2010 WL 1147977 (La.App. 5 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Fifth Circuit.

Maxine Kunselman REARICK,
v.
Dixie Rearick MICHETTI.

No. 10-CA-122.
March 15, 2010.

On Appeal from the 24th Judicial District Court in and for the Parish of Jefferson, State of Louisiana No. 670-499 the Honorable Judge Nancy R. Miller

Original Appellant Brief of Appellant Maxine Kunselman Rearick

Kirkpatrick & Associates, LLC, Mark Needham, Bar No. 9914, 3501 North Causeway Blvd., Suite 300, Metairie, LA 70002, (504) 836 0033, Fax (504) 828-3311, Appeal Counsel.

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***4** *STATEMENT OF JURISDICTION*

This Court has jurisdiction over this matter pursuant to Article 5, Section 10(a) of the Louisiana Constitution of 1974.

***5** *STATEMENT OF THE CASE*

This suit arises from a purported donation of real estate located at 729 Cedar Avenue in Metairie, Louisiana, from Maxine Kunselman Rearick to her daughter, Dixie Rearick Michetti, in December of 2007. Mrs. Rearick seeks to revoke this donation on the grounds that it was made under duress, that it was not properly confected as an authentic act, and that Ms. Michetti is guilty of acts of ingratitude warranting the revocation of the purported donation.

Ms. Michetti was experiencing financial problems in late 1999 or early 2000 and asked her mother is she could move into the Cedar Avenue property. After first refusing, Mrs. Rearick finally relented to allow her to stay for a short time until she was again financially stable. Ms. Michetti however remained in the house for nearly ten years until the institution of the present action. Throughout this period, Ms. Michetti exerted an ever-growing control over her mother and the household. They live almost exclusively on Mrs. Rearick's income. Sometime in 2004, Ms. Michetti became the caregiver for her mother when she became less able to care for herself.

In December of 2007, Ms. Michetti told Mrs. Rearick that unless she donated the Cedar Avenue property over to her, she would put her into a nursing home. Rather than employ the Rearick's family attorney, Ms. Michetti then arranged with another attorney to pass an act of donation of the property. Ms. Michetti told Mrs. Rearick that in Louisiana, the caregiver always gets the house, and Mrs. Rearick, fearing that she would be put into a nursing home, agreed to the donation.

On December 18, 2007, they went to the office of the attorney, Vallerie ***6** Oxner. The act of donation was prepared, reserving a usufruct for life in Mrs. Rearick, and was executed by Mrs. Rearick, Ms. Michetti and the notary. The notary then left the room to secure the signatures of the required witnesses. Ms. Rearick asserts that because the act of donation was not actually witnessed, it was not properly confected as an authentic act, and in thereby invalid as an act of donation *ab initio.*

As ostensible consideration for the donation, the act recited that it was made “as recompense for services rendered and in consideration of donee's having cared for donor for many years”. In truth and fact, the donation was made under duress and is invalid. Any services rendered by defendant certainly do not exceed 2/3 of the value of the property at the time of the purported donation (nor did it exceed 1/2 of the value as required under the law at the time).

After the time of the purported donation and most particularly in the year preceding the filing of this action, Ms. Michetti became increasingly inconsiderate, uncaring, **abusive** and cruel in her treatment of her mother. She restricted her movements and limited her visitors, including family. She controlled her medication and food. She would not let her mother use her walker when her mother felt it was necessary. She would move furniture and not assist her mother when she needed help due to her medical condition. Mrs. Rearick fell several times as a result of this behavior. She subjected her mother to loud verbal **abuse**. Mrs. Rearick was finally forced to contact an **elderly** **abuse** agency in order to escape from her own home. Ms. Michetti's actions constitute conduct which is naturally offensive to her mother, Mrs. Rearick, and constitute cruel treatment and grievous injuries sufficient to justify revocation of the donation of immovable property.

7** ***ACTION OF THE TRIAL COURT

This matter came before the trial court on October 7, 2009. After a trial in open court at which multiple witnesses testified, a judgment was issued from the bench denying Mrs. Rearick's petition and confirming the donation. This judgment was signed by the lower court on October 23, 2009. Ms. Rearick filed a Motion for Devolutive Appeal on November 18, 2009, which motion was granted by the trial court.

