warranty. Historically, "Warranty in its early stages was in tort and recovery by an action of deceit," 2 Ohio St. L.J. 180. But beginning with the case of *Stuart* v. *Wilkins*, 1 Doug. 18 (1778), an action in assumpsit was allowed. "The action on a warranty is a hybrid between tort and contract," 3 Williston "Contracts" p. 1505. "In pleading the warranty, the allegation may be framed in two counts, one in contracts and one in tort," 2 Ohio St. L.J. 180, 181; *Davies* v. *Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920); *Back* v. *Dixon*, 115 Minn. 172, 131 N.W. 1078 (1911); *Mayerhoff* v. *Wortman*, 92 Okla. 66, 218 Pac. 842 (1923). There still seems to be doubt in the minds of some courts whether these actions can properly be joined. The majority of the courts which have passed on this matter allow a joinder. *Farrell* v. *Manhattan Market Co.*, 198 Mass. 271, 84 N.E. 481 (1908); *Needham* v. *Halverson*, 22 N.D. 594, 135 N.W 203 (1912); *Ades* v. *Wash*, 199 Ky. 687, 251 S.W. 970 (1923). Some courts have forced the plaintiff to elect, *Van Tassel* v. *Beecher*, 28 N.Y.S. 73 (1894). The minority of the courts do not permit a joinder of the two courts in torts and implied warranty. *Montgomery* v. *Alexander Lumber Co.*, 140 Ga. 51, 78 S.E. 413 (1913); *Pridemore* v. *Fife*, 178 Mo. App. 332, 165 S.W. 1155 (1914). But Ohio permits an action in tort and contract to be joined when they arise out of the same transaction. *Sturges* v. *Burton*, 8 Ohio St. 215 (1848). It would seem that under this doctrine, counts based upon negligence and warranty such as were joined in the principal case would be good in Ohio. R. W. VANDEMARK.

# WILLS

## TESTAMENTARY CAPACITY — UNDUE INFLUENCE

In an action to set aside a will it was disclosed that the testator was a man of the age of seventy-nine and afflicted with some of the ills that flesh is heir to; that he was childish; that he was forgetful and occasionally got lost in close proximity to his own home; and that frequently he did not know his intimate friends, or knowing them refused to speak to them even when they were present as guests in his own house.

The legatee, a blood relative of testator's deceased wife, visited his house at least once a week after the death of his wife, cleaned the house, sent out the laundry, and cooked for him. During the last illness she remained at his home, continually looking after him. It was also shown that the testator referred to her as the "boss," called her a hog to want all his property, and that she, during testator's last illness, a year and a

half after the execution of the will, excluded his relatives and after the funeral of the testator complimented herself as being "smart." The trial court set the will aside, but the Court of Appeals, 2nd District, Madison County, reversed the decision, holding that the burden of the issues of mental incapacity and undue influence were not made out. Judge Sherick, dissenting. *Olney* v. *Schurr*, 21 Ohio L. Abs. 630 (1936).

General Code, Section 10504-2 declares that a person of full age, of sound mind and memory, and not under restraint, may make a will. The question immediately arises, however, as to what circumstances indicate the presence or absence of "sound" mind and memory. In *Ketteman* v. *Metzger*, 3 Ohio C. C. (NS) 224, 23 O.C.C. 61 (1901), it is stated: "It is an elemental proposition that it does not require the highest degree of mental capacity to make a will."

Various tests of testamentary capacity have been laid down in the Ohio cases. The most comprehensive statement is found in *Neimes* v. *Neimes*, 97 Ohio St. 145, 119 N.E. 503 (1917), which is followed in the principal case, that "testamentary capacity exists when the testator has sufficient mind and memory to: (1) understand the nature of business in which he is engaged; (2) to comprehend generally the nature and extent of his property; (3) to hold in his mind the names and identity of those who have natural claims upon his bounty; and (4) to be able to appreciate his relation to the members of his family." In light of the fact that the court later states that the ability of a testator to transact ordinary business "is in fact a higher test than the law imposes," it would seem that what the court meant when it spoke of understanding the nature of the business in which he was engaged, was that the testator should have the purpose and intention of disposing of his property by will, or in other words, that he understood that he was engaged in the "business" of making a will. Such a requirement is expressly laid down in *Dunlap* v. *Dunlap*, 89 Ohio St. 28, 104 N.E. 1006 (1913). To these requirements some courts have added another, namely, that in regard to such matters, the testator must be able to form a rational judgment, *Beck* v. *Snively*, 29 Ohio L. Rep. 100 (1929), and to convey that information and his wishes to the party drawing his will, *Baille* v. *Heimsath*, 20 Ohio App. 216, 151 N.E. 788 (1925). Again it is said that testamentary capacity is the ability, without suggestion, to make a testamentary disposition of his property, *Moore* v. *Caldwell*, 6 Ohio C. C. (N.S.) 484, 27 Ohio C. C. 449 (1904); or that it is a rational understanding on the part of the testator at the time of the making of his will, of the business he is engaged in, the kind and value of the property devised, the persons who are the natural ob-

