EMPLOYMENT LAWSCENE ALERT: DOL ISSUES UPDATED FMLA GUIDE FOR EMPLOYERS

Today, the U.S. Department of Labor, Wage and Hour Division, issued an updated guide for employers on the Family and Medical Leave Act. The guide is designed to provide essential information about the FMLA for employers, including the obligations under the law and the options available to employers in administering FMLA leave. The updated guide contains flowcharts, helpful hints, and other information to explain the FMLA process and regulations. The Employer's Guide to The Family and Medical Leave Act can be found here.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECTS NEWBOLD AS SHAREHOLDER

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Joe Newbold was recently elected a shareholder of the firm. Mr. Newbold has been with the firm since 2011 and is a member of the Litigation Practice Group. Joe concentrates his practice in commercial litigation in both state and federal court. He manages a variety of complex cases involving class actions, commercial real estate, franchise litigation, and intellectual property matters. Joe has extensive experience representing plaintiffs and defendants in challenging civil litigation.

Learn more about Mr. Newbold by visiting his full profile.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN COURT OF APPEALS ISSUES DECISION ON MEANING OF "SUBSTANTIAL FAULT" IN UNEMPLOYMENT

This week, the Wisconsin Court of Appeals issued an important ruling on what "substantial fault" means in the context of unemployment compensation. In 2013, the Wisconsin legislature amended the unemployment insurance statutes to state that, in addition to

discharge for misconduct and voluntary termination of work, employees would be denied unemployment benefits if they were terminated by the employer for "substantial fault by the employee connected with the employee's work." The statute defines "substantial fault" as "those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following: 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction. 2. One or more inadvertent errors made by the employee. 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment." Wis. Stat. 108.04(5g)(a).

In O*perton v. Labor and Indus. Review Comm'n et al*., 2015AP1055 (Wis. Ct. App. April 14, 2016) an employee who worked as a cashier had made eight cash handling errors over twenty months, including not requesting to see identification for a credit card purchase of $399 on what turned out to be a stolen credit card. The employer issued her multiple written warnings, and she was warned that further errors could result in termination. After she failed to get identification related to the stolen credit card, she was terminated for her cash handling errors.

Both the Department of Workforce Development and the Labor and Industry Review Commission (LIRC) found that the employee was ineligible for unemployment benefits because her discharge was for substantial fault based on the fact that she continued to make cash handling errors after receiving multiple warnings. Despite LIRC's arguments that the court should defer to its experience and judgment in employment issues, the Court of Appeals took a very narrow view of what constitutes "substantial fault." The Court of Appeals found that there had been no evidence presented that the cash handling errors were "infractions" that violated any specific rule of the employer. The Court of Appeals then went on to determine that the employee's cash handling errors fell into the second category of what is not substantial fault because they were "inadvertent," and it did not matter that warnings had been given because that is not a part of the "inadvertent error" analysis.

The important takeaway for Wisconsin employers is the fact that inadvertent errors, even if repeated after a warning, do not constitute substantial fault under the unemployment statutes. Therefore, in issuing warnings for performance related deficiencies, employers need to cite specific policies and rules that the employee has violated. This will give employers a better chance of showing that the employee has committed an infraction, rather than an inadvertent error, and should be denied unemployment benefits if such an infraction is repeated. At this point in time, it is not certain as to whether this matter will be taken to the Wisconsin Supreme Court. We will keep you updated on any further developments.

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.

---

[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).

UNDUE INFLUENCE IN WISCONSIN PART 2: ELEMENTS OF CLASSIC UNDUE INFLUENCE

This is the second in a series of three articles on undue influence in Wisconsin.

In Wisconsin, the four elements of classic undue influence cases are susceptibility, opportunity, disposition and a coveted result. In addition to classic undue influence in Wisconsin, there is a second method of challenging a will or gift made during lifetime, a so-called *inter vivos* conveyance, which will be discussed in the third and final article in this series.