8** ***ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED IN DENYING THE PETITION FOR REVOCATION OF DONATION FILED BY APPELLANT MAXINE KUNSELMAN REARICK ON MARCH 9, 2009.

***9** *ISSUES PRESENTED FOR REVIEW*

I. DID THE TRIAL COURT ERR IN APPLYING THE IMPROPER STANDARD (THAT OF UNDUE INFLUENCE) IN DETERMINING THE QUESTION OF DURESS?

II. WAS THE DURESS APPLIED BY APPELLEE IN THE MAKING OF THE DONATION SUFFICIENT TO INVALIDATE IT *AB INITIO?*

III. WAS APPELLEE'S CRUEL TREATMENT OF APPELLANT AFTER THE MAKING OF THE DONATION NATURALLY OFFENSIVE TO THE DONOR AND THUS SUFFICIENT TO JUSTIFY REVOCATION OF THE DONATION UNDER LA. C.C. ART. 1556?

10** ***ARGUMENT

I. THE TRIAL COURT ERRED IN APPLYING THE IMPROPER STANDARD (THAT OF UNDUE INFLUENCE) IN DETERMINING THE *QUESTION OF DURESS*

The first basis for recovery in the plaintiffs case is that she was under duress in the making of the donation and that it was thereby null. The trial court recognized the basis for the claim, but rather than applying the law and elements of proof applicable to the legal concept of duress on the making of the donation, the lower court instead applied the law of undue influence.

On page 188 of the appeals transcript, the lower court gave its reasons for judgment on this issue, stating,
"In this case plaintiffs have alleged three bases in which they have asked this court to consider in revoking donation of immovable property that was donated *inter vivos* by authentic act.

"The first basis is that the donation was signed under conditions of duress. And a donation that is signed under duress should be declared null upon proof of duress."

The lower court is correct here under C.C. Art. 1478,
"Art. 1478. Nullity of donation procured by fraud or duress

"A donation *inter vivos* or *mortis casa* shall be declared null upon proof that it is the product of fraud or duress. (Acts 1991 , No. 363, §1.)"

The trial court continues,

> "In this case the plaintiff had to prove by clear and convincing evidence that the proof - I'm sorry - had to prove by clear and convincing evidence that the influence over the donor was such that it would have impaired the volition of the donor and to substitute the volition of the donee for the other person, or of the other person."

Here the lower court is no longer discussing issues of duress, but is instead inappropriately applying the test for undue influence under C.C. Art. 1479,

***11** "Art. 1479. Nullity of donation procured through undue influence

"A donation inter vivos or mortis causa shall be declared null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor. (Acts 1991, No. 363, §1.)"

The trial court continues,

> "I find in this case, and I think what the plaintiff has mainly argued in regards to the duress is a statement made by the defendant that she told her mother, or basically gave her mother an ultimatum, which said if you don't sign over the property to me, I'm no longer going to provide care to you. I find that that statement does not reach the level of duress as contemplated by 1479."

At this point, it is clear that the lower court is mistakenly applying the law on undue influence (C.C. Art. 1479) to the claim of duress. The court found that an ultimatum was given (certainly a basis for duress) but that it did not serve to so impair plaintiffs volition that the defendant's volition was substituted for her own (the basis for undue influence).

The footnotes to C.C. Arts. 1479 clearly differentiate the causes of duress covered by Art. 1478 and that of undue influence covered by Art. 1479. Even C.C. Art. 1480 shows the distinction when it states, "(w)hen a donation *inter vivos* or *mortis causa* is declared null because of undue influence or because of fraud or duress..." (emphasis added).

It is easy to confuse the two concepts and to even believe that undue influence is somehow a lesser form of duress and thus conclude that if one is not guilty of undue influence, one cannot be guilty of duress. The truth is that these are actually diametrically opposed ideas, distinguished principally by the state of mind of the coerced party.

Undue influence is typically a slow, invidious process, often benign, where one person falls so deeply under the sway of another that that person is no longer able to exercise her own will, but instead comes to believe, consciously or ***12** unconsciously, that the will of the other person is her own. This process is not necessarily evil in nature, but it is characterized by the inability of the coerced person to properly make her own decisions.