jects of his bounty, and the manner in which he wishes to dispose of his property. *Ross* v. *Stewart*, 15 Ohio App. 339, 32 Ohio C. A. 217 (1921).

Ohio courts have repudiated the alleged "Ability to Transact Ordinary Business" test. A testator may have capacity to make a will, although unable to manage his estate or engage in the conduct of business, *Neimes* v. *Neimes*, *supra*; *Welsh Hills Baptist Church* v. *Wilson*, 9 Ohio C. C. (N.S.) 611, affirmed in 75 Ohio St. 636, 80 N.E. 1135 without opinion (1907). On the other hand, one may possess capacity to carry on ordinary business transactions and yet not be able to make a will, as where he is suffering from delusions. *Board of Foreign Missions* v. *Bevan*, 2 Ohio App. 182, 17 Ohio C. C. (N.S.) 275, affirmed in memorandum opinion in 91 Ohio St. 395, 110 N.E. 1054 (1913). Likewise, ability to make a contract is not the test of testamentary capacity. A testator may have capacity to make a will, even though he is unable to make a contract. *Ketteman* v. *Metzger*, *supra*. See also 28 Ruling Case Law, p. 89.

The courts in applying the test laid down in *Neimes* v. *Neimes* do, however, give certain weight to various recognized factors influencing the testator's capacity. It is well settled that one may have testamentary capacity though he is blind, *Rewell* v. *Warden*, 4 Ohio C.C. (N.S.) 545, 24 Ohio C.C. 344 (1903), *dictum*; or, as in the principal case, though he is of advanced years, *Barlion* v. *Connor*, 9 Ohio App. 72, 31 Ohio C.A. 463 (1917), or possessed of an impaired memory, *Bell* v. *Henry*, 28 Ohio L. Rep. 528, affirmed in 121 Ohio St. 241, 167 N.E. 880 (1929). Neither is testamentary capacity negatived by the fact that the testator is weakened by sickness, *Bell* v. *Henry*, *supra*; possessed of eccentricities of conduct, *Ketteman* v. *Metzger*, *supra*; addicted to the use of alcoholic liquors or drugs, *Gregg* v. *Moore*, 14 Ohio C.C. (N.S.) 570, 33 Ohio C.C. 534 (1911); insane, *Kennedy* v. *Walcutt*, 118 Ohio St. 442, 161 N.E. 336 (1928); suffering from delusions, *Wadsworth* v. *Purdy*, 12 Ohio C.C. (N.S.) 8, 31 Ohio C.C. 110 (1908); suffering from moral depravity, *Joslyn* v. *Sedam*, 7 Ohio Dec. Rep. 350, 2 Bull. 147 (1877); or in extreme distress or disability of the body, *Rewell* v. *Warden*, *supra*. Obviously, however, the pain or effect of any one of the weaknesses above may so effect the intellect as to destroy a sound mind and memory within the test set out in the *Neimes* case. See *Re Burrough*, 8 Ohio N.P. 358, 11 Ohio N.P. 229 (1900).

As was stated in the principal case, while weakness or impairment of memory may affect the capacity of the testator, one may be able to devise property even though his memory is impaired. *Singer* v. *Howard*,

22 Ohio N.P. (N.S.) 161, 64 Bull. 643 (1919). An individual may be forgetful at times, unable to recognize neighbors, friends, and acquaintances, yet that alone does not determine whether such person has capacity to execute a will, *Bell v. Henry, supra.* If, however, it disqualifies him from having a "disposing" memory the will may be set aside, *Rewell* v. *Warden, supra.* The court in the latter case defined a "disposing" memory as "that possessed by one who has knowledge of the act he is engaged in, full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty."

