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Track A – Session 4

Remedying Financial Exploitation of the Elderly Through Litigation

Trevor C. Lippman, O'Neil, Cannon, Hollman, DeJong & Laing S.C., Milwaukee
Karen L. Tidwall, Whyte Hirschboeck Dudek S.C., Milwaukee
Peter J. Walsh, Whyte Hirschboeck Dudek S.C., Milwaukee

About the Presenters...

Trevor Lippman is an attorney with the law firm of O'Neil, Cannon, Hollman, DeJong & Laing S.C. and is a member of the firm's Litigation Practice Group. Trevor assists clients in a variety of civil litigation matters including inheritance litigation, business dispute litigation, estate litigation, employment disputes, and class action litigation. He received his Juris Doctorate (J.D.) from the University of Wisconsin Law School and B.A. from University of Wisconsin–Eau Claire. Trevor is a member of the Continuing Legal Education Committee of State Bar of Wisconsin. He is also a member of the Young Professionals Board of the Boys & Girls Club of Greater Milwaukee and is a volunteer for Project Street Youth, an organization dedicated to providing free legal assistance to homeless youth under the age of 25. You can view Trevor's complete biography at http://www.wilaw.com/attorney/trevor-c-lippman/

Karen L. Tidwall Whyte Hirschboeck Dudek S.C., Milwaukee.

Peter J. Walsh is an attorney with the law firm of Whyte Hirschboeck Dudek S.C. He received a Master's in Tax Law (LL.M.) from the University of Florida's Graduate Tax Program in 1999, a Juris Doctorate (J.D.) from DePaul University College of Law in 1998, and a Bachelor's of Arts (B.A.) from Marquette University in 1995. Peter is licensed to practice law in the States of Wisconsin, Illinois, and Florida, and he has been elected to be the Chair of the Board of Directors of the Elder Law Section of the Wisconsin Bar Association. Peter has authored numerous tax and estate planning articles for Tax Strategies, Estate Planning and the Elder Law Journal of Wisconsin and he speaks frequently on elder law and estate planning issues. Peter's curriculum vitae is available online at www.wiswalsh.com.

REMEDYING FINANCIAL EXPLOITATION OF THE ELDERLY THROUGH LITIGATION: WILL CONTESTS, INTENTIONAL INTERFERENCE WITH INHERITANCE, AND CONSTRUCTIVE TRUSTS

Prepared and Presented By:

Attorney Peter J. Walsh[1]
Whyte Hirschboeck Dudek S.C.[2]
20800 Swenson Drive, Suite 300
Waukesha, WI 53186-2058
(262) 956-6226
pwalsh@whdlaw.com

Attorney Karen L. Tidwall
Whyte Hirschboeck Dudek S.C.
555 East Wells Street, Suite 1900
Milwaukee, WI 53202-3819
(414) 978-5411
ktidwall@whdlaw.com

Attorney Trevor Lippman
O'Neil, Cannon, Hollman, DeJong & Laing S.C.
111 East Wisconsin Avenue, Suite 1400
Milwaukee, WI 53202
(414) 276-5000
trevor.lippman@wilaw.com

I. Introduction

A. The financial exploitation of the elderly is far too common in today's society. Attorneys are often asked for legal assistance in remedying such abuse.

B. Exploiters are often family members, caregivers, or close friends of the elderly person, and the circumstances of the exploitation vary greatly in context and severity. The very nuanced nature of such abuse makes it difficult to resolve through criminal investigation or county elder abuse referrals. This leaves families with little choice but to seek assistance through civil litigation.

C. During the lifetime of the elderly person, such litigation may proceed under Chapters 54 and 244 of the Wisconsin States through a guardianship proceeding or a review of the conduct of an agent under a power of attorney.

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[2] On July 1, 2016, the law firm of Whyte Hirschboeck Dudek will combine with the law firm of Husch Blackwell, and will be known as Husch Blackwell LLP.

