable donor of the land concerned, who could not cope well without support and had resorted to alcohol abuse, and a friend who lived nearby, who had frequent contact with him and provided him with some home comforts. In the context of the instant case, it is appropriate to recall that the presumption has been applied in the context of a relationship between an aunt and her nephew by marriage (*Inche Noriah v. Shaik Allie Bin Omar* [1929] A.C. 127) and even as between a man and his great nephew (*Cheese v. Thomas* [1994] 1 W.L.R. 129). This is not to suggest that it would apply in all such relationships: leaving aside those categories of relationship which, by their nature, automatically raise the presumption of undue influence, the question of whether the presumption applies depends on the particular circumstances of the case. As Budd J. said in *Gregg v. Kidd* [1956] I.R. 183 at p. 195:-

> "The influence may arise or be acquired in many ways, such as through disparity of age or the mental or physical incapacity of the donor or, indeed, out of a mere dependence upon the kindness and assistance of another. To bring the principle into play it must be shown that the opportunity for the exercise of the influence or ascendancy on the donor existed, as where the parties reside together or meet frequently. While close family relationship creates a situation where influence is readily acquired, mere blood relationship is not sufficient of itself to call the principle into play; it must be shown that the actual relations between the parties give rise to a presumption of influence."

Furthermore, as Denham J. observed in *Carroll* at p. 249:-

> "Counsel for the defendant, in oral submissions, on the issue of undue influence quite correctly accepted that the relationship between Thomas Carroll senior and Thomas Carroll junior and the circumstances in which Thomas Carroll senior found himself were such as to raise the presumption of undue influence."

41. It is clear from the passages quoted that the presumption arises from the actual relationship between donor and donee at or shortly before the time of the impugned transaction, coupled with the circumstances of the parties relevant to the acquisition of a position of influence, including the age, position in life, state of health and other particular vulnerabilities of the donor. This is probably because these and other vulnerabilities can give rise to a degree of influence over the donor in a relationship where no such influence would arise if both parties were of the same capacity and in the same position to protect their interests.

42. The transaction occurred within close proximity of the funeral of Monica Joyce's husband, with whom she had enjoyed a very close relationship and on whom she had depended very greatly. She was described as having been in a state of shock at the funeral. In the immediate aftermath of her loss she was clearly vulnerable. That, however, is only part of the picture. Her vulnerability was compounded by the progressive deterioration of her mental condition. From 1993 onwards those who had contact with her noticed that she was becoming forgetful. The evidence discloses that in the years that followed she experienced periods of confusion and agitation. She became unable to care for herself even before her husband's death. Within a short time thereafter she needed 24-hour care. The full extent of the deterioration in her health is reflected in the fact that she began to attend a respite home for sufferers of Alzheimer's disease shortly after Jack Joyce's death.

43. In addition, she was 70 years of age at the time of the transfer. The defendant did not consider this to be elderly, although Mr. Mellett, the bank manager, took a different view. In my view, at 70 her age is not as weighty a factor as it would be if she were 75 years or older, but it is a factor that has to be borne in mind. Significant disparities in age have, in combination with other factors, contributed to the conclusion that a presumption of undue influence arises (see for example In *re Craig, deceased; Meneces v. Middleton* [1971] Ch 95). In *Cheese* Sir Donald Nicholls V-C, with whom the other members of the Court of Appeal agreed, noted at p. 133:-

> "It was common ground that the relationship between the two of them was of a fiduciary character: they were close, Mr. Thomas was considerably younger, and he had business experience and a degree of actual influence over Mr. Cheese. Undue influence was therefore to be presumed."

