

## Trusts and Estates

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tions purported to resolve the entire question of compensatory damages despite the fact that neither stated specific items of damages. The compensations given were held to have already included a consideration of prejudgment interest.

*Wyandotte* clarified two important matters. First, it emphasized that the granting of prejudgment interest was not solely based on the question of whether the amount of damages was determinable. The court stressed that the granting of prejudgment interest was determined by a balancing of the injured party's right to be fully compensated against the right of the withholding party to be free from a claim for prejudgment interest when his refusal to pay the claim was legally justified. Second, *Wyandotte* made clear that a stipulation which purports to resolve the entire damage question will preclude a claim for prejudgment interest unless the stipulation makes clear that such a claim is expressly reserved.

JOHN L. SCHLIESMANN

## TRUSTS AND ESTATES

### I. CONSTRUCTIVE TRUSTS

Ordinarily the breach of an oral promise to devise realty by will is not grounds for imposing a constructive trust against a promisor or his successor.<sup>1</sup> Such a decree would generally constitute a violation of Wisconsin Statute section 853.06 which requires a written instrument, signed by the testator and executed in the presence of witnesses, to effectuate a transfer of a decedent's property.<sup>2</sup> However, when the breach by a promisor of an oral promise to devise results in unjust enrichment of the actual devisee, the court may exercise its equitable authority to impose a constructive trust in favor of the promisee. Utilizing this doctrine in *Meyer v. Ludwig*,<sup>3</sup> the court unanimously affirmed a trial court order imposing a constructive trust in favor of the defendant-daughter on land willed to the plaintiff by his deceased wife. The land had been orally promised to the defendant over twenty years prior to this action. In reliance on this promise, the defendant and her husband had significantly

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1. BOGERT, TRUSTS §§ 83, 85 (5th ed. 1973).

2. WIS. STAT. § 853.03 (1973).

3. 65 Wis. 2d 280, 222 N.W.2d 679 (1974).

improved the property.<sup>4</sup> The mother's will, however, was never amended to reflect this promise to convey. When the will was probated, the plaintiff received the promised parcel of land by devise.

Plaintiff-father contested the trial court's imposition of a constructive trust on the devised land asserting that his wife's promise was not binding on him. Furthermore, it was urged that the trial court's action constituted a belated amendment of the decedent's will, recognizably an action beyond judicial authority. If neither argument sufficed, the plaintiff alleged that the statute of limitations effectively barred this action commenced seven years after the decedent's death. All of these arguments failed.

In Wisconsin, constructive trusts have traditionally been recognized as: "' . . . a device in a court of equity to prevent unjust enrichment which arises from fraud or abuse of confidential relationship and is implied to accomplish justice.'"<sup>5</sup> By judicial interpretation, this rule has been held to extend beyond the Restatement Rule,<sup>6</sup> casually referred to as an "unjust enrichment only" test, by requiring an additional element of proof: "' . . . duress, abuse of confidence, mistake, commission of a wrong, or by any form of unconscionable conduct, [against one who] has either obtained or holds the legal title to property which he ought not in equity and in good conscience beneficially enjoy.'"<sup>7</sup>

The court relied on evidence of defendant's substantial investments and justifiable reliance on the decedent's assertions as sufficient proof of the first requirement for imposing a constructive trust — unjust enrichment. The court found the second element fulfilled, reasoning that a confidential relationship

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4. *Id.* at 282, 222 N.W.2d 680. The court reported evidence that defendant and her husband had made considerable improvements to the property between 1945 and 1968, including the installation of running water, electricity, new floors, insulation, kitchen facilities, garage, driveway, bathroom, front porch, new roof and landscaping.

5. 65 Wis. 2d at 285, 222 N.W.2d at 682, quoting *Estate of Massouras*, 16 Wis. 2d 304, 312, 114 N.W.2d 449, 453 (1962); see also *Masino v. Sechrest*, 268 Wis. 101, 66 N.W.2d 740 (1954); *Nehls v. Meyer*, 7 Wis. 2d 37, 95 N.W.2d 780 (1959); *Estate of Schmalz*, 58 Wis. 2d 220, 206 N.W.2d 141 (1973).