D. Following the death of the elderly person, such litigation may proceed in probate court in the context of a will or trust contest or through civil litigation under a theory of intentional interference with inheritance.

E. This presentation focuses on post morteum litigation in the context of a will or trust contest as well as a suit for intentional interference of inheritance. Specifically, the legal theories by which a will, trust or other form of gratiutious transfer may be undone following the death of an elderly person are examined.

F. These legal theories include:

1. A challenge to a will based on a failure in the form of its execution,

2. Lack of capacity of the testator or settlor,

3. Insane delusion of the testator or settlor,

4. Undue influence, and

5. Intentional interference with inheritance

II. General Considerations in Will and Trust Contests and Challenges as to Formality

A. There is No Cause of Action for Pre-Death Will Contests

1. There is no cause of action for a potential beneficiary before the death of a testator. "[A] will does not create any enforceable right in a beneficiary of that will until the testator has died." *Eisenberg v. Eisenberg (In re Estate of Eisenberg)*, 90 Wis. 2d 620, 630, 280 N.W.2d 359 (1979).

2. By reason of the absolute right of disposal of property by the owner, any expectancy or chance of inheritance is too conjectural and remote to be recognized as a legal right. *Sanborn v. Carpenter* (*In re Carpenter*), 140 Wis. 572, 123 N.W. 144 (1909).

3. This limitation may not apply to litigation involving a trust. The statutory limitation in such context refers to being brought no later than one year of the death of the settlor of a trust which was revocable immediately before the settlor's death. See Wis. Stat. § 701.0604.

B. A Will Can Be Negated for Failure to Satisfy Execution Requirements

1. The testator must be over 18 to make or revoke a will. Wis. Stat. § 853.01.

2. A will must be signed by testator, with the assistance of another person with the testator's consent or by another person at testator's direction and in the testator's conscious presence. Wis. Stat. §§ 853.03(1) & 853.07(2).

3. A will must be witnessed by two disinterested persons who

a. Sign within a reasonable time after witnessing the signing;

b. Sign with the testator's acknowledgment of his or her signature within the conscious presence of each witness; or

c. Sign with the testator's acknowledgement of the will, within the conscious presence of each witness. Wis. Stat. § 853.07(2).

4. An uncontested will that contains an attestation clause that complies with Wis. Stat. §§ 853.03 and 853.05 will be admitted to probate without testimony or other evidence. Wis. Stat. § 856.15.

5. The attestation clause in itself creates a presumption in favor of due execution of the will, which can only be overcome by clear and satisfactory evidence. *Moore v. Halberstadt (In re Will of Frederiksen)*, 246 Wis. 263, 16 N.W.2d 819 (1944).

C. Witnesses of Will

1. Beneficiary as Witness – Wis. Stat. § 853.07(2)

a. "[A]ny beneficial provisions of the will for a witness or the spouse of a witness are invalid to the extent that the aggregate value of those provisions exceeds what the witness or spouse would have received had the testator died intestate." Wis. Stat. § 853.07(2)(b).

b. An attesting witness is interested only if the will gives to the witness or spouse of the witness some personal and beneficial interest.

c. Exceptions:

i. The will is not invalid if it is also signed by 2 disinterested witnesses or there is sufficient evidence that the testator intended the full transfer to take effect.

ii. The will is not defective; however, the portion which exceeds the share which would have passed intestate to the beneficiary or the beneficiary's spouse is invalid.