44. In view of Monica's age and state of health she was undoubtedly vulnerable to exploitation, in particular at the hands of persons she was close to. I do not accept that the defendant's relationship with her and Jack was as close as the defendant maintained, but there was an ongoing family relationship between Jack and his nephew, the defendant, and this is evidenced in the will of the late Jack Joyce wherein, in the event that Monica pre-deceased him, he left his property at Hollymount to the defendant, but only in the event that Monica pre-deceased him. I am satisfied that the defendant did keep in reasonably regular contact with his uncle Jack, and that he did visit for weekends, but I am not satisfied apart from a very infrequent occasion that he helped out by manning the sales in the business in Hollymount. He may well have been around the premises from time to time, but the evidence of Patsy Dalton, Evelyn Prendergast and Seamus Hughes satisfies me that he did not, as such, regularly help out with the sales aspect of Jack Joyce's business. Further, I do not accept that he visited his uncle as regularly as indicated by him: such visits were probably on an infrequent basis. I do not accept the evidence of the defendant that Jack and Monica Joyce went to Dublin in the early 1990s with the intention of buying an apartment in Sandymount, Dublin, or that Jack and Monica Joyce would visit Dublin and stay for periods in the region of ten to twelve days. The defendant did travel some distance to visit his uncle during his illness and arranged his funeral with Kevin Prendergast. All the circumstances taken together are consistent with the view that he occupied a position of trust in relation to his uncle. I accept the evidence that Monica was inclined to agree with everything Jack said. It seems reasonable to infer from this that she would tend to repose trust in those in whom her husband trusted, provided that she herself was familiar with them. Further, the defendant was a nephew of the couple and was well known to them.

45. Monica's state of health should also be borne in mind. I am satisfied that from in or about 1993 or 1994, she was beginning to fail healthwise, both mentally and physically, and that this was a cause of concern to Jack. In particular, I am satisfied to accept the evidence of Dr. William O'Connor that by 1995, Monica was very frail, depressed, and severely anxious, and suffered from poor concentration and memory. She was taking Prozac for depression, had attended a psychiatrist and was taking Valium and needed sleeping pills to assist her with sleep. I am satisfied that her husband had to accompany her most places when she left the family home and that she was reliant on his support and he was reluctant to leave her on her own.

46. Her state of health exposed her to potential exploitation by those in a relationship of trust with her. The impairment of her mind can only have made her more subject to exploitation and less capable of defending her own interests. In these circumstances I am satisfied that the nature of the relationship between the defendant and his aunt, and her position and condition at the time of the transaction, were such as to give rise to a presumption of undue influence.

47. I appreciate that the presumption is inapplicable in a case in which the full facts are known to the court (*Carroll* at pp. 263-264, per Barron J. (with whose judgment Lynch J. agreed)). However, in that case Barron J. held, at p. 265, that the presumption applied because the evidence adduced left

> "a clear doubt as to whether the donor knew what he was doing and also as to what was his real intention."

I do not consider the court can be satisfied that all the relevant facts are known in the present case, in light of the fact that the donor Monica is now deceased and was at the time of the transaction suffering from a progressive and serious deterioration of her mental faculties such as to call into question her capacity to understand the transaction at issue. A clear doubt of the kind referred to in *Carroll* therefore exists. As Barron J. made clear in that case, at p. 264, the presumption still has a function to perform where an element of doubt is present:-

> "when all the facts are known surrounding the execution of the impugned document and these show that the donee exercised no influence over the donor then there is no ground to set the deed aside.
>
> In the ordinary way, the person seeking to set aside a voluntary deed does not know all the circumstances surrounding the execution of the document. Accordingly, where the relationship between the donor and donee suggests that the deed might have been procured by undue influence, a presumption arises and the onus of rebutting it is placed upon the donee….The presumption is important when all the facts are not known. It cannot be rebutted until all the gaps in the evidence are filled and the evidence then denies the existence of any undue influence."

48. An objection was raised to the application of the presumption in the present case on the basis of the following passage from the judgment of Lord Scarman in *National Westminster Bank Ltd. v. Morgan* [1985] A.C. 686 at 704:-

> "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."