6. RESTATEMENT OF RESTITUTION § 160 (1937):

Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.

7. 65 Wis. 2d at 286, 222 N.W.2d at 682, quoting *Estate of Massouras*, 16 Wis. 2d 304, 312, 114 N.W.2d 449, 453 (1962).

between the defendant and plaintiff arose from their filial relationship and proven mutual assistance and inter-family cooperation.

The plaintiff-father unsuccessfully contested any abuse of a confidential relationship insisting that since he had not made the promise to convey he had no duty to fulfill it. The court acknowledged the fact that actual abuse of a confidential relationship occurred when the mother failed to will or convey the land to her daughter. However, the court pointed out that the plaintiff, as father, "stood in the same confidential relationship to their daughter as did his deceased wife,"<sup>8</sup> having knowledge of the promise and benefiting from subsequent inter-family cooperation. The decedent's "abuse of a confidential relationship" was thus imputed to the plaintiff-father and constituted the final element to justify imposition of the constructive trust.

The court added that even if the plaintiff had been "a stranger to the promise made, the relationship existing, and the benefits derived,"<sup>9</sup> his status as transferee rather than promisor would not prevent imposition of a constructive trust. The court quoted with approval the rule that "[w]here a person holding property transfers it to another in violation of his duty to a third person, the third person can reach the property in the hands of the transferee [by means of a constructive trust] unless the transferee is a bona fide purchaser."<sup>10</sup>

The court's indulgence in this dicta was purportedly to "nail shut" the "escape hatch" which the plaintiff-father had attempted to utilize to preclude his liability under the testatrix's promise. The court's attempt, however, appears less than conclusive and the court's propensity to impose constructive trusts, less than settled. An innocent donee, ignorant of a prior promise or breach, who has neither been associated with nor benefited from the relationship in issue, is arguably the ultimate "stranger" to an alleged inequitable transfer. As previously noted, however, constructive trusts are imposed to reach transfers deemed secured by a recipient's unconscionable conduct.<sup>11</sup> A transfer to an innocent donee would thus seemingly not warrant utilization of this equitable remedy by the

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8. 65 Wis. 2d at 289, 222 N.W.2d at 683.

9. *Id.*

10. *Id.* quoting *Richards v. Richards*, 58 Wis. 2d 290, 206 N.W.2d 134, 138 (1973) which cited and adopted the rule as stated in 5 SCOTT, TRUSTS § 470 (3d ed. 1967).

11. See generally BOGERT, TRUSTS, §§ 83-85 (5th ed. 1973).

court. Imposition of a constructive trust in such a circumstance would, however, be within the scope of the Wisconsin court's dicta.

The court also rejected the plaintiff-father's second argument that the imposition of the constructive trust constituted a belated amendment of the final probate judgment of the decedent's will and noted that the plaintiff had misconceived the legal rights involved in the imposition of a constructive trust on property. The court clarified the distinction:

The heirs or legatees do not receive, under a final judgment in the probate of an estate, any more title than the testator had to give. If, in an appropriate subsequent proceeding, there is an impressing of a constructive trust upon the interest of the testator in a piece of property, the constructive trust follows the property to the legatee or heir who receives title from the testator. The challenge is not to the fact of transfer but to what is in fact transferred under the will.<sup>12</sup>

Defendant-daughter's title thus arose from the constructive trust created, not from a change in the probate judgment.

The statute of limitations argument was also rejected by the court. The plaintiff-father had argued that the applicable statutory provisions were either of two six year statutes of limitations, one dealing with claims against a decedent or his estate,<sup>13</sup> the other pertaining to fraud actions.<sup>14</sup> Citing prior authority,<sup>15</sup> the court noted that since no fraud was asserted, the ten year limitation period under Wisconsin Statute section 893.18(4) was applicable. No cause of action occurred until the mother actually died leaving a will which did not fulfill her promise to convey the land. Since only seven years had lapsed since that time, the ten year statutory period presented no bar to the defendant's action. Thus, every argument of the defendant was rejected.