2. Attorney as Witness

a. Testimony of the attorney who drafts the will and one of the subscribing witnesses "may not be lightly brushed aside" or permitted to be outweighed by circumstances which give rise to mere suspicion. *Schaefer v. Ziebell (In re Will of Schaefer)*, 207 Wis. 404, 414, 241 N.W. 382 (1932).

b. When a lawyer witnesses a will, either in hopes it will enhance her or his chance of probating the will or for convenience, she or he assumes the risk that the execution is put in issue. His and her first duty is to the client to sustain the will and this requires the attorney to free himself or herself completely from the issue of its admissibility. A lawyer should not be both a witness for and an advocate of the cause of action. This rule is not one of the competency of the testimony but a question of professional ethics. Even in violation of the ethical standards, the evidence is competent. *Weinert v. First State Bank of West Bend (In re Estate of Weinert)*, 18 Wis. 2d 33, 38, 117 N.W.2d 685 (1962).

c. "In some cases, it may be unseemly, especially if counsel is in a position to comment on his testimony; and the practice has often been severely criticized by the courts. It has even been held to be reversible error to permit an attorney to continue to act as such after having testified for his client." *Id.* at 37.

D. Trusts are Not Subject to Such Formality

1. **Wis. Stat. § 701.0402** sets forth the requirements for creation of a valid trust. There are no formal requirements such as those for a Will. Wisconsin does not require two witnesses to a Trust. *Glaeske v. Shaw*, 2003 WI APP 71, 261 Wis. 2d 549, 661 N.W.2d 420.

2. **Wis. Stat. § 701.0407: "Evidence of oral trust.** Except as required by a statute other than this chapter, a trust does not need to be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence."

E. Legal Presumption That a Missing Will Has been Revoked

1. Wisconsin law imposes a presumption that if the original will cannot be found, it is presumed to have been revoked by the testator. *See Fonk v. Zastrow (In re Estate of Fonk)*, 51 Wis. 2d 339, 341, 187 N.W.2d 147 (1971) ("[N]onproduction of a will gives rise to the presumption that the will was destroyed by [the testator] . . ."); *Davis v. Slama (In re Estate of Slama)*, 18 Wis. 2d 443, 448, 118 N.W.2d 923 (1963) ("[W]here a will cannot be found after the death of the testator there arises a presumption . . . that it has been destroyed for the purpose of revoking it.")

2. "This presumption has been adopted as the rule which conforms most of the actual facts of human life. While wills are occasionally destroyed by disinherited heirs, they are much more frequently destroyed by testator, with the intention of revoking them. This presumption, therefore, takes the normal case as the standard, and requires affirmative evidence of the abnormal case." *Fonk*, 51 Wis. 2d at 342 (emphasis added) (internal cite omitted).

3. "If any will is lost, destroyed by accident, destroyed without the testator's consent, unavailable but revived under s. 853.11(6), or otherwise missing, the court has power to take proof of the execution and validity of the will and to establish the same." Wis. Stat. § 856.17.

4. To establish a lost will, the proponent of the lost will has the burden of establishing that (1) the original will was properly executed, (2) that the original document was in the testator's possession before his or her death, (3) that after the testator's death the original document could not be found, though a diligent search was conducted, and (4) that the testator did not destroy the document with the intent to revoke. Katherine W. Lambert, Death in Wisconsin § 5:53, at 154 (9th ed. 2008); Robert C. Burrell and Jack A. Porter, *Lost Wills: The Wisconsin Law*, 60 Marq. L. Rev. 351, 352 (1977).

III. Challenges as to the Competency of Testator or Settlor

A. Requisite Mental Capacity to Execute of Will or Trust

1. **Wis. Stat. § 701.0402(4)** "The capacity required to create a trust is the same as the capacity to make a will." The doctrines of competence and undue influence apply to the execution of a Trust. *Svacina v. E. Wis. Tr. Co. of Manitowoc (In re Estate of Svacina)*, 239 Wis. 436 1 N.W.2d 780 (1942), *Glaeske v. Shaw*, 2003 WI APP 71.

2. Competency must be determined on the date the instrument was executed. *Prod. Credit Ass'n of Madison v. Kehl*, 148 Wis. 2d 225, 230, 434 N.W.2d 816 (1988).