Susceptibility

The first element of classic undue influence is a finding that the person charged with exercising undue influence unduly influenced a susceptible testator or grantor.

The Wisconsin Supreme Court, in numerous cases, has stated that the key factors regarding the issue of a testator or grantor's susceptibility to undue influence are:

- Age
- Personality
- Physical and mental health
- Ability to handle business affairs[1]

Opinions about the general state of mind of the testator or grantor from third parties with whom he or she may have had contact are given much credence by the court.

For example, the court will consider whether or not a person is considered to be strong-willed, independent, self-reliant, dominant, stubborn, dependent, capable of making decisions, and taking care of ordinary day-to-day management of their affairs.

Age, in and of itself, is of little significance unless it is coupled with a deteriorating physical or mental condition.[2]

If consideration of the factors set forth above demonstrates that the testator or grantor was unusually receptive to the suggestions of others and consistently deferred to others on matters of utmost personal importance, then the element is established.[3]

Opportunity to Influence

This element requires a showing that the person charged with exercising such influence on the susceptible person had the opportunity to procure the improver favor.

As a general rule, this is the easiest of the four elements to prove. To justify a finding of the opportunity to influence, the court must find repeated close contact with the testator.[4] Close personal relationships whether because of familial ties, living conditions, working conditions, or other social conditions have been found sufficient.

However, opportunity to influence does not mean mere physical propinquity or personal contact. It requires that interviews or personal transactions between the parties exist and that they were followed by the accomplishment of a desired end.[5] It is not necessary, nor is it often the case, that opportunities to influence are accomplished in secret or that they culminate in one particular act that represents the attempt to unduly influence. However, the opportunities to influence must exist at or about the time the will or conveyance is effected.[6]

Disposition to Influence

The third element requires proof of more than a desire on the part of the person charged with undue influence to obtain a share of the estate. It necessitates a showing of a willingness to do something wrong or unfair to obtain a share. It requires proof of grasping or overreaching affirmative steps on the part of the person charged.[7]

Evidence must be submitted of conduct designed to take an unfair advantage. Proof of this element requires evidence of the personality traits of the person charged with committing the act of undue influence.

For example, evidence shows a willingness to take advantage of the kindness and generosity of the testator or grantor. Alternatively, evidence shows that the influencer misled or kept a secret from natural beneficiaries.[8] The court has specifically indicated that there is nothing wrong with aiding and comforting a failing testator and that such activity should be encouraged.[9]

Coveted Result

The last element required in order to present a case of classic undue influence is the showing of a result caused by, or the effect of, such undue influence. Two compounds of this element exist.

First, the result must be an "unnatural," raising "a red flag of warning."[10] The essential question is whether the person was favored to be excluded from the natural or expected recipients of the testator's bounty. However, more than a result favorable to the alleged person is required.

The second component is whether the result obtained was caused by or was the effect of undue influence. What is under scrutiny is that a particular recipient benefits for no apparent reason and that the disposition is, in fact, unnatural and, therefore, the bequest or conveyance is unjust[11]

The mere provision in a will that benefits the influencer does not, by that fact alone, prove the element. Evidence may make what appears unnatural natural given the circumstances of the individual case. The mere fact that the testator makes bequests to his close friends rather than to relatives does not necessarily render the disposition unnatural. Whether a will or conveyance is unnatural or not must be determined from a consideration of all the surrounding circumstances.[12]

---

[1] *Dejmal*, 95 Wis. 2d at 156.
[2] *Id.* at 159.
[3] *Id*. at 157.
[4] *In Matter of Estate of Becker*, 76 Wis. 2d 336, 348, 251 N.W.2d 431 (1977).
[5] *Ward vs. Ward*, 62 Wis. 2d 543, 554, 215 N.W.2d 3 (1974).
[6] *Elvers*, 48 Wis. 2d at 21.
[7] *Estate of Brehmer*, 41 Wis. 2d 349, 356, 164 N.W.2d 318 (1969).
[8] *In Matter of Estate of Vorel*, 105 Wis. 2d 112, 312 N.W.2d 850 (1981).
[9] *Estate of McGonigal*, 46 Wis. 2d 205, 214, 174 N.W.2d 256 (1970).
[10] *Estate of Culver*, 22 Wis. 2d 665, 673, 126 N.W.2d 536 (1964).
[11] *Will of Cooper*, 28 Wis. 2d 391, 399, 137 N.W.2d 93 (1965).
[12] *Becker*, 76 Wis. 2d at 349.