## II. WISCONSIN UNIFORM GIFTS TO MINORS ACT

The scope of a custodian's authority under the Wisconsin Uniform Gifts to Minors Act<sup>16</sup> was defined with greater speci-

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12. 65 Wis. 2d at 292, 222 N.W.2d at 685.

13. WIS. STAT. § 893.19(9) (1973).

14. WIS. STAT. § 893.19(7) (1973).

15. Estate of Demos, 50 Wis. 2d 262, 184 N.W.2d 117 (1971).

16. WIS. STAT. § 880.61 *et seq.* (1973).

ficity during this term of court in *Erdman v. Erdman*.<sup>17</sup> Pursuant to a decree of divorce, the defendant-father had been appointed custodian under the Wisconsin Act of an investment fund gifted to his children by their grandfather. During the period of custodianship, the defendant had withdrawn more than \$10,000 from the fund to meet various medical and educational expenses of his children. Testimony indicated that the defendant had been unemployed when the expenses arose and was unable to make the payments from his own resources. No limitation existed on use of the funds except the grandfather's request that all withdrawals be expended for the minors' benefit. The divorce decree, however, had obligated the defendant to pay all medical and educational expenses of his children. When the children reached majority the balance of the fund was transferred to them. This action was subsequently commenced by the plaintiff-mother for return of the amount withdrawn from the investment fund by the defendant.

On appeal the trial court decision was affirmed; the defendant had exceeded the scope of his custodial authority under Wisconsin Statute section 880.64(2)<sup>18</sup> by using proceeds to defray his own support obligation. The court relied heavily on a prior United States Tax Court decision,<sup>19</sup> which in pertinent part asserted:

[A] custodian named thereunder [Wisconsin Uniform Gift to Minors Act] has both the power to apply income or principal for the minor's support, maintenance, education, or bene-

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17. 67 Wis. 2d 116, 226 N.W.2d 439 (1975).

18. Wis. STAT. § 880.64(2) (1973) reads:

**Duties and powers of custodian**

(2) The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper with or without court order, with or without regard to the duty of himself or of any other person to support the minor or his ability to do so, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.

19. *Estate of Prudowsky v. Commissioner*, 55 T.C. 890 (1971), *aff'd per curiam*, 465 F.2d 62 (7th Cir. 1972). In *Prudowsky*, the decedent had held certain assets as custodian for his children under Wisconsin's Uniform Gifts to Minors Act. All of the assets had been donated by the decedent. Prudowsky's executor attempted to prevent estate taxation of these amounts by arguing that the assets could not be considered part of the decedent's property since Prudowsky would have been restrained from employing them in satisfaction of any legal support obligation. The tax court rejected this argument and included the assets in the estate.

fit, and the power to terminate the relationship at his discretion. The former power permits a parent who names himself as custodian of a gift to his minor child to apply the funds of that custodianship in satisfaction of his legal obligation of support; the latter creates a power of termination.<sup>20</sup>

The act of creating the gift and the accompanying potential to terminate the benefit were found to be essential contingencies on the power to expend custodial funds in lieu of a pre-existing support obligation. Reflecting on the tax court decision, the Wisconsin court asserted with approval that only a transferor-custodian could, at his discretion, return the gifted assets to his full ownership and redirect them to fulfill an independent obligation.<sup>21</sup> In *Erdman*, however, the defendant had not created the fund by transferring property to himself as custodian. The investment fund had been created by a court of equity which alone retained the right to terminate or modify the gift's existence. Absent the act of creation and the right of termination, the defendant-custodian had no authority to satisfy his personal responsibilities with fund money.<sup>22</sup>

The significance placed by the Wisconsin court on the act of creation and right of termination is difficult to reconcile with the apparent applicability and significance of Wisconsin Statute section 880.63(1) which defines the interest conferred in a minor under the Uniform Gifts to Minors Act. Such an interest or gift is: "irrevocable and conveys to the minor indefeasibly vested legal title to the security . . . [and] no guardian of the minor has any right, power, duty or authority with respect to the custodial property except as provided in ss. 880.61 to 880.71 [Uniform Gifts to Minors Act]."<sup>23</sup> While the custodian is authorized to expend "so much of or all"<sup>24</sup> the custodial property as is deemed advisable, the disposition must, in every case, be to or for the benefit of the minor. There is no authorization for

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20. *Id.* at 892.