3. In the case of *Gittel v. Abram* (*In re Estate of Persha*), 2002 WI APP 113, ¶ 40, 255 Wis. 2d 767, 649 N.W.2d 661, the Wisconsin Court of Appeals stated the standard for testamentary capacity as follows:

> "The standard for testamentary capacity is well-established:
>
> > The testator must have mental capacity to comprehend the nature, the extent, and the state of affairs of his property. The central idea is that the testator must have a general, meaningful understanding of the nature, state, and the scope of his property but does not need to have in his mind a detailed itemization of every asset; nor does he need to know the exact value of his property ….The testator must know and understand his relationship to persons who are or who might naturally or reasonably be expected to become the objects of his bounty from which he must be able to make a rational selection of his beneficiaries.

> He must understand the scope and general effect of the provisions of his will in relation to his legatees and devisees. Finally, the testator must be able to contemplate these elements together for a sufficient length of time, *without prompting*, to form a rational judgment in relation to them, the result of which is expressed in the will." (emphasis added).

O'Brien v, Lumphrey (*Estate of O'Loughlin*), 50 Wis. 2d 143, 146-47, 183 N.W.2d 133 (1971); See also *Bellew v. Holzknecht* (*In re Estate of Woelz*), 9 Wis. 2d 458, 471, 101 N.W.2d 681 (1960).

Note "without prompting." Rationale: if a person does not or cannot comprehend or have the requisite knowledge on his or her own; how can he or she determine, evaluate and form the intent and rational judgment.

4. The testamentary capacity necessary to execute a valid will requires that the testator have "the mental capacity to comprehend the nature, extent and state of affairs of his property," "an understanding of his" relationship to persons who are or might naturally . . . be expected to be the objects of his bounty," and that the testator "must understand the scope and general effect of the provisions of his will in relation to his legatees and devisees." *O'Laughlin*, 50 Wis. 2d at 146-147; (*In re Estate of Evans*), 83 Wis. 2d 259, 277, 265 N.W.2d 529 (1978).

5. There is a presumption that a testator was mentally competent at the time of signing the will. *Olszewski v. Borek (In re Szperka's Will)*, 254 Wis. 153, 35 N.W.2d 209 (1948), reh'g granted 1949.

6. The fact of legal guardianship and evidence of an inability to handle one's business affairs are relevant factors in reaching a decision on testamentary capacity, but they are not controlling. *Deleglise v. Morrissey (In re Deleglise's Will)*, 142 Wis. 234, 125 N.W. 452 (1910). Legal guardianship in and of itself does not prove the testator lacked the capacity to execute a valid will. *Estate of O'Laughlin*, 50 Wis. 2d at 147-148.

7. A person may be incompetent to make a will at one period of time and yet be competent during a ***lucid interval*** between periods of sickness. *Will of Silverthorn*, 68 Wis. 372, 378, 32 N.W. 287 (1887).

8. "[T]he general mental condition of one who executes a will is only peripherally relevant, for a person may have a general or usual condition of inability to comprehend and yet have lucid intervals, during which time there is demonstrated testamentary capacity and a will may be appropriately executed." *Becker v. Zoschke (In re Estate of Becker*, 76 Wis. 2d 336, 345, 251 N.W.2d 431 (1977).

B. **Insane Delusions = Lack of Testamentary Capacity**

1. Provisions of a will or trust which are the product of an "insane delusion" are void.

2. **Elements**: In order to prevail upon the theory of insane delusion, the plaintiff must prove that:

   a. The testator had an insane delusion, and

   b. The insane delusion materially affected the disposition objected to. See *Evans*, 83 Wis. 2d 259.