The court is satisfied however that this passage does not correctly state the law in this jurisdiction. It posits that the presumption can arise only where the transaction "constituted an *advantage taken* of the person subjected to the influence" (emphasis added). This statement calls to mind the argument on behalf of the defendant in *Carroll* that, because the evidence did not establish that the donee had acted improperly, the presumption had been rebutted. Denham J. rejected this contention, noting that it seemed to confuse the concepts of actual and presumed undue influence. It is clear from the judgment of Denham J. in *Carroll* (in the passage quoted in the paragraph below herein) that the existence of the relationship, combined with the conferring of a substantial benefit, gives rise to the presumption without more. The judgment of Barron J. in that case is also instructive in this regard, wherein he states at p. 265:-

> "In the present case, the defendant relies essentially on three matters. The first is that the plaintiffs accept that their brother did not do anything improper. That alone is insufficient. As I have already indicated the evidence does not show clearly why the donor did what he did, that he knew what he was doing, and that it was the free exercise of his will."

Furthermore, as Denham J. noted at p. 257:-

> "In this case, the presumption existing, it was then necessary to conduct a careful analysis of the facts. On the facts it was a matter of determining if the donee, Thomas Carroll junior, had taken advantage of his position or had been assiduous not to do so. *This was not a case where the issue was whether Thomas Carroll junior had taken advantage of his position expressly. Rather it was a case where in the circumstances assiduous care should have been taken not to take advantage of the position of Thomas Carroll senior*" (emphasis added).

The transaction was set aside on the ground of undue influence in that case even though it was expressly accepted by the plaintiffs that their brother had not exercised any improper pressure. Returning to first principles, the definitive statement of Cotton L.J. in *Allcard* on the classes of undue influence is to the same effect: the presumption arises as a matter of public policy and to prevent such relationships from being abused. It achieves this objective by placing a burden on the donee to prove that the transaction did not result from the exercise of undue influence. It seems wholly contrary to the decision in *Carroll*, and detrimental to the public policy objective stated in *Allcard*, to adhere to the reasoning of Lord Scarman. The passage quoted from his judgment seems to impose an additional requirement that it be proved that the transaction was procured through misconduct, a requirement not endorsed in *Carroll*. Accordingly I do not propose to follow *National Westminster Bank Ltd. v. Morgan*.

In the particular circumstances of this case, for the reasons as set out, I am satisfied that the presumption of undue influence arises.

Has the presumption of undue influence been rebutted?
49. In *Carroll* Denham J. approved and applied at p. 254 the following passage from Delany, *Equity and the Law of Trusts in the Republic of Ireland* (1st Ed., Dublin, 1996) at p. 482:-

> "Once a relationship giving rise to a presumption of undue influence is established, and it is shown that a 'substantial benefit' has been obtained, the onus lies on the donee to establish that the gift or transaction resulted from the 'free exercise of the donor's will'. As Dixon J. put it in *Johnson v. Butress*, the evidence must establish that the gift was 'the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee'. The manner in which this presumption may be rebutted relates to two main issues; first, the question of whether independent legal advice has been received and secondly, whether it can be shown that the decision to make the gift or transfer was 'a spontaneous and independent act' or that the donor 'acted of his own free will'."

50. In the present case the defendant has received a substantial benefit and the presumption of undue influence applies. Accordingly, the defendant carries the onus of proof referred to in the above quoted passage. There is evidence to suggest that Jack Joyce had conversations with third parties concerning the transfer of monies and/or his estate to the defendant. Jack Joyce may well have had discussions with him to the effect that he wanted him to have the monies in the joint accounts. However, up to the time of his death no actual transfer took place. On the balance of probabilities, I doubt that Jack would have deprived Monica of the use of the monies in the joint accounts because to do so would have denied her access to the great majority of the funds available to her exactly at the time when she found herself without the assistance and support of her husband on which she relied so heavily. I am fortified in this view because on the evidence of Seán Mellett, the Manager at Bank of Ireland, Claremorris, the manner in which the joint deposit account had been set up allowed for either person to withdraw any amount, including the entire amount, from the account. Accordingly, Jack Joyce could, at any stage during the 1990s, have signed the necessary withdrawal docket and simply given the defendant a portion of or the entire of the monies in the joint deposit account with Bank of Ireland. There was, in fact, no need to advise Monica as to what he was doing, and yet he never took such a step. Furthermore, when he was ill in hospital shortly prior to his death, he must have known, as was the factual situation, that he could have directed Monica to go to the bank and sign the appropriate withdrawal form so as to transfer part of or the entire of the monies in the joint deposit account to the defendant, and there is no evidence that any such discussion occurred and it was, at all times, open to Monica to have gone to the Bank of Ireland with the defendant, on 12th January, 1998, and to have met with Seán Mellett, the manager, and signed the necessary documentation. It is furthermore clear from the last will and testament of Jack Joyce, particularly in the manner in which the will is worded, that he wished to leave everything he died possessed of to Monica absolutely.