21. 67 Wis. 2d at 121, 226 N.W.2d at 442:

[T]his power to terminate the fund for the benefit of children and return the assets involved to full control and ownership of the parent who created the fund was crucial. . . . In the case before us we do not have one who had a legal obligation to support children transferring property to himself as custodian, and retaining the right to terminate . . . on the part of the person named as custodian of the fund.

22. *Id.*; see also *Schwartz Estate*, 449 Pa. 112, 115 n. 2, 295 A.2d 600, 603 n. 2 (1972).

23. WIS. STAT. § 880.63(1) (1973).

24. WIS. STAT. § 880.64(2) (1973).

a donor-custodian to recapture gifted assets to his own full ownership and control. Indeed, any such provision would be contrary to the status of an indefeasibly vested right in one other than the donor-custodian. Additional elucidation by the Wisconsin Supreme Court on the applicability of section 880.63 would be useful.

The court stressed that as a court-appointed custodian, the defendant also assumed the role and responsibility of a trustee. This implicitly obligated the defendant to "treat the fund as belonging to the children and to expend it only for the benefit of the children, not for the benefit of the trustee."<sup>25</sup> The court acknowledged that the withdrawn funds had been used exclusively to meet the children's expenses. It asserted, however, that the true benefit improperly accrued to the custodian through his utilization of the funds to solve his own financial problems.<sup>26</sup>

The use of gifted funds by a non-transferor parent-custodian to fulfill his legal obligation to support the beneficiary-children was not summarily precluded by *Erdman*. The court, however, noted that the legal obligation could be circumvented only if the parent had: (1) applied to the appointing court, (2) established the fact of his inability as a parent to support his children, and (3) established the need of or benefit to the children in using the fund.<sup>27</sup> The crucial language of Wisconsin Statute section 880.64(2), "[t]he custodian shall . . . expend for the minor's benefit . . . with or without court order, with or without regard to the duty of himself or any other person to support the minor or his ability to do so . . .,"<sup>28</sup> was thus limited, making it impossible for a custodian to use his statutory authority to his own advantage.

### III. CLAIMS-STATUTORY COMPLIANCE

The necessity of strict compliance with statutory procedures for submitting claims against a decedent's estate was underscored by the court in the *Estate of Palmer*.<sup>29</sup> In this case plaintiff-creditor sought reversal of a county court order barring recovery on loans made to the decedent but not claimed

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25. 67 Wis. 2d at 122, 226 N.W.2d at 442.

26. *Id.* at 124, 226 N.W.2d at 443.

27. *Id.*

28. WIS. STAT. § 880.64(2) (1973).

29. 68 Wis. 2d 101, 227 N.W.2d 680 (1975).

against the estate. Following the decedent's death, over three years before this action, the plaintiff had accepted a guaranty from the estate's executor promising payment of all outstanding and future loans to the decedent's business enterprises. In exchange for this assurance, the plaintiff agreed not to submit a claim against the estate within the statutory period for such filing. After several Palmer corporations defaulted on their loans, the plaintiff petitioned the county court for recovery against the estate under the guaranty.

On appeal the supreme court affirmed the trial court's determination that the guaranty was unenforceable. The court stated that the guaranteed debts constituted contingent claims, enforceable only if properly filed against the estate within the statutory period required. Not only was the filing-of-claims requirement a statutory provision, but it had received recognition under Wisconsin case law as a nonwaiverable rule.<sup>30</sup> The court insisted that the execution of the guaranty was thus an unsuccessful attempt to elude statutory filing requirements.

