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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]

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

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[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.