51. Accordingly, I find, as a fact, that while Jack Joyce may have indicated to Seán Mellett of the Bank of Ireland, Claremorris, and to Ms. Clancy, the manager of AIB in Ballinrobe, that he wished the defendant to have everything when he passed away and/or that he wished him to have the entire of the monies in the joint deposit accounts, he did not mean what he was saying because, in fact, he had every opportunity to do so in respect of the joint accounts and never availed of that opportunity and insofar as his last will and testament is concerned, he left no bequest to the defendant other than his property at Hollymount in the event that Monica pre-deceased him, which did not occur.

52. However, even if I had taken the view that Jack had harboured such an intention, that could not be such as to rebut the presumption because Jack Joyce was not the donor of the monies involved. Although Monica may have confirmed her agreement to the transfer some three months prior to her husband's death, for a number of reasons I do not consider any real weight can be attached to such a situation. The evidence establishes that she tended to agree with everything Jack said, at least insofar as business and banking affairs were concerned. In addition, she could not speak freely on this occasion. The intended beneficiary, the defendant, was actually present when the point was raised, and Monica was not being invited to give her assent in any way or by any means which could be such as to bind her. It would be patently unfair to hold her to an assent given in such circumstances. Furthermore there is no evidence available to suggest that Jack ever directed Monica at any time to transfer the monies in the three joint accounts to the defendant.

53. Although I consider this sufficient to dispose of the assertion that Jack and Monica had expressed an intention to transfer the monies to the defendant, it should be added that Monica's mental impairment was already well advanced by October 1997, and, for the reasons stated below, the court does not accept that she had had the benefit of independent advice.

54. A contrary submission was advanced on behalf of the defendant, who asserted that Mr. Mellett of the Bank of Ireland had provided the requisite independent advice. A year or two prior to the impugned transactions, he had discussed with Jack and Monica the proposal to transfer the monies into the sole name of the defendant. The transaction was also explained to Monica by Mr. Mellett on the day the transfer was effected.

55. In the context of a person in Monica's state of mental health, I am unable to conclude that on the balance of probabilities she would recall the content of a discussion that took place a year or two prior to the transactions. Even if she did, neither that discussion nor the explanation Mr. Mellett is said to have given her on the occasion of the impugned transaction would have been sufficient to satisfy the requirement as to independent advice. In *Inche Noriah* at pp. 135-136, Lord Hailsham L.C., delivering the judgment of the Privy Council, stated:-

> "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 Court that the donor was acting independently of any influence from the donee 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 the presumption. But the fact to be established is that stated in the judgment already cited of Cotton L.J., 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 advice must be received in order to satisfy the rule in cases where 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."

56. Denham J. quoted this passage with apparent approval in *Carroll*. The judgment of Barron J. in that case is also instructive. He stated at p. 265 that it was clear from *Gregg* that:-

> "(1) a solicitor who acts for both parties cannot be independent of the donee in fact; and
>
> (2) to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing it should be established 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. Further, the advice must be given with a knowledge of all relevant circumstances and must be such as a competent advisor would give if acting solely in the interests of the donor.
>
> Accepting these principles, there can have been no independent advice given by Mr. Joyce since at best he was acting for both parties. In any event his evidence was lacking in two important respects:-
>
> (1) he did not have knowledge of all the relevant circumstances; and
>
> (2) he did not give advice, he merely set out to carry out the donor's instructions."