Conversely, duress by definition involves the forcing of a person to take action against her will by threatening behavior. The person under duress is not without the ability to make her own decisions, but rather is fully aware that the actions she is being forced to make are not being made of her own volition, but rather are being done as a result of the pressure being exerted upon her.

Undue influence is extremely difficult to prove because the level of influence necessary to substitute one's volition for another's is necessarily high. Everyone is subject to the influence of others to some extent and the level of proof offered at trial did not rise to the level that it demonstrated such undue influence. Nor was it intended to. Not only is the level of proof required to demonstrate duress much lower, but appellant was not attempting to prove that she had lost her volition to appellee, but rather that she was indeed aware at the time of the donation that she was being coerced into the action.

The trial court erred in applying the legal principles for undue influence in this matter instead of the legal principles for duress.

II. THE DURESS APPLIED BY APPELLEE IN THE MAKING OF THE DONATION WAS SUFFICIENT TO INVALIDATE IT *AB INITIO*

Even though the lower court's reasoning indicates that the judge was evaluating the demeanor and testimony of the witnesses to determine whether undue influence rather than duress was present, the testimony of the parties contained in the record is sufficient to support a determination by this Court that duress was indeed involved in the making of this donation. The Court here is ***13** therefore not being asked to review the lower court's impressions as to the veracity of the witnesses. This would be improper and likely impossible, but more importantly in this case, unnecessary. This court need only examine the testimony of the parties themselves, particularly that of the appellee, to reach a decision as to the merits of the case.

Mrs. Rearick testified that her daughter threatened to put her in a nursing home if she did not donate the property to her. Her daughter testified that the ultimatum given to her mother was that she would withhold the nursing care she was providing and move out of the house if the property was not donated to her. From Mrs. Rearick's prospective, these threats are one and the same - without the nursing care provided by her daughter, she would face the terrifying possibility of being placed in a nursing home. Mrs. Rearick further testified that she believed that her daughter had the ability to place her in a home because she had her power of attorney. It is the nature of duress that its power and effectiveness depends in no small measure on the disposition and fortitude of the victim, but its effect remains the same - the victim of duress is induced to take action which she would not ordinarily have taken.
The nature of duress is codified in C.C. Art. 1959,

"Art. 1959. Nature

"Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation.

"Age, health, disposition, and other personal circumstances of a party must be taken into account in determining reasonableness of the fear. (Acts 1984, No. 331, §1, eff. Jan. 1, 1985)

Mrs. Rearick is an 86-year old woman who suffers from Parkinson's Disease and hypertension. She must rely on others to some extent to receive the care she needs. Her daughter, Dixie Michetti, undertook to care for her mother in her ***14** mother's home, and in doing so created fiduciary obligations toward her mother which exceeded her normal filial duty because it put her mother into a position where routine decisions of life and care were voluntarily assumed by daughter. Appellant trusted that daughter would do the right thing as her caretaker and became understandably alarmed and initially resisted her daughter's suggestion that the home be donated to her. Faced with such resistance, appellee threatened her mother that care would be withheld if she failed to comply. Appellee secured her own attorney to handle the donation, and did not tell her siblings or her mother's family attorney about the plan. Appellant ultimately complied with the granting of the donation because she felt pressured and threatened. Her daughter took advantage of the situation and breached both her filial and fiduciary obligations.

Appellant testified in court that she did not want to donate the property to her daughter, but did so because she threatened to put her into a nursing home. On page 94 of the appeals record, she states,
"Q. (Mr. Needham): Did your daughter Dixie ever threaten to put you in a nursing home?

"A. (Mrs. Rearick): Yes.

"Q. When did she do that?

"A. She said that if I didn't sign the house over to her, she was going to put me in a home. She said she didn't want to be there anyway."

Her daughter Dixie characterizes the ultimatum differently, testifying that she threatened instead to withhold nursing and housekeeping service and move out of the house if the donation was not made. On page 69 of the appeals record, she states,
"Q. (Mr. Needham): Whose idea was it to have the donation made?

"A. (Ms. Michetti) I told my mother that she either sign the house over to me or I would be moving out because I was not going to be caught...I have spent... don't have much money every month. I gave her everything I had.