FIRM OBTAINS BIG WIN FOR CLIENT

From 1997 to 2009 Sujata Sachdeva embezzled over $36 million from her employer, Koss Corporation, in one of the Top 10 Largest Embezzlements in U.S. history. The embezzlement was reported all over the world, including on the cover of *The National Enquirer*.

Ms. Sachdeva was criminally convicted of embezzlement and is currently serving a prison term. In an attempt to recoup its loses, Koss sued its auditor, credit card company, and banks. Its auditor, Grant Thornton, settled the claim for $8.5 million, and its credit card company American Express, settled the claim for $3 million. Those lawsuits were filed in Illinois and Arizona, respectively.

Koss also sued its local bank, Park Bank, in Milwaukee, arguing that Park Bank acted in bad faith under the Uniform Fiduciaries Act by failing to discover and report the embezzlement. In the lawsuit, Koss sought damages of $43,749,400 from Park Bank. After five years of litigation, on March 11, 2016, the trial court dismissed the case in a 24–page written decision, finding that "Park Bank did not act in bad faith." The court held that, under the Uniform Fiduciaries Act, bad faith "requires a showing of some indicia of dishonest conduct or a showing of facts and circumstances so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction," and "there must be some factual basis—whether an allegation of monetary self-interest or compelling evidence of wrongdoing—to suggest the bank acted intentionally to avoid knowledge of the fiduciary's wrongdoing." Here, the court held, "Koss has not provided any evidence that Park Bank intentionally ignored Sachdeva's embezzlement," and it "declines to require banks to act as detectives, whether they be Sherlock Holmes, Columbo, or Andy Sipowicz."

Dean Laing of our firm was Park Bank's lead attorney. Also working on the case were Greg Lyons and Joe Newbold.

UNDUE INFLUENCE IN WISCONSIN PART 1: INHERITANCE DISPUTES AND CLAIMS OF UNDUE INFLUENCE

This is the first of a series of three articles on undue influence in Wisconsin.

Unscrupulous people sometimes use undue influence to change wills and obtain gifts from the elderly, sick, or weak. Increasingly, the public has come to realize this is a form of elder abuse.

Undue influence cases involve predominantly factual determinations and require a lawyer to engage in extensive pretrial fact development and investigation. Since appellate courts have shown great deference to the findings of the trial court in these cases, the importance of adequate trial preparation and courtroom experience cannot be overstated.

Elements of a Successful Case

By its very nature, proof of the necessary elements will rest almost entirely on **circumstantial evidence**, or evidence that relies on an inference to connect it to a conclusion, like a fingerprint at the scene of a crime. Even with adequate preparation, it is difficult to predict with any success the outcome of undue influence cases. Why is this? The outcome is based on disputes in the inferences drawn from facts, not the facts themselves.

Success will depend in large measure upon the **skill and labor of your trial attorney**.

Undue Influence in Wisconsin

Wisconsin has long recognized the doctrine of undue influence, or influence that "commands or compels the exercise of volition on the part of the person subject to such influence so that the result is the accomplishment of the will or purpose of the one using influence rather than, in fact, the will or purpose of the donor."[1] In other words, in Wisconsin a person can be prosecuted if he or she compels a person to act other than by his or her own freewill or without adequate attention to the consequences.