57. I am not to be taken as suggesting that Mr. Mellett acted otherwise than *bona fide* in relation to this transaction. However, his intervention in the present case was not sufficient to comply with the principles established by the above authorities. He had a financial interest in the transaction, in that he had targets to meet in regard to the number of transactions he oversaw. The defendant argued that this was immaterial, since he would have benefited in the same way if Monica had transferred the monies into a product in her sole name. No doubt that is so, but the argument presumes that there was a possibility such an alternative transaction might take place. It may well be that there would have been no investment in the financial product at issue, and indeed no transaction of any kind, if the impugned transfer had not gone ahead as planned. It has not even been suggested that the proposal to invest the money in a financial product came from Monica. Even if she had been fully aware of the nature of what she was doing I see no reason to believe that she would have contemplated entering into a transaction which left the money in her name but in a different form. Had she been advised to consider keeping the money in a financial product in her own name I consider it probable that she would not have transferred the money from her account at all. Mr. Mellett's understanding of the reason for the transaction was that it was intended to benefit the defendant, and he had no reason to suppose that the donor would have considered an alternative transaction wholly inconsistent with that intention if recommended. Accordingly, it seems probable that no alternative transaction would have occurred, and this would have impacted adversely on Mr. Mellett's business targets. Again I do not wish to call his motives into question, but in circumstances where the purportedly independent advisor has an interest in the transaction, his advice cannot be said to meet the criteria of independence referred to in the authorities.

58. In addition, Mr. Mellett was aware of the supposed intention of Jack Joyce that the money should pass to the defendant. When pressed in cross-examination as to why the transaction had proceeded even though the money had passed to Monica, he indicated that it was Jack Joyce's intention that the defendant should have the money in the joint account. I do not think I am being unfair to him in suggesting that, having discussed it with Jack and the defendant, he approached the matter with a preconception that the transaction should go ahead. It would appear that he saw his role in this context as helping to give effect to the expressed intention of Jack Joyce. Considering that this was the objective he had in view, the court is not satisfied that he gave sufficient consideration to the interests of the donor.

59. In addition, he did not know Monica beyond having met her briefly on just a few occasions. He does not appear to have known or inquired into the nature or extent of her other assets, nor was he aware of the extent of her mental impairment and her consequently greater need for advice and protection in financial matters.

60. It should be noted that the focus in this regard is on ensuring that the particular donor fully appreciates the quality of the transaction. This means that greater care must be taken to ensure that persons who are particularly susceptible to exploitation, such as those who are aged, or suffer from ill health, or are vulnerable, genuinely understand the nature and effect of the transactions into which they enter, particularly when those transactions are of substantial value. The advice must also be such as a competent advisor would give if acting solely in the interests of the donor. In my view a person in such a position *vis-à-vis* Monica Joyce would of necessity have cautioned her about the gravity of what she was doing. The evidence does not establish that this was done in the present case and indeed it has not been suggested that it was. I am not satisfied on the evidence that Monica Joyce received adequate independent expert advice to give her a full appreciation of what she was doing at the time she gave effect to the transfer.

61. The courts do not demand "absolute disproof" of undue influence in order to rebut the presumption (*Provincial Bank of Ireland v. McKeever* [1941] I.R. 471). The defendant argued that, in all the circumstances of this case, the court should find that the presumption has been rebutted.

62. It was submitted that Monica Joyce was mentally fit to carry out the transfer on the date in question. Both the defendant and Mr. Mellett were satisfied of this, and no-one else had given evidence as to Monica's mental state on the particular day of the transfer.

63. In my view this suggestion seeks to isolate that particular day from the overall context of the lengthy and progressive deterioration of her mind. It is a fallacy to suggest that she was mentally fit to give effect to the transfer when the circumstances surrounding it are considered. Dr. O'Connor gave evidence that, in his professional opinion, it is doubtful that Monica was capable of understanding the transaction she entered into on 21st January, 1998. Much was made of the fact he had previously stated that he could not "express a categorical opinion" in that regard, since he had not seen her on the day of the transaction. However, it does not follow that he could not express an opinion on the balance of probabilities, based on his knowledge of Monica since 1995 as her doctor. Furthermore, he examined her on 3rd February, 1998, and concluded that she was incapable of living alone or making her own decisions, a conclusion he later expressed to her brother Kevin Prendergast. On 17th February he conducted a mental state examination and concluded she was unfit to understand a legal document or execute a will. The defendant pointed to the gap of two weeks between the transaction and the doctor's conclusion, and the 27 days between the transaction and the mental state examination.