"Q. So you gave your mother an ultimatum about donating the ***15** property?

"A. Well, yes, I did. It was either donate the property so I'm never put out, or I will leave."

And again on page 81,
"A. My mother has no loyalty to me and she never has. This is obvious.

"Q. That's why you needed to give her the ultimatum about giving you the property or you weren't going to stay in the house?

"A. That's correct."

Questions of whether the degree of duress imposed on a person is sufficient to vitiate the consent in the making of a donation must meet a reasonableness standard, but under the law this reasonable standard must also be tempered by the particular situation involved and by the age, health, disposition, and other personal circumstances of the parties involved (C.C. Art. 1959, supra). Duress felt by a child will not be of the same nature as duress felt by a combat veteran recently returned from deployment in Iraq.

Far less duress needs to be applied to force an 86-year old woman in failing health to donate to a woman on whom she depends than under ordinary circumstances. Mrs. Rearick is largely confined to a wheelchair and suffers from diabetes and heart disease requiring daily medication and monitoring. Even a cursory reading of her testimony in court (Pages 85 through 113 of the appeals record) reveals a witness who has difficulty both hearing and understanding the questions and whose confusion leads to sometimes conflicting answers but with no understanding that the answers are indeed conflicting. Add to this the fact that she is being given an ultimatum by the person she relies upon on a daily basis to provide for her health and comfort and her feelings of helplessness in the face of the threat are understandable.

And make no mistake that threats to withhold nursing and household services and leave the house are not monumentally significant to Mrs. Rearick. She ***16** testified that her daughter had her power of attorney and that she was under the mistaken impression that this gave her daughter the power to have her committed. Defendant Dixie Michetti testified that she did not threaten to put her into a nursing home but rather threatened to withhold the nursing care that she provided. If that were to happen, how could her mother react other than with panic? She said that she would withhold care, her mother heard that she would be forced into a nursing home.

It was suggested in the lower court that Ms. Michetti was only threatening to do an act which she had a legal right to do and that such an act cannot constitute duress. As a general rule, under C.C. Art. 1962, this is correct,

"Art. 1962. Threat of exercising a right

"A threat of doing a lawful act or a threat of exercising a right does not constitute duress.
"A threat of doing an act that is lawful in appearance only may constitute duress. (Acts 1984, No. 331, §1, eff. Jan. 1, 1985)."

However, Art. 1962 also notes that the threat of doing an act that is lawful in appearance only may indeed constitute duress. It is clear that this sentence is intended to ameliorate the effect of the initial sentence and that the rule does not apply to acts which may be lawful, but are lawful in name only. Threatening to report a crime to the police is a lawful act in both name and in deed and legally would not constitute duress; threatening for example to unnecessarily reveal a shameful fact about someone to coerce a concession from them may be lawful, but it is lawful in name (or in appearance) only and thereby may constitute duress. Just because the action threatened may be lawful does not make it right. In the case at bar, threatening to withhold nursing care and abandon her mother may be lawful but that does not make it right. Especially when the threat is clearly (and solely) made with the intention of applying sufficient pressure on her mother to ***17** force her to donate the property. Ms. Michetti admits to this ultimatum in her testimony.

Clearly the testimony of the parties, and especially that of the appellee, establishes that duress was present in the making of the donation and that it should have been declared null as provided under the law.

III. APPELLEE'S CRUEL TREATMENT OF APPELLANT AFTER THE MAKING OF THE DONATION WAS NATURALLY OFFENSIVE TO THE DONOR AND THUS SUFFICIENT TO JUSTIFY REVOCATION OF THE DONATION UNDER LA. *C.C. ART. 1556*

C.C. Art. 1557 sets out the basic law for revocation of a donation for ingratitude,
"Art. 1557. Revocation for ingratitude

"Revocation on account of ingratitude may take place only in the following cases:

"(1) If the donee has attempted to take the life of the donor; or

"(2) If he has been guilty towards him of cruel treatment, crimes, or grievous injuries. Acts 2008, No. 204 , §1, eff. Jan. 1, 2009)"

The wording of this article might indicate that revocation for ingratitude is necessarily a remedy only for the most severe of actions involving murder or other crimes. However, the case law interpreting this article takes a different view. Certainly, the crimes enumerated justify revocation for ingratitude, but the inclusion of the cause of cruel treatment in the article allows for revocation in other appropriate instances which do not meet so severe a test.

