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Gifts - Necessary for Competent Independent Advice to Sustain Gift to Donee in Fiduciary Capacity

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RECENT DECISIONS

Gifts — Necessity for Competent Independent Advice to Sustain Gift to Donee in Fiduciary Relation — This case involves certain property owned by the deceased, R. H. Leathers, intestate. The closest of kin were his nieces and nephews. Defendant, M. L. Leathers, was a nephew of the deceased who with his family lived on the uncles' farm as members of one family. In a short period before his death deceased made gifts of about $4000 in land and money to the defendant and members of the defendant's family. After the gifts deceased had $2700 in Government bonds left. The County Register drew up the deeds at the request of the deceased. The defendant brought a notary public to witness the acknowledgments in private with the deceased. R. H. Leathers held the defendant and his family in high regard and always spoke well of them. Evidence showed that the deceased was a man of sound mind, but was ninety years of age, infirm and feeble. The heirs brought suit to set aside the gifts. *Held:* For the plaintiffs, that there was a relationship of confidence between the parties; that the defendant was the dominant party; that it was necessary for the defendant to show that Mr. Leathers had the benefit of independent counsel and advice and that he had failed to sustain that burden. *Turner et al v. Leathers et ux. 232 S.W. (2d) 269 (Tenn., 1950).*

There exists a conflict in the cases as to the necessity of showing that competent, independent advice was made available to the donor where there was a confidential relationship between the parties. In the instant case the court follows the strict view requiring proof that independent advice was available to the donor where there was a confidential relationship, even though the donee does not actively seek the gift, nor know of it in advance.[1] The New Jersey Equity Court, the leading exponent of this view, says that it will apply the rule of independent advice whenever a relation of trust and confidence exists and the inequality favors the donee. Even where the case is free from fraud and undue influence a gift of the bulk of the donor's estate will not be sustained unless it clearly appears that he well understood the effect and consequences of his act, and the indispensable evidence of this understanding is that he had competent and independent advice.[2]

Other courts consider competent, independent advice only as evidence on the question of whether or not there has been undue influence. They hold that independent advice is not essential to the validity of a gift where a fiduciary relationship exists, but absence of such advice is a circumstance to be considered in determining whether a gift should

[1] Ware v. Mulford, 79 N.J. Eq. 470, 82 A. 48 (1911).
[2] Reeves v. White, 84 N.J. Eq. 280, 134 A. 681, 53 A.L.R. 1115 (1926); Roosma v. Roosma, 100 N.J. Eq. 280, 135 A. 79 (1926).

be avoided because of undue influence or fraud.[3] It is to be considered with other surrounding facts and circumstances, such as the nature and purpose of the gift, and the condition and relation of the parties.[4]

The instant case quoted a New Jersey opinion as follows:

> "Proper independent advice in this connection means that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise the donor impartially and confidently as to the consequences of his proposed benefaction."[5]

The New Jersey Court ruled that its requirement of competent, independent advice was not met where a realtor, retained by the donor to draw up a deed, suggested a will instead.[6] The donee did not satisfy the test where a lawyer merely explained the contents of an assignment to the donor and the assignment was drawn up at the instigation of the donee.[7] The same result was reached in a case where a lawyer was summoned by the donee only to draw a deed, without being in any sense an advisor of the donor.[8]

Before the rule of competent, independent advice will be applied there must be a relation of trust and confidence with one party more or less dependent upon the other, and the gift must be of substantially the whole of the donor's estate, or the bulk of it where the gift results in the donor's impoverishment.

The defendants in the instant case had equity on their side in that they were good to the donor, took care of him and treated him as a member of the family. The gift did not strip the donor of all of his property, did not leave debts unpaid nor leave him at the mercy of the donee. The donor had an opportunity to confer with the County Register when they were alone making out the deeds. To rule that the donor did not have the benefit of competent, independent advice and defeat the gift seems an injustice to the defendants.

In Wisconsin there has been no decision upon the requirement of

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[3] Amado v. Aquirre, 63 Ariz. 213, 161 P.(2d) 117 (1945).
[4] Hawkins v. Gray, 128 Ark. 143, 193 S.W. 509, 28 C.J. 654 (1917); Burnham v. v. Witt, 217 Cal. 397, 18 P.(2d) 949 (1933); Brown v. Canadian Industrial Alcohol Co., 209 Cal. 566, 28 P. 613 (1938); Taylor v. Pivec, 149 Md. 526, 131 A. 757 (1926).
[5] Post v. Hagan, 71 N.J. Eq. 234, 243, 65 A. 1026, 28 C.J. 654 (1907).
[6] Kelly v. Kelly, 107 N.J. Eq. 483, 153 A. 384 (1931).
[7] Hackensack Trust Co. v. Nowacki, 124 N.J. Eq. 565, 3 A. (2d) 615 (1939).
[8] Post v. Hagan, *Supra*, note 5
[9] Chandler v. Hardgrove, 124 N.J. Eq. 516, 2 A. (2d) 661 (1938); Dyer v. Smith, 112 N.J. Eq. 126, 164 A. 21 (1933); Slack v. Rees, 66 N.J. Eq. 447, 59 A. 466, 69 A.L.R. 393 (1904); In this case the gift stripped the donor of his property without leaving anything to pay the donor's debts.

competent, independent advice to a donor. The court has only required that the donee sustain the burden of proving that there was no undue influence where the parties were in a confidential relation and the donee in a position of dominance. In *Davis v. Dean* the donor, an aged lady, made gifts of real estate constituting the substantial portion of her estate to her grand-daughter and the grand-daughter's husband several days before death. This gift cut off a daughter and several grandchildren. The husband, while in a position of trust and confidence with the donor, showed an effort to keep those most interested in ignorance of the pending gift. The gifts were set aside. Under these circumstances the Court said that the defendant had the burden of proving that there was no undue influence. It suggested that he should have given some of the parties adversely interested an opportunity to be present when the deeds were executed, or to be represented there by some chosen friend or counsel, so that they would be cognizant of the whole transaction. Such evidence would aid in showing that the donee acted honestly and fairly in the matter.[10] Thus the donee in Wisconsin need not affirmatively prove that the donor had the benefit of competent, independent advice. The presence or absence of such advice will be considered as evidence on the general question of undue influence.

An interesting point was raised in *Beilfuss v. Dinnauer*.[11] In this case the defendant, in trying to prove that there was no undue influence, introduced testimony that the donor had conferred with a lawyer as to procedure in making a gift of land to the defendant. This evidence was admitted by the trial court, but rejected by the Supreme Court upon appeal, on the ground that it was a privileged communication between attorney and client. This creates a dilemma in a state following the New Jersey rule as to competent, independent advice—which rule almost demands that a lawyer give the advice.[12]

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Restitution — Recovery of Part Payments by a Defaulting Plaintiff — Defendant brewing company contracted to sell beer to plaintiff and his partner as wholsale buyers over a period beginning in 1946 and ending in 1951. Upon execution of the contract, plaintiff and his partner paid $20,000.00 "to secure performance of the contract," which was to be applied to the last shipments of beer under the contract, but if the contract was breached by the buyer, the deposit was to be used to the extent of defendant's actual damages. Plaintiff warranted he was a licensed dealer, but he in fact was not and was denied the neces-

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[10] Davis v. Dean, 66 W. 100, 26 N.W. 737 (1886).
[11] 174 W. 507, 183 N.W. 700 (1921).
[12] Wis. Stat. (1949) Sec. 325.22.