Every sane person is considered as having testamentary capacity, but testamentary capacity and sanity are not synonymous terms, *Neimes* v. *Neimes, supra.* A partial unsoundness of mind, not affecting the general faculties and not operating on the mind of the testator in regard to the testamentary dispositions is not sufficient to render a person incapable of disposing of his property by will, *Re Underhill,* 10 Ohio Dec. Rep. 487, 21 Bull. 279 (1889); *Evans* v. *Davis,* 11 Ohio Dec. Rep. 876, 30 Bull. 289 (1899). That one is declared insane or is under guardianship, *Kennedy* v. *Walcutt, supra,* does not *per se* deprive him of capacity to make a will, but such may be used in evidence bearing on testamentary capacity at the time of making the will, *Rutledge* v. *Inlow,* 2 Ohio Ops. 306 (1935). It has also been held that a will executed by an insane person during a lucid period is valid, *Re Underhill, supra.* See also 28 Ruling Case Law p. 99.

Like insanity, delusions may or may not disqualify one from testamentary capacity. In order to avoid a will on the ground that the testator at the time of the execution thereof labored under a delusion, the delusion must be an insane delusion, *Board of Foreign Missions* v. *Bevan, supra,* which has been defined as "a diseased condition of the mind in which the testator believes things to exist which exist only in his imagination and with a persuasion of belief so firm and fixed that neither argument nor evidence could convince him to the contrary," *Fridline* v. *Dolby,* 8 Ohio L. Abs. 423 (1929). Also, the delusion must affect the provisions of the will to invalidate it, *Singer* v. *Howard, supra,* for, as has been stated, "the existence of delusions which do not affect either the natural or selected objects of his bounty, is not inconsistent with testamentary capacity." *Wadsworth* v. *Purdy, supra.*

As to the question of undue influence, the court, in the principal case, presumably followed the prevalent hard and fast rule that to make a case of undue influence the free agency of the testator must be shown to have been destroyed. While such a rule is firmly established, undue

influence such as invalidates a will is not easy to define, 41 Ohio Jur. 352, since every will is the result of influence strong enough to produce it, *Monroe* v. *Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620 (1867). Many influences which are lawful may induce the testator to make certain provisions in his will which otherwise would be omitted, *Baille* v. *Heimsath, supra.* So long, then, as such influences do not induce a disposition of the testator's property contrary to his wishes and inclinations the will is not susceptible to the attack of undue influence, *Monroe* v. *Barclay, supra,* for it is the effect that the restraint or threats have upon the testator, and not the effort or attempt to coerce, that constitutes undue influence, *Rapp* v. *Becker*, 4 Ohio C.C. (N.S.) 139, 26 Ohio C.C. 321 (1904). Even though the purpose to coerce is clear, there can be no undue influence if the testator is unaffected thereby, *Rapp* v. *Becker, supra;* and if coercive conditions are created of which the testator is unaware but by which he is influenced, undue influence has been exercised even though the testator did not know of such agency, *Rapp* v. *Becker, supra.*

The fact that the testator is given advice does not amount to undue influence if he decides to follow or reject the advice according to his own free will, *Joslyn v. Sedam, supra,* even though one should, by such means, procure a disposition in favor of himself or of someone else whose interests he has maintained, *Hall* v. *Hall,* 15 Ohio D.N.P. 161 (1904). This same principle applies to influence exerted by treating the testator kindly, *Hall* v. *Hall, supra*; or as in the principal case, with consideration and friendliness, *Baille* v. *Heimsath, supra;* by argument, *Hayes* v. *Halle,* 23 Ohio App. 522, 155 N.E. 493 (1925); or by appeals to the affection, *Rewell* v. *Warden, supra.*

It is clear that no precise quantity of influence can be said to be necessary in all cases, as the requisite amount varies with the circumstances of each case, *Huff* v. *Huff,* 3 Ohio L. Abs. 259 (1925), and especially does it vary according to the strength or weakness of mind of each testator. The amount of influence necessary to dominate a mind impaired by age or disease is obviously less than that required to control a strong mind. See *Raymond* v. *Hearon,* 30 Ohio App. 184, 164 N.E. 644 (1928); *Gress* v. *Stark,* 14 Ohio N.P. (N.S.) 545, reversed on other grounds in 4 Ohio App. 92 (1914). Thus, soundness of mind, advanced age, and physical weakness are important facts to be considered in passing on the question of undue influence, *Winkler* v. *Washburn,* 6 Ohio I. Abs. 689 (1928).

Although Judge Sherick dissented in the principal case, his opinion was concerned with the questions of admissibility of certain evidence and of the sufficiency of the evidence to establish the issues drawn in the

case. No hint of any departure from the principles contained in his discussion was made. In light of the decisions contained herein, it would seem then that proper legal principles were applied in the principal case leaving to conjecture only the question whether or not the evidence warranted the conclusion reached.

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