While there are not a great many cases which discuss this issue, the case law is consistent in that the test for cruel treatment in the revocation of a donation is ***18** whether the subsequent actions of the donee are so cruel as to constitute acts which are "naturally offensive to the donor". See Salassi v. Salassi, 13 So.3d 670 (La. App., 2009), where this Court wrote,
"There is a considerable paucity of Louisiana cases that have addressed what constitutes "cruel treatment, crimes, or grievous injuries". In Perry v. Perry, 507 So.2d 881 (La.App. 4 Cir.1987), the Fourth Circuit Court of Appeal came to the conclusion that; "[i]njuries" include any act naturally offensive to the donor. It may be the adultery of one of the spouses...The act may consist of slanderous charges; of a seizure levied by the donee against the donor of whom he is creditor; or, in a proper case, even of the refusal to consent to the revocation."

Note that the test is not whether it is naturally offensive to *a* donor, but rather to the donor involved. As with the test for duress discussed above, this test involves a reasonable standard, but once again, it is the personal nature of the particular donor involved which is used to determine whether the acts complained of are acts "naturally offensive" to the donor or not. Again, the acts that a truck driver may find naturally offensive are not necessarily the same as those naturally offensive to a society matron.

The examples given in the case law range from serious (seizure levied by donee) to as mild an offensive act as a refusal to consent to the revocation of the donation itself This range in severity of the offense is directly attributable to the corresponding

range in personal dispositions of the donors involved. Furthermore, if a donor believed that she had been coerced into making the donation in the first place, the offensiveness of subsequent acts of cruelty by the donee could only be further magnified by the initial unfairness of the situation. Insult was being added to injury.

The trial transcript seems to indicate that Ms. Michetti provided adequate ***19** care for her mother for most of the time they lived together and while they were financially supported by her mother's income, but she also displayed a sense of entitlement that allowed her to dictate to her mother how she was to behave, despite her mother's objections. This was magnified after the donation when she believed that she was able to assert domination over the house itself (this is what ultimately required the services of the **elder** **abuse** agency in order to allow Mrs. Rearick to leave her home). In the final year before this suit was brought, the parties became antagonistic to the point where Ms. Michetti's behavior became increasingly cruel and offensive to her mother. At page 110 of the transcript, Mr. Shepherd asks,
"Q. Mrs. Rearick, would you agree that Dixie was a good caretaker for you?

"A. At first.

"Q. Okay. When did she stop becoming a good caretaker for you?

"A. I'd say the last year.

"Q And that was because of what?

"A She said that she did not want to be there anymore."

At page 90, Mrs. Rearick stated,

> "A. The last time she left, I was in the living room and she was in the kitchen, and she was coming into the living room and she was talking to me while she was out there. And she come into the living room screaming and yelling. I was so upset I don't know what she said other than I know I told her if she didn't quit yelling at me, I'd have her removed - moved out of the house. And she told me I couldn't."

The specific incidents of cruelty enumerated by Mrs. Rearick may seem individually minor, but they accumulated to the point that Mrs. Rearick feared that she was being held a prisoner in her own home. This finally escalated to the point that her other children were forced to take action. At her mother's request, her daughter Joanne Bellflower brought in the **elder** protective services agency for the Parish whose visit allowed Mrs. Rearick to move out of the house and out of Ms. Marchetti's control (see page 127 of the appeal transcript). Another daughter, Patricia Petrie, and her husband, gave up his employment in another state and put ***20** their home up for sale so that they could move back into Louisiana to care for their mother after Ms. Machetti was removed from the home (see page 139). Mrs. Rearick certainly found the actions of her daughter to be naturally offensive to her. At page 88 of the appeals transcript, Mrs. Rearick states,
"She used to kick the stool out from under me where I kept my feet propped up most of the time. And when she'd do my blood pressure, she'd kick it out and I'd ask her not to. And she took my blood pressure and she'd lay the little round thing on my stomach and I'd ask her not to because of the (Parkinson's), it starts them up."