The plaintiff attempted to circumvent this authority by asserting that the guaranty fell within the statutory exception to filing claims provided by Wisconsin Statute section 317.10.<sup>31</sup> This statute permitted an executor's good faith payment of unfiled claims to be recognized as a valid satisfaction if paid within the statutory period for filing claims against the estate. The plaintiff thus argued that the guaranty constituted payment of the outstanding claims it represented; actual receipt of money was a mere technicality enforceable because the guaranty had been executed within the requisite filing period.

The court, however, refused to accept this argument. The real effect of executing the guaranty, it noted, was the creation of a new obligation for the estate to pay an otherwise unenforceable claim. Although the executor had been authorized in the

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30. *Estate of Lathers*, 215 Wis. 151, 251 N.W. 466, 254 N.W. 550 (1934).

31. Wis. STAT. § 317.10 (1967) reads as follows:

**Payment of unfiled claims.** Where an executor or administrator has, in good faith, paid claims against the estate without the claims having been filed, such payments may be allowed under proof that they were just demands against the estate and were paid within the time limited for the presentation of claims. Notice that application will be made for such allowance shall be served as provided in section 324.18. Payment shall be allowed on a pro rata basis with other claims when the estate is insolvent.

This statute has been amended and renumbered Wis. Stat. § 859.47 (1973).

decedent's will to settle, extend, or compromise demands and obligations asserted against the estate, the court held that this authorization did not extend to creating new liabilities. No transaction beyond the executor's authority would be recognized.<sup>32</sup>

The court also refused to bind the decedent's estate to only those claims existing at his death by severing language in the guaranty applying to future loans. The court acknowledged as a primary purpose of the guaranty the executor's professed desire to insure future corporate advances and creditor good will. The Wisconsin rule of severability permits deletion of that part of an otherwise legal transaction "which will not defeat the primary purpose of the bargain."<sup>33</sup> To sever the instrument as to protect only loans existing at the time of the decedent's death, the court asserted, would have defeated the primary purpose of the guaranty.

The supreme court utilized statutes existing at the time of Palmer's death in 1967 to evaluate the plaintiff-creditor's claim. In 1971 a new probate code became operative in Wisconsin, changing several of the statutes evaluated in *Palmer*. Wisconsin Statute section 859.01 has replaced section 318.08 in barring all claims not filed against a decedent's estate within the time required. Exactly what claims must be filed has been clarified from the previous designation of "every claim against a decedent, proper to be filed in probate proceedings" to "all claims against a decedent's estate . . . whether due or to become due, absolute or contingent, liquidated or unliquidated."<sup>34</sup> Furthermore, the statute eliminates any possibility of asserting an action against either the personal representative or the decedent's heirs and beneficiaries to recover on claims not filed within the three month statute of limitations.

Unlike its 1969 counterpart, Wisconsin Statute section

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32. 68 Wis. 2d at 111, 227 N.W.2d at 686.

33. *Id.* at 112, 227 N.W.2d at 686, quoting *Simenstad v. Hagen*, 22 Wis. 2d 653, 661, 126 N.W.2d 529, 534 (1964).

34. WIS. STAT. § 859.01(1) (1973) which reads:

**Limitation on filing claims against decedent's estates** (1) Except as provided in sub. (3) and s. 859.03, all claims against a decedent's estate including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, are forever barred against the estate, the personal representative and the heirs and beneficiaries of the decedent unless filed with the court within the time for filing claims.

859.21 defines contingent claims and the necessity of filing such claims is reasserted:

If the amount or validity of a claim cannot be determined until some time in the future, the claim is a contingent claim regardless of whether the claim is based on an event which occurred in the past or on an event which may occur in the future. . . . [C]ontingent claims which cannot be allowed as absolute must, nevertheless, be filed in the court and proved in the same manner as absolute claims.<sup>35</sup>

The outstanding and potential debts covered by the executor's guaranty in *Palmer* would have been clearly covered by this language.

Section 859.47, covering payment of unfiled claims, is substantively identical to its predecessor section 317.10. Creditors citing this statute to suggest that an executed guaranty constitutes payment of a debt enforceable without filing against the decedent's estate should expect that their claim will be denied under the *Palmer* decision.

