

UNDUE INFLUENCE IN WISCONSIN PART 3: ALTERNATIVE METHOD OF PROOF

This is the third and final article in a series on undue influence in Wisconsin.

The second method of challenging a will or gift made during a lifetime on grounds of undue influence, a so-called *inter vivos* conveyance requires that the party establish only two elements. Doing so raises a rebuttable presumption of undue influence.

Moving forward with such evidence shifts the burden from the person raising the issue of undue influence to the proponent of the will or the recipient of the conveyance.[1] If rebutting testimony is introduced, the trier of fact does not need to accept the presumption and may reject it and accept the rebutting evidence.[2]

Existence of Confidential or Fiduciary Relationship

The first element of the second method requires a finding that a confidential or fiduciary relationship exists between the testator/grantor and the favored beneficiary. The basis for the presumption is not merely the existence of a personal relationship between the testator or grantor and the beneficiary. Instead, it's the ease with which a confidant can dictate the contents or influence the drafting of a will or particular conveyance, or it's the ease with which such an individual can control or influence the draftsman of such a document.[3]

If the person charged with undue influence is not the actual draftsman or the procurer of the draftsman, evidence must be presented which shows that the testator or the grantor depends upon the advice of the confidant in relation to the subject of the will or conveyance. Establishment of this element requires more than showing that a confidential relationship exists between the parties. It requires proof.

The proof offered will be circumstantial because "if a beneficiary has either instructed the draftsman as to the contents of the will or has unduly influenced the testator as to the disposition of his property, he would not testify that he had done so." [4]

Suspicious Circumstances

The final element of the second method requires that suspicious circumstances surround the

execution of the will or conveyance. This element requires a detailed review of factual circumstances.

To prove this element, the Supreme Court has found it sufficient to provide:

- Evidence that proves the conveyance was hastily drafted by a layman or drafted with the active participation of the influencer either in the actual drafting of the document or in the procurement of an individual to draft the document.
- Evidence of a weakened condition, be it physical or mental, of the testator or grantor, all of which culminate in sudden and unexplained changes in the attitude of the testator towards the disposition of his or her property.[5]

As was discussed in our prior article in relation to the fourth element of the classic undue influence case, proof of this element requires more than simply suspicious results. The suspiciousness must be judged in light of the totality of the circumstances.

If you have any question, please contact Carl Holborn at carl.holborn@wilaw.com or 414-276-5000.

[1] *In Re Estate of Kamesar*, 81 Wis. 2d 151, 164, 259 N.W.2d 733 (1977).

[2] *Cooper*, 28 Wis. 2d at 399.

[3] *Estate of Fetcher*, 88 Wis. 2d 199, 219, 277 N.W.2d 143 (1979).

[4] *Estate of Velk*, 53 Wis. 2d 500, 507, 192 N.W.2d 844 (1972).

[5] *Estate of Komarr*, 46 Wis. 2d 230, 240, 175 N.W.2d 473 (1970).