The doctrine of undue influence has been utilized to challenge wills as well as to void *inter vivos* conveyances, or a transfer that was made during a person's lifetime as opposed to one made after his or her death. The same legal principles and theories apply to both situations.[2]

Two distinct methods of proof exist to establish undue influence in Wisconsin. The first, often referred to as **classic undue influence,** is composed of four elements:

1. **Susceptibility** – A person who is susceptible of being duly influenced by the person charged with exercising undue influence.
2. **Opportunity** – The opportunity of the person charged to exercise such influence on the susceptible person to procure the improper favor.
3. **Disposition** – A disposition on the part of the party charged, to influence unduly such susceptible person for the purpose of procuring an improper favor either for himself or another.

4. **Coveted Result** – A result caused by, or the effect of, such undue influence.[3]

The second method of challenging a will or voiding an *inter vivos* conveyance requires establishment of a confidential or fiduciary relationship between the testator or grantor and the favored beneficiary or grantee. It also requires proof of suspicious circumstances surrounding the execution of the will or conveyance.[4]

Proving Undue Influence in Wisconsin

The elements of either method must be proved "by clear, satisfactory and convincing evidence."[5] This high civil burden of proof must usually be met with **circumstantial evidence**. Undue influence exercised in secret, undercover, and with little opportunity for the presence of disinterested parties usually rests "wholly upon circumstantial evidence,"[6] which, the Supreme Court has noted, "is as convincing as direct testimony."[7]

Lower Standard of Proof

Although the burden is on the objector to prove each of the necessary elements, a lower standard of proof applies because of the secrecy that usually accompanies such affairs. When three of the four elements are established by the necessary clear, satisfactory and convincing evidence, only "slight additional evidence" need be presented as to the fourth element."[8] This lower standard of proof has been variously described as requiring only "slight additional evidence"[9] or "very little evidence."[10]

Application of this lesser quantum of proof has generally not caused problems because the finder of fact in the vast majority of reported cases is the trial court. A jury trial is not available as a matter of right in will contests. Suits relating to *inter vivos* transfers, on the other hand, need not be venued in the probate court, and trial by jury is available.[11]

The manner in which a jury is to be instructed with respect to the lower standard of proof is not the subject of a reported case. Whether a jury should be instructed in the black letter case law language ("slight additional evidence" or "very little evidence") or should be instructed with the usual civil burden of proof (preponderance of the evidence) is an unresolved issue.

However, instructions to the jury in such a case must indicate that the jury need find only **three of the four elements** by clear, satisfactory and convincing evidence. The lesser quantum of proof is all that is needed for the fourth element, whichever element that may be in the mind of the trier of fact.

Scope of Appellate Review in Wisconsin

The law governing the scope of appellate review is also well established in Wisconsin. Undue

influence must be proved by **clear, satisfactory and convincing evidence**. Findings by the trial court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence presented at trial.[12]

The appellate court will examine the trial court record not for facts to support a finding the trial court did not make or could have made, but for facts to support the finding the trial court *did* make.

As a result, the practitioner must make every effort to present a successful case at the trial court level. A review of undue influence cases decided by the Wisconsin Supreme Court between 1945 and 1968 encompassing 54 decisions revealed that only four trial court decisions were reversed.[13]

---

[1] *Kuehn vs. Kuehn,* 11 Wis. 2d 15, 24, 104 N.W.2d 138 (1960).
[2] *Estate of Fillar*, 10 Wis. 2d 141, 102 N.W.2d 210 (1960).
[3] *Will of Freitag*, 9 Wis. 2d 315, 317, 101 N.W.2d 108 (1960).
[4] *Will of Faulks*, 246 Wis. 319, 360, 17 N.W.2d 423 (1945).
[5] *In Matter of Estate of Dejmal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980).
[6] *Will of Ehlke*, 244 Wis. 115, 121, 11 N.W.2d 497 (1943).
[7] *Estate of Elvers*, 48 Wis. 2d 17, 20, 179 N.W.2d 881 (1970).
[8] *Freitag*, 9 Wis. 2d at 318.
[9] *Id.*
[10] *In Re Stanley's Will*, 226 Wis. 354, 360, 276 N.W. 353 (1937).
[11] *Casper vs. McDowell*, 58 Wis. 2d 82, 205 N.W.2d 753 (1973).
[12] *Dejmal*, 95 Wis. 2d at 154.
[13] *Undue Influence – Judicial Implementation of Social Policy*, 1968 Wis. L. Rev. 569.