Thus the court's conclusion in *Palmer* would not differ if current Wisconsin law were applied to an identical fact situation. The added clarity of the current probate law, however, might have prevented the plaintiff-creditor from ever accepting a guaranty in lieu of filing his claim against the decedent's estate.

It should be noted that Wisconsin's new procedure for informal administration of a decedent's estate has not minimized the necessity of proper and timely presentation of creditor's claims.<sup>36</sup> Although Wisconsin Statute section 865.13 recognized payment by a personal representative of valid claims against the estate, whether filed or not,<sup>37</sup> section 865.135 protects only those claims filed with the probate registrar or court.<sup>38</sup> This

35. WIS. STAT. § 859.21 (1973).

36. WIS. STAT. § 865.01 *et seq.* (1973). *See generally*, Comment, *Informal Administration of Decedent's Estates in Wisconsin*, 1974 WIS. L. REV. 581.

37. WIS. STAT. § 865.13 (1973) reads in part:

A personal representative may pay valid demands against the estate, whether filed as a claim or not, within the time allowed for filing claims.

38. WIS. STAT. § 865.135 (1973) in pertinent part reads:

(1) The claimant may deliver or mail to the probate registrar a written statement of the claim indicating its basis, . . .

(2) The claimant may commence a proceeding against the personal representative in the court designated by s. 865.01 to obtain payment of his claim against the estate.

latter requirement is arguably beneficial to the new probate system. Proof of a creditor's compliance with the nonclaim statute can easily be detected if a claim has been processed and filed at a county courthouse. However, a creditor merely relying on a personal representative's assurances that payment will be made may later find his unpaid claim barred for failure to file. Whether a decedent's estate is administered by formal or informal procedures, careful compliance with statutory provisions is critical to safeguarding a creditor's claims.

#### IV. WILL — UNDUE INFLUENCE

Whether a testator's will is the product of undue influence primarily involves the resolution of issues of fact rather than law. In one respect the four-three decision in *Estate of Hamm*<sup>39</sup> was little more than a dispute over the appropriate theory of law against which the facts would be applied. The sheer weight of majority rule produced the affirmance of the trial court's conclusion; the great weight and clear preponderance of the evidence failed to demonstrate either undue influence or suspicious circumstances surrounding the preparation of the testator's will. However, a more subtle and perplexing consideration lingers unresolved in the court's thirty-two page response: What will the Wisconsin Supreme Court consider sufficiently clear or suspicious evidence of undue influence in the preparation of a will?

In *Estate of Hamm* the testator's heirs challenged, on grounds of undue influence, the devolution of ninety percent of an approximately million dollar estate to the decedent's male nurse and the attendant's brother. The testator had been partially paralyzed for many years and required constant physical assistance. In 1965, eight years prior to the decedent's death, the attendant was hired as the testator's companion. Shortly thereafter, the testator added a codicil to his will bequeathing \$5,000 to the attendant. One week later this devise was increased to five percent of the testator's estate. In 1966 the testator directed his attorney to prepare a new will. A \$35,000 trust and a \$50,000 bequest were willed to the testator's sisters along with a forty-nine percent interest in the estate residue. The nurse was also named as a residuary legatee of forty-nine percent of the estate and his brother was to receive the remaining

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39. 67 Wis. 2d 279, 227 N.W.2d 34 (1975).

two percent. The attendant's bequest, however, was conditional upon his remaining in the testator's employ. In the event of a voluntary termination or discharge for misconduct, the will provided that the lapsed legacy would devolve to the testator's sisters. In 1970 the last will, which is the subject of this appeal, was executed. Under this revision the nurse's share was increased to eighty-five percent and his brother's share to five percent of the testator's residuary estate. No change was made in the employment stipulation. However, the nurse's family was substituted for the testator's sisters as legatees in case the attendant's share lapsed. In addition, the attendant and his brother were to receive the specific bequests to the testator's sisters in the event they predeceased him. The decedent's heirs asserted that the facts surrounding this sequence of wills, the escalation of the nurse's distributive share and the substitution of the attendant's heirs as residuary legatees sufficiently evidenced undue influence upon the testator so as to prohibit the probate of his will.