64. In context however these periods are very unlikely to have had any real bearing on her condition. The mere fact that it was not formally pronounced upon until a short time after the transaction does not mean that the impairment of her mind was not present at the relevant time. Viewed against the background of her illness, such short periods of time are of little relevance. The donor had been suffering from a mental impairment at least since 1993, a condition which progressively deteriorated over the years that followed. It was suggested she could not be left in charge of a till or a kettle by the beginning of 1998, a conclusion which seems consistent with the expert evidence of her regular doctor. Like Budd J. in *Gregg*, I am inclined to give more weight to the opinions of her regular doctor than those of persons who were not sufficiently familiar with her circumstances to correctly evaluate her mental state.

65. In *Gregg*, Budd J. was concerned with a deed executed by a man who suffered from a disease of the mind that left him with occasional periods of lucidity. Budd J. observed at p. 197:-

> "I believe that his capacity to make rational decisions was by the autumn, definitely impaired and that his capacity to resist influence and suggestions was very slight and easily overcome. At times, I think, he might have been fit to make a simple officious will or simple disposition of his property if uninfluenced and properly advised, but it would, in my view, have been difficult to discover just when he was in that condition and equally difficult to bring him to a full understanding of the transaction. Someone well acquainted with him would obviously be the best person to make the attempt, but even such a person would require to exercise care and patience in examining him before coming to a conclusion as to his capacity. Even if he could be shown to have had the capacity to bring a reasoning mind to bear on such a disposition there would still remain the formidable difficulty of ascertaining and ensuring that his mind was emancipated from the influence and dominion of others alleged to have existed."

66. The same considerations apply in the context of the donor's state of health in the present case. The defendant was the only person well acquainted with her who had the opportunity to observe her mental state on the date of the transaction. It has not been suggested that he undertook a patient and careful examination of her to ascertain whether she was fit to proceed, albeit that he, like Mr. Mellett, thought she understood what it entailed. The evidence of her doctor however, together with the long progression of her illness over the preceding years and the effect on her mental state of the recent death of her husband, leads to the conclusion that the donor was on the balance of probabilities incapable of fully understanding what she was doing on 21st January, 1998.

67. I do not overlook the letter of 15th June, 1998, from Maguire & Brennan, solicitors for Monica Joyce, to the Bank of Ireland. That letter states that the solicitors received instructions from Monica Joyce and Kevin Prendergast to the effect that the money should be placed in an account in the sole name of the former. That letter was a response to Mr. Mellett's letter of 27th March, 1998. Accordingly, it is said that at some point between those two dates Monica must have been capable of giving instructions. I accord little merit, however, to this matter when weighed against the cogent and persuasive evidence given as to her mental state nearer to the time of the transaction, in particular the evidence of Dr. O'Connor. It may be that when these instructions were given to her solicitors, she had enjoyed at least some amelioration in her condition, perhaps due to the intervention of the respite home and the period that had elapsed since the death of her husband. While this is speculative, I mention it only to indicate that there are alternative explanations for the giving of these instructions, and that it cannot be deduced from the donor's apparent capacity to give instructions at that time that she was so capable on the date of the transaction, four days after her husband's funeral.

68. It was contended that the donor carried out the transfer in exchange for the services rendered by the defendant to her and to Jack. I cannot avoid the conclusion that this suggestion as to the motivation for the transfer is incorrect. The evidence of friends of Jack and Monica Joyce indicates that the defendant did not assist at the garage as often or as productively as he contends.

69. Alternatively it was suggested that the transfer was carried out in consideration of natural love and affection. However I do not consider that this submission affords a plausible explanation for the transfer. Although the relationship between donor and donee in this case was sufficiently close to raise a presumption of undue influence, I am mindful of the fact that Monica had other relatives in a closer relationship to her. Some of them went on to assist and care for her in the years following the death of her husband. It is difficult to understand why she would have made greater provision for the defendant, a nephew by marriage, than she would for those who were closer to her both in family ties and in the care they showed for her. The explanation proferred might conceivably be acceptable if the defendant were in particular need of financial assistance, but there is nothing to indicate that was the case at the time of the impugned transfer. Even then it would have been difficult to conclude that such a large sum, representing such a substantial portion of the donor's assets, should have been given to her husband's nephew in consideration of natural love and affection.

