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C. E. G.

West Virginia University College of Law

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STUDENT NOTE

UNDUE INFLUENCE AS AFFECTING WILLS IN
WEST VIRGINIA

An inquiry into the field of undue influence will show that, while the phrase "undue influence" is comparatively recent legal terminology, the idea of invalidity of testaments through immoderate importunity antedates even the Statute of Wills in 1540, and is probably of civil law origin.¹ Despite this long incubation, the concept cannot be precisely defined nor stated in terms of a general rule. The inquiry must rather be a factual investigation into the peculiar circumstances of each case.

Any analysis of the problem must involve a classification of the facts into two categories, that is, a separation of the operative from the evidentiary facts of undue influence.² Although our court does not make this distinction sharply, a close analysis of the cases will disclose that some such factual separation has been the motivation of the decisions.

More obscure, perhaps, than the classification of operative and evidentiary facts by the court is the further separation of some evidentiary facts into what may be called positive and negative factors. The negative factors are those elements which, though influential, are not exercised improperly, and consequently have no effect on the problem. A negative factor may be the kindness or affection of the principal devisee toward the testator, or some virtue of such devisee.³ A positive factor, on the other hand, is an element conducive to an improper influence such as the practice of artificial affection and kindness. What is improper influence in every case is not clear. However, it is not so much a question of whether the influence is wrongful or illegal, or whether the acts constituting influence were done with intent to influence, as it is a question of whether or not the testator would have done what he did had the influence been removed.

¹ SWINBURNE, WILLS (7th ed. 1793) §§ 2, 3, 4. REPPY & TOMPKINS, HISTORY OF WILLS (1928) 21, 22.

² 2 PATTERSON, CASES ON CONTRACTS (1935) 36 n.

³ Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493 (1888); see Nicholas *et al.* v. Kershner, 20 W. Va. 251 (1882); *cf.* Deck v. Deck, 106 Wis. 470, 82 N. W. 293 (1900).

" . . . Solicitations, however importunate, cannot of themselves constitute undue influence; for though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate." Trost v. Dangler, 118 Pa. St. 259, 270, 12 Atl. 296, 4 Am. St. Rep. 593 (1888). A man has a right, by fair persuasion, to induce another to make a will, and even to make it in his favor, Miller v. Miller, 3 S. & R. 267, 8 Am. Dec. 651 (Pa. 1817).

The Operative Fact. The element of dominance is, without doubt, the operative fact of undue influence. Dominance may be gained by inordinate flattery, hypnotic stratagem, or some other influence which has overpowered the testator's volition without convincing his judgment. It is more or less synonymous with undue influence, and perhaps more properly could be defined in terms of result or effect. Nevertheless, for a proper understanding of the term "undue influence" and its retinue of lay misconceptions, we must consider dominance as a factor and not a result, because its presence or absence is the test by which we determine whether the will in question shall fail or stand.

The West Virginia court has stated many times that to set aside a will on the ground of undue influence, it must appear that the influence was such as to "wholly destroy the free agency of the testator at the time the will was made."⁴ Unless the wish of the testator has been subdued and displaced through some influence which he has not the power to resist, it cannot be logically argued that the will is not his will and thus invalidate it on that ground.

In *Stewart v. Lyons*,⁵ the court quotes with approval the following statement: "The criterion is, is the influence irresistible?"⁶ If so, the will is not the instrument of the testator, and cannot stand. If it is not, the influence is not undue and its existence is immaterial, even though the testator did in fact yield to it."

In *Snedeker v. Rulong*, after a summary of past decisions, the court concludes that, "mental weakness, attachment or love for, and desire to gratify the wishes of a beneficiary, are not enough to overthrow a will, if the free agency of the testator, at the time of the execution of the will, be not overcome by undue influence; and that such undue influence must have amounted to such force or coercion as to overcome such free agency."⁷

If the testator has been dominated by the volition of another as to the whole will, the entire testament is invalid. If it appears that only a part of the will was so induced, the tainted part alone

⁴ *Forney v. Ferrell*, 4 W. Va. 729 (1871); *Snedeker v. Rulong*, 69 W. Va. 223, 71 S. E. 180 (1911); *Payne v. Payne*, 97 W. Va. 627, 125 S. E. 818 (1924); *Parramore v. Taylor*, 11 Gratt. 220, 238 (Va. 1854); *Ebert v. Ebert*, 200 S. E. 831 (W. Va. 1938).

⁵ 54 W. Va. 665, 678, 47 S. E. 442 (1903).

⁶ Apparently what is meant by the question is whether the influence was or was not resisted in the particular case. The courts use a subjective test, because an influence that is "irresistible" to one may have absolutely no effect upon another.

⁷ 69 W. Va. 223, 227, 71 S. E. 180 (1911).

may be expunged and the remainder of the will be permitted to stand.⁸

The Evidentiary Facts. The method by which a testator is deprived of his free agency and thus dominated, or the reasons why he is more susceptible to domination, may be regarded as the evidentiary fact or facts. Though indicative of the all controlling ingredient, dominance, it appears from the cases that the court treats such facts as merely evidentiary and not *per se* sufficient to frustrate the will and bring about its nullification. Although such facts are numberless, a few examples will be sufficient to illustrate the proposition.

Where it is shown that the testator lacks testamentary capacity, it is obviously unnecessary to inquire into the question of undue influence. However, testamentary capacity may be of such low order as to make the testator an easy prey to harassing circumstances. Such debility is not of itself indicative of dominance, or even of undue influence.⁹ It is but an evidentiary fact, lessening the quantum of influence, where influence is shown, necessary to establish the operative fact of dominance.