The primary issue dividing the court was whether the challengers had met their burden of proof in establishing that the will had been the product of undue influence. In general, the burden of proving that a testator had been unduly influenced in drafting his will is placed upon the challenger.<sup>40</sup> The quantum of evidence necessary for a successful challenge, however, is dependent upon which of two tests is utilized by the court. Under one test, clear and convincing evidence of four factors is required: susceptibility, opportunity, disposition, and coveted result.<sup>41</sup> Under the second theory, a presumption or inference of undue influence arises if a confidential relationship between the testator and beneficiary, coupled with "suspicious circumstances," is established.<sup>42</sup> The notably lower standard of proof required in the latter test is premised on the ease by which one in a confidential relationship can influence the drafting or procuring of a will.<sup>43</sup> Arbitrary use of either test has

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40. ATKINSON, WILLS § 101 (2d ed. 1953).

41. 67 Wis. 2d 279, 282, 227 N.W.2d 34, 35 (1975); *see also*, Estate of Von Ruden, 55 Wis. 2d 365, 373, 198 N.W.2d 583 (1972); Will of Freitag, 9 Wis. 2d 315, 101 N.W.2d 108 (1960).

42. 67 Wis. 2d 279, 283, 227 N.W.2d 34, 35 (1975); *see also*, Will of Faulks, 246 Wis. 319, 17 N.W.2d 423 (1945); Will of Cooper, 28 Wis. 2d 391, 137 N.W.2d 93 (1965).

43. 67 Wis. 2d 279, 227 N.W.2d 34, 42 (1975), *quoting* Estate of Steffke, 48 Wis. 2d 45, 51, 179 N.W.2d 846, 849 (1970).

not, however, been a judicial policy in Wisconsin. Thus, when a confidential relationship is found to exist, the role of the court is limited to determining whether the circumstances surrounding the execution of the challenged will are "suspicious."<sup>44</sup>

Both the majority and dissenting opinions acknowledged these two theories of proof. Each also unquestionably asserted that a confidential relationship existed between the testator and his attendant.<sup>45</sup> In evaluating the trial court's finding of facts, however, the majority focused its attention on determining whether undue influence had been adequately proved under the fourfold opportunity test.

The majority found that the trial court's findings were not against the "great weight and clear preponderance of the evidence."<sup>46</sup> Two crucial issues, however, emerged from the court's response: (1) Was the majority applying too stringent a test in evaluating the facts presented? And (2), since a confidential relationship had been clearly acknowledged, would the facts at least have warranted a finding that suspicious circumstances existed?

The majority did not ignore the applicability of the "suspicious circumstance" approach. The majority addressed the trial court's use of this theory to evaluate the contestor's challenge. In direct contrast to the detailed analysis accorded the fourfold opportunity test, the court was short and conclusory in reaching its determination that no suspicious circumstances surrounded the preparation of the will. "[T]he basic question which must be determined from the evidence submitted is always whether 'the free agency of the testator has been destroyed.'" <sup>47</sup> The court held that such a result had not occurred when the will was executed or at any time.

The court seemed to base this determination on the absence of what it would consider clearly objectionable actions by the attendant in either dictating the terms of the will or soliciting its preparation. The actual provisions of the final draft were not questioned by the court. Although the challengers had vigorously asserted that the escalation of the attendant's share

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44. 67 Wis. 2d 279, 299, 227 N.W.2d 34, 42 (1975).

45. *Id.* at 283 (majority) and 297 (dissent), 227 N.W.2d at 35 (majority) and 42 (dissent).

46. *Id.* at 289 (majority) and 294 (dissent), 227 N.W.2d at 38 (majority) and 41 (dissent).

47. *Id.* at 294-95, 227 N.W.2d at 41.

and elimination of the testator's heirs as residuary legatees constituted an unnatural revision, the court was not responsive to the allegation. Rather, the court asserted: "There is no evidence in the record to reflect that Jenkins [nurse] procured the drafting of the will or participated in its drafting."<sup>48</sup> A finding of suspicious circumstances would seemingly be limited to evidence of an improper *activity* in drafting or procuring the will itself.