At page 89,

"Q. (Mr. Needham) Did she restrict the visitors that you had?
"A. Yes."

And finally, at page 93,
"Q. (Mr. Needham) When Dixie yelled at you and moved furniture and put the monitor on your stomach, did you tell her that you did not want her to do those things?

"A Yes. I asked her please don't, and I asked her to please don't yell.

"Q Did you find these acts were naturally offensive to you?

"A Yes."

Ultimately, the **elder** protective services agency of the Parish was brought in to address the situation by Joanne Belflower, who describes her mother's demeanor on page 127 of the appeals transcript,

> "...You know, just towards the end it got really bad. She's like, you know, she's kicking the foot stool out of my way. You know, she won't get me my medicine. She won't fix me food. And then she got to where she was crying and just begging me to get her out of the house."

While the report of the protective agency is largely inconclusive in that no evidence of **abuse** was found (although this is not surprising when Mrs. Rearick's interview lasted but a few minutes), the report is riddled with inaccuracies as to dates and people's identity to the point where it is unreliable in any event. The true importance of the actions of the **elder** **abuse** protection agency to the parties ***21** involved in the case is not in what they found, but that their involverment finally facilitated Mrs. Rearick's escape from the home.

The testimony of Dr. Ryan and Ashley Oglesby can likewise be disregarded with respect to any evidence they might have given as to evidence of **abuse**. Dr. Ryan saw Mrs. Rearick only on routine medical visits and the topic of the relationship between the parties was not discussed. On page 105 of the appeals transcript, Mr. Shepherd asks Mrs. Rearick,
"Q. Do you discuss personal issues with Dr. Ryan, like family stresses that you are going through?

"A. No."

Mr. Oglesby testified that he would visit "once every couple of months" (page 182). His testimony can be completely discounted.

Shakespeare said, "How sharper than a serpent's tooth it is To have a thankless child!" Mr. Shepherd in his closing argument noted succinctly if not as eloquently that just because "someone donates something to you, it shouldn't necessarily mean that you have to be a suck-up to them for the rest of your life". I can only counter that perhaps a little gratitude is in order, especially when the donor is your mother who has donated to you her largest asset, a $150,000.00 house, to the exclusion of her other ordinary heirs. A child in this State has an obligation towards her parents,
"C.C. Art. 215. Filial honor and respect.

"A child, whatever be his age, owes honor and respect to his father and mother."

While this obligation may not extend to the duty of devoting one's life to the happiness of the parent, it certainly addresses behavior which the parent finds ***22** naturally offensive. This is particularly true when that child is maintaining the complained of acts of cruelty against the donor in the very home that is provided to her by the donor (and even more true when the donor

was coerced to donate the house to the donee under duress). The unfairness of the circumstances surrounding the donation can only serve to further compound the degree of natural offensiveness felt by the donor with respect to subsequent acts of cruelty.

Clearly the testimony of the parties establishes that, given the age, health and disposition of the donor, the nature of acts of cruelty by the appellee towards the appellant rose to the level where such acts were naturally offensive to the donor and thus sufficient to reasonably justify revocation of the donation on the grounds of ingratitude.

23 *CONCLUSION

As set forth hereinabove, the trial court erred in denying the petition for revocation of donation filed by appellant Maxine Kunselman Rearick on March 9, 2009. The lower court misapplied the law by using the standard of proof required to prove undue influence instead of the proper standard of proof required to prove duress in the making of the donation. The lower court further erred in not finding sufficient evidence of duress in the making of the donation despite testimony of both parties as to threats and coercion. The trial court finally erred in not finding sufficient evidence that appellee was guilty of ingratitude toward her donor when the testimony clearly supports a conclusion that such ingratitude was present and was reasonably appreciated by the donor as naturally offensive.

Appellant requests that this Honorable Court reverse the findings of the trial court and instead find 1) that the trial court erred in using the improper standard of proof in the making of the donation, and 2) that the December 2007 donation between the parties is null *ab initio* on the basis of duress, or revoked on the basis of ingratitude of the donee, thereby restoring full ownership in the immovable property to appellant.

Appendix not available.

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