70. It follows from the foregoing that the defendant has not established that the gift "resulted from the 'free exercise of the donor's will'", constituting "the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee" (*Carroll* at p. 254). Accordingly, the presumption has not been rebutted and the transactions should be set aside for undue influence. For the sake of completeness I will also consider the aspect of alleged improvidence.

Improvidence

71. Before considering this question, the court must address an objection on behalf of the defendant to the effect that this issue was not argued at the hearing. As the defendant acknowledges however, it is specifically pleaded at para. 11 of the statement of claim that the transfer was grossly improvident, and denied in the defendant's defence at para. 4. In addition, it was clearly understood that the legal argument in this case would be by way of written legal submissions. The plaintiff was entitled to raise the ground of improvidence as she did. The point having been raised, the defendant had the opportunity to respond to it in written submissions and very properly did so.

72. The jurisdiction to set aside a transaction for improvidence was recently considered in the High Court in *Carroll v. Carroll* [1998] 2 I.L.R.M. 218. In that case Shanley J. (at p. 230) quoted with apparent approval the following passage from Hanbury and Martin, *Modern Equity* (4th Ed., London, 1991) at p. 821, concerning the criteria for setting aside a transaction on this ground:-

> "First, that one party was at a serious disadvantage to another by reason of poverty, ignorance, or otherwise, so that circumstances existed of which unfair advantage could be taken; secondly, that the transaction was at an

undervalue; and thirdly, that there was a lack of independent legal advice."

Both the High and Supreme Courts applied those principles in *Carroll.*

73. The defendant submits that this jurisdiction extends only to setting aside improvident or unconscionable bargains, in the sense of a transaction for value. In support of this proposition reliance was placed on *Langton v. Langton* [1995] 2 F.L.R. 890, a decision of A.W.H. Charles Q.C. sitting as a deputy High Court judge. However, it has been pointed out (Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 L.Q.R. 479 at p. 492) that this view was expressed *obiter* and that it is inconsistent with two decisions of the High Court of Australia. In *Wilton v. Farnworth* (1948) 76 C.L.R. 646 the court set aside a deed on the ground of unconscionability where no value was given in exchange for it. The judgments of Latham C.J. (at p. 649) and Rich J. (at p. 655) expressly refer to the transfer of the plaintiff's share in his wife's estate to his stepson as a gift. Again, in *Louth v. Diprose* (1992) 175 C.L.R. 621 the court set aside a gift of a house on the ground of unconscionability. The decisions of our courts support the view that the doctrine extends to gifts. In *Noonan v. O'Connell* (Unreported, High Court, Lynch J., 10th April, 1987) the court set aside a gift of a half share in the plaintiff's farm on the ground of improvidence. The court noted (at pp. 8-9) that the consideration of 50 pence could be disregarded as it did not constitute any real consideration for the purposes of determining whether the transfer was improvident, and that although the plaintiff and defendant might have agreed that the defendant should support the plaintiff and carry out work for him, there was no mention of this in the deed. Accordingly, the court in effect treated the transfer as a gift and set it aside for improvidence. In *McGuirk v. Branigan* (Unreported, High Court, Morris J., 9th November, 1992) a gift of much of the plaintiff's garden was set aside as improvident. While the agreement provided for some consideration, there was no evidence that it had been paid or genuinely envisaged, and the court attributed its inclusion in the agreement as a mere device to evade special requirements in a conveyance for natural love and affection. Accordingly, the transfer being set aside was in fact a gift. Similarly, the judgment in *Grealish v. Murphy* [1946] I.R. 35 at p. 50 indicates that the doctrine extends to gifts.