Paralleling the specificity with which the majority had analyzed the facts under the opportunity test, the dissenter evaluated the evidence applying the confidential-suspicious circumstance test. The dissent was highly critical of the majority's primary consideration of the opportunity test when a confidential relationship had been clearly acknowledged. The trial court's rejection of the presence of "suspicious circumstances" was likewise attacked as a "conclusion of law, no more."<sup>49</sup> Three considerations were utilized by the dissent to structure its analysis of the evidence: (1) the unexplained change in the testator's attitude in substituting the residuary legatees,<sup>50</sup> (2) the unnatural result (virtual disinheritance) which such substitution produced,<sup>51</sup> and (3) the apparent inconsistency of the change with the stated purpose of the will.<sup>52</sup> Suffice it to say that for each circumstance that the dissenter found not only capable of arousing suspicion, but "completely persuasive of the fact of undue influence upon the testator,"<sup>53</sup> the majority asserted it could "be at least partially explained."<sup>54</sup>

While the dissenter's substantive argument is instructive, the framework of their analysis is more crucial to the hypothesized change of policy arising from *Estate of Hamm*. The three considerations were each directed to underscoring the unnatural *result* produced by the sequence of wills. What precisely the attendant had done to influence the testator or when any overreaching actually occurred was not the crucial consideration. The burden of proving "suspicious circumstances" was deemed met because this unnatural result was not convincingly ex-

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48. *Id.* at 295, 227 N.W.2d at 41.

49. *Id.* at 300, 227 N.W.2d at 44.

50. *Id.* at 305, 227 N.W.2d at 46.

51. *Id.* at 306, 227 N.W.2d at 47.

52. *Id.* at 308, 227 N.W.2d at 48.

53. *Id.*

54. *Id.* at 291, 227 N.W.2d at 39.

plained by the nurse's activity or surrounding facts. In essence, the dissenter's analysis appeared to consist of a thorough consideration of the "coveted result" criteria of the opportunity test. It would seem to appear that while the majority was seeking evidence of the attendant's activity from which overreaching could be inferred, the dissenters focused on the unexplained result produced from the sequence of will changes to deduce the presence of undue influence.

One might speculate that this difference in approaches and conclusions is due to the absence of judicial specificity in defining what does constitute "suspicious circumstances." General criteria were suggested in *Will of Faulks*,<sup>55</sup> a case cited by both the majority and dissent:

[S]uch as the fact that the beneficiary took part in the preparation or procuring of the will, or actually drafted it or assisted in its execution, or that the testator was weak-minded or in frail health and particularly susceptible to influence, or that the provisions of the will are unnatural and unjust.<sup>56</sup>

The *Faulk* court itself supplemented these factors with the alternative criteria of either "a sudden and unexplained change in the attitude of the testator or some other somewhat persuasive circumstance."<sup>57</sup>

Prior case law has been no more helpful in adding specificity. In *Estate of Culver*,<sup>58</sup> cited by the dissent, the court held that the transfer of the residue of a \$30,000 estate to a late-in-life companion of the testatrix constituted a "remarkable and unnatural bequest which raised a red flag of warning."<sup>59</sup> In *Estate of Hamm*, however, with a \$900,000 residuary estate in issue, the majority did not find the sequence of changes leading to the bequest unnatural or suspicious. Whether the Wisconsin Supreme Court will in the future narrow its view of suspicious circumstances to evidence surrounding the activities of the alleged influencer (majority) or focus on the unexplained nature of the resulting will (dissent) appears far from settled by this four-three decision.

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55. 246 Wis. 319, 17 N.W.2d 423 (1945).

56. *Id.* at 359, 17 N.W.2d at 440.

57. *Id.* at 360, 17 N.W.2d at 440.

58. 22 Wis. 2d 665, 126 N.W.2d 536 (1964).

59. *Id.* at 673, 126 N.W.2d at 540.