Physical weakness, like mental infirmity, is one of the conditions to be considered when undue influence is charged. However, it is clear that although it may cause the court to be more alert to the possible presence of dominance, it is not an operative fact. The West Virginia court clearly demonstrates that it considers physical weakness but an evidentiary fact in *Payne v. Payne*.¹⁰ There it was said that "If undue influence is charged, the testator's weakened physical condition is to be considered, but the undue influence must be shown to be such as to wholly destroy the free agency of the testator and to substitute the will of another for his."

However the courts may admire the rule of equality in the disposition of the property of a testator, they are bound to give an unequal or unjust will full effect if the testator was competent and free from irresistible importunity. In *Couch v. Eastham* it was said, "When a testator has the legal capacity to make a will, he has the legal right to make an unequal, unjust or unreasonable will."¹¹ In *Ebert v. Ebert*, Judge Fox states that a testator of sound mind has a right to dispose of his property in such manner

⁸ *Gay v. Gay*, 74 W. Va. 800, 83 S. E. 75 (1914); *Lyons v. Campbell*, 88 Ala. 462, 7 So. 250 (1889); *Harrison's Appeal*, 48 Conn. 202 (1880).

⁹ *Snedeker v. Rulong*, 69 W. Va. 223, 227, 71 S. E. 180 (1911); *Stewart v. Lyons*, 54 W. Va. 665, 676, 47 S. E. 442 (1903).

¹⁰ 97 W. Va. 627, syl. 2, 125 S. E. 818 (1924).

¹¹ 29 W. Va. 734, 790, 3 S. E. 23 (1887).

as he may desire, and, “. . . in the absence of a showing of fraud or undue influence such as amounts to a substitution of the will of some other person for his own, the courts will not disturb such disposition of his property as he may make, however unjust and inequitable it may appear to others.”¹²

The unlawful sex relations of the testator and the principal devisee will not give rise to a presumption of undue influence. The immoral influence which the relation gives the mistress over her paramour will perhaps cause the court to scrutinize the facts surrounding the will more closely, but the cases are uniform in holding that this unlawful relation will not avoid a will which is the offspring of the testator's own volition.¹³ In *Stewart v. Lyons*, the West Virginia court said that an unlawful sexual relation is “only a circumstance to be considered along with other matters.”¹⁴

If the provisions of the will were induced by extreme kindness and attention to the testator on the part of the principal devisee, that will not constitute influence which is undue if no imposition is practiced amounting to a control of the will of the devisor.¹⁵ If a wife by her virtues has gained an ascendancy over her husband to such a degree that his affections are riveted to her to the exclusion of his children, it is not a reason for impeaching his will in her favor.¹⁶ The same is true of the influence of a child by reason of confidence reposed in him by the parent, or because he has been attentive and kind while the other children have been thankless and ungrateful.¹⁷ Influence gained by kindness and affection would seem to be a negative factor so long as the kindness and affection are sincere. It is natural to suppose that the testator would wish to reward a person who has been thoughtful and considerate of his welfare; such a testamentary reward, in fact, expresses the will of the testator rather than the contrary. On the other hand, if the kindness or affection is artificial and practiced with intent to delude, it is clear that a gross imposition

¹² 200 S. E. 831, 836 (W. Va. 1938); cf. *Parramore v. Taylor*, 11 Gratt. 220 (Va. 1854).

¹³ *ROOD, WILLS* (2d ed. 1926) § 182; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227 (1898).

¹⁴ 54 W. Va. 665, 679, 47 S. E. 442 (1903); cf. *Porschett v. Porschett*, 82 Ky. 93 (1884).

¹⁵ *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493 (1888); cf. *Roberts v. Clemens*, 202 Pa. St. 198, 51 Atl. 753 (1902).

¹⁶ *Ebert v. Ebert*, 200 S. E. 831 (W. Va. 1938); *Small v. Small*, 4 Me. 220, 16 Am. Dec. 253 (1826); *Armstrong v. Armstrong*, 63 Wis. 162, 23 N. W. 407 (1885).

¹⁷ *Thompson v. Ish*, 99 Mo. 160, 12 S. E. 510, 17 Am. St. Rep. 552 (1889); *Furlong v. Carraher*, 108 Iowa 492, 79 N. W. 277 (1899).

has been perpetrated; it is unnatural to suppose that the testator would wish to reward such an imposter. Influence gained by such hypocrisy thus ceases to be a negative factor and becomes a positive evidentiary ingredient; if the testator's volition is thereby controlled, the will may be set aside.

The fact that the testator executed other wills prior to the one offered for probate, in which the principal devisee of his last testament was not so favorably considered, is a circumstance to be studied, perhaps with suspicion, but will not in any sense be controlling.

Conclusion. From the foregoing cases it would seem that the West Virginia court has been diligently careful in avoiding a mixture of the several issues involved where undue influence has been charged against the validity of a will. In every instance, the court has reiterated that before the influence exerted on the testator will be sufficient to nullify his testamentary act, it must be of such a degree as to control his volition and induce him to do what otherwise he would not have done; in short, the testator must have been dominated.

To reach a conclusion as to the operative fact, the court will consider the mental and physical capacity of the testator, his relations with the principal devisee, the equities of the will, the age and sex of the testator, the means of coercing the testator's volition, the time of executing the will, and prior testaments. In brief, all the relevant circumstances and conditions surrounding the execution of the will are to be considered. But in conformity with the general view taken in other jurisdictions, our court has demonstrated with constancy that it regards such relevant circumstances and conditions as of evidentiary value only.

C. E. G.