74. It has also been suggested in a series of cases (*Hart v. O'Connor* [1985] A.C. 1000; *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.* [1983] 1 W.L.R. 87; *Louth v. Diprose* (1992) 175 C.L.R. 621) that to have a transaction set aside for improvidence, it must be established that the defendant acted in a manner which involved some element of moral turpitude. I am satisfied that this proposition does not represent Irish law. In *Carroll*, Shanley J. noted at p. 223:-

> "there is no suggestion from them [the donee's sisters, who were also the plaintiffs] that their son [*Sic*] in any way bullied or cajoled their father into transferring the property to him."

75. As noted above, the plaintiffs in that case expressly rejected the idea that their brother had acted wrongfully toward their father in relation to the transaction, and it was common case that he was mentally alert at the time. Of course, the absence of express undue influence does not rebut the presumption. However, if some form of misconduct were to be regarded as an essential element of the doctrine of improvident transactions, it would not have been held in such circumstances as those which prevailed in *Carroll* that the gift was liable to be set aside for improvidence. Indeed, both the High and Supreme Court in that case reached the conclusion that it was a clear case of improvidence, without any suggestion that the defendant had acted improperly or that impropriety in his conduct would have to be present. Denham J. noted at p. 250, but did not accede to, the submission that some unconscientious use of power by the stronger party against the weaker had to be shown. Similarly, in *Noonan* no presumption of undue influence arose and "there was no express undue influence of any sort by the Defendant" (at p. 7). The court did not attribute any moral wrongdoing to the defendant. Indeed, the proposal for the transfer of half of the plaintiff's interest in his land had come from the plaintiff himself. He had originally suggested he should transfer all his lands to the defendant. The defendant had dissuaded him from doing so. The court nonetheless set aside the transfer on the ground of improvidence.

76. It is clear then that the court enjoys jurisdiction in equity to set the transfer aside once the three criteria identified by Shanley J. in *Carroll* have been established:-

> (1) that one party was at a serious disadvantage to another by reason of poverty, ignorance, or otherwise, so that circumstances existed of which unfair advantage could be taken;
>
> (2) that the transaction was at an undervalue; and
>
> (3) that there was a lack of independent legal advice.

77. In the present case the donor was at a serious disadvantage to the donee owing to her mental impairment, the then very recent loss of her husband and her advanced age. I have already indicated that I regard as unreal the proposition that her mental impairment was somehow absent at the time of the impugned transfer. Accordingly, the circumstances were such as to enable unfair advantage to be taken, whether or not such advantage was in fact taken. For the reasons as set out it need not be shown that the donee in fact took advantage of the donor's vulnerability.

78. The transaction was at an undervalue. As was properly conceded on behalf of the defendant, the donor was entitled to the monies transferred following the death of her husband. I appreciate that she had the benefit of her husband's will, and funds available to her in the form of a monthly pension of approximately US$500 together with death benefits of £34,017.63. However on the basis of the evidence adduced the will was only read to her after she had completed the impugned transactions. The sum transferred represented the great majority of her liquid assets. The effect of the transfer was to divest her of that money. While it was placed in an account in the joint names of herself and the defendant, she could not access it without his assent. At a stroke she deprived herself of these monies in exchange for no benefit immediately following the loss of a husband on whom she had become almost totally dependent. The evidence in this regard discloses a clear case of improvidence.

79. Finally, for the reasons already outlined the court finds that the donor did not have the requisite independent advice. In a passage approved by Denham J. (with whose judgment Lynch and Barron J.J. agreed) in *Carroll* at pp. 258-259, Gavan Duffy J. stated in *Grealish* at p. 49:-

> "Equity comes to the rescue whenever the parties to a contract have not met upon equal terms, see Lord Hatherley's judgment (dissenting on facts) in *O'Rorke v. Bolingbroke*; the corollary is that the Court must inquire whether a grantor, shown to be unequal to protecting himself, has had the protection which was his due by reason of his infirmity, and the infirmity may take various forms."

80. Having regard to her age, state of health, and shocked state very shortly after her husband's funeral, Monica Joyce was in my view unequal to protecting herself and was suffering an infirmity for the reasons as set out and did not have the benefit of independent advice such as to ensure she understood the nature and effect of the transfer.

81. Accordingly I am satisfied that the transactions should be set aside for improvidence.