THE NOMINATIONS ARE IN FOR THE LEADERSHIP DEVELOPMENT SUMMIT

Our very own Trevor Lippman was 1 of 24 attorneys selected by the State Bar of Wisconsin's Leadership Development Committee to participate in this year's Leadership Development Summit. This nomination follows up on Trevor's recent three-year appointment by the State Bar President, Mr. Ralph Cagle, to serve on the Continuing Legal Education Committee of the State Bar of Wisconsin.

Trevor was selected to participate in the Leadership Development Summit because his nominator felt that he has demonstrated a commitment to civic-mindedness, has shown a capacity to lead, and possesses the personality and leadership skills that make others want to follow his direction. These are attributes the State Bar of Wisconsin seeks in developing

the next generation of its leaders.

The Summit will be held on Friday, April 1, 2016, at the Monona Terrace in Madison for the purpose of developing and encouraging the next generation of leaders both for the State Bar and in the legal profession. The Summit brings participants together with key State Bar leaders for direct interaction and discussion on leadership in the State Bar and legal community today.

ATTORNEY GREGORY S. MAGER RECOGNIZED AS A BOARD CERTIFIED FAMILY LAW TRIAL ADVOCATE

The National Board of Trial Advocacy (NBTA) has recognized attorney Gregory S. Mager, a shareholder at O'Neil, Cannon, Hollman, DeJong and Laing S.C., as a Board Certified Family Law Trial Advocate. The NBTA is the first American Bar Association accredited attorney board-certifying agency in the world. The organization certifies specialists, predicated on high standards of demonstrated competence and integrity.

"*With less than 4% of all practicing lawyers certified by an ABA-accredited or state-sponsored certification board, board certification is not only highly important to the profession of law but also paramount to consumer protection. In so doing, it differentiates such attorneys for having objectively established their specialized proficiency in the practice of law*."
http://www.nbtalawyers.org/

Contact Greg today for assistance with your family law matters at 414-276-5000 or Gregory.Mager@wilaw.com

---

ADA WEBSITE COMPLIANCE CASES MOVE FORWARD; SENATORS URGE REGULATORY ACTION

As we discussed in a recent article, class action lawyers have been sending demand letters and filing lawsuits claiming that websites belonging to businesses and organizations are

“places of public accommodation” and are in violation of the Americans with Disabilities Act (ADA) because they are not accessible to people with visual and hearing impairments.

On January 29, 2016, several consolidated cases in the Western District of Pennsylvania moved forward after a scheduling conference. While claims against some of the defendants have resolved through settlement, claims against the National Basketball Association and Toys “R” Us, among others, are moving forward rapidly, with the parties scheduled to complete depositions in March 2016, and with trial scheduled for May 2, 2016.

Meanwhile, nine Senators from across the country, all Democrats, have sent a joint letter to the Office of Management and Budget urging it to complete its review of the proposed regulations regarding accessibility standards for websites and to impose strict ADA compliance regulations for companies. While the Senators commended the Department of Justice’s prosecution of various institutions for having websites that are allegedly not compliant with the ADA, they stated their concern that companies were “exploiting the lack of regulatory clarity” by maintaining non-accessible websites, which the Senators believe to be in violation of the ADA.

These developments show that the issue of whether your company’s website complies with the ADA is not going to go away soon. Plaintiffs’ lawyers representing visual and hearing impaired groups will likely continue to broaden the scope of who they sue for alleged ADA violations. If you receive a letter demanding action or requesting a settlement, it is important to know your rights before agreeing to anything.

If you have any questions, please contact Attorney Erica N. Reib of O’Neil Cannon at 414-276-5000 for more information.