3. **Case Examples**:

   a. *Estate of Evans*, 83 Wis. 2d 259.

      i. Daughters of the decedent asserted that decedent was suffering from an insane delusion that daughters were stealing decedent's assets and they were responsible for lack of sexual relations between decedent and his spouse.

      ii. Wisconsin Supreme Court found credible evidence to show that decedent was suffering from insane delusions.

      iii. Daughters lost under the second prong of the test, however, because the record contained substantial evidence of other grounds that led to the estrangement between the father and daughters. Therefore, daughters could not prove by a preponderance of the evidence that the insane delusions materially affected the outcome of the will.

   b. *Williams v. Firstar Bank Wisconsin (In re Estate of Williams)*, Nos. 97-3117, 96 CV 1507, 1998 WL 514343 (Wis. Ct. App. Aug. 20, 1998).

      i. Decedent executed a will in 1992 splitting approximately 90% of her multi-million dollar estate between her niece and nephew. Later that year, decedent executed another will to leave the bulk of her estate to art-oriented religious organizations, and leaving her nephew and niece approximately 10% of her total estate.

      ii. Plaintiffs asserted that the decedent suffered from insane delusions because she had thought plaintiffs had stolen property from her.

      iii. The court noted that test of whether an erroneous belief is an insane delusion is an objective one: whether a sane

person could have formed such a belief from the evidence. That belief must be unreasonably adhered to over time.

iv. The court found that even though decedent mentioned that the niece and nephew were taking things from time to time, no evidence was introduced that this belief was of the persistent quality needed to amount to an insane delusion.

v. Decedent still interacted positively with the niece and nephew after making the pour-over-will and gave them both gifts even after she changed the will.

c. *Haddican-Czestler v. Barrock (In re Estate of Haddican)*, No. 98-0319, 1999 WL 366694 (Wis. Ct. App. June 8, 1999).

i. Daughter left out of father's will challenged its validity based on father's apparent insane delusion that daughter stole Social Security money from him.

ii. Attorney's notes indicated that father left daughter nothing in the will because she benefited from father's Social Security money.

iii. Daughter argued that she did not benefit from the Social Security money and she alleged that the attorney's notes proved that her father disinherited her based on an insane delusion.

iv. The court held that daughter failed to show that father's delusion materially affected the outcome of her inheritance. Evidence showed other factors could have led to daughter's disinheritance:

a) An argument between daughter's husband and father that made daughter feel as though she had to choose between them.

b) Daughter's testimony that she was estranged from her father after this disagreement between her husband and her father.

c) Daughter's brother (decedent's son) testified that father was not happy with daughter or her husband regarding a recent real estate transaction.

d. *Hardy v. Barbour*, 304 S.W.2d 21 (Mo. 1957).

i. Missouri Supreme Court held that it was a jury question as to whether or not testatrix was suffering from insane

delusions and reversed trial court's summary judgment in favor of the executor of the will.

ii. There was evidence in the record showing an irrational belief that the daughter had conspired to try to put the testatrix into an insane asylum. Mother repeatedly blamed her daughter for her divorce. Mother repeatedly belittled daughter and openly wished her daughter had been a boy.

iii. Even though mother was competent in all other aspects of her life, the court noted an irrational belief need not come from a person lacking testamentary capacity. All that matters is that the belief in question not be based on facts or reason.

e. *In re Lockwood's Will*, 8 N.Y.S. 345 (1889).

i. Decedent executed an instrument intended to be his will giving all his property to charities, except a sum to his executor "large enough to be over and above any bribe" by his relatives. *Id.* at 346.

ii. The witnesses who signed the will in his presence were "comparative strangers" to him.

iii. Decedent's siblings challenged the legitimacy of the will by alleging insane delusion based on the following:

a) Decedent had previously been an inmate in an insane asylum.

b) Decedent believed his brothers and sisters were trying to poison him.

c) Decedent thought devils were pursuing him.

d) Based on numerous peculiar delusions, statements, and actions taken by decedent, the New York court refused to recognize the will as legitimate, even though the witnesses felt the decedent was of sound mind when he signed it.

f. *Kirkpatrick v. Union Bank of Benton*, 601 S.W.2d 607 (Ark. 1980).

i. Arkansas Court of Appeals held summary judgment appropriate because plaintiffs could not prove decedent was suffering from insane delusion.

ii. There was evidence to support that decedent was a very strong willed person who possessed extremely strong feelings that all drugs besides aspirin were wrong.

g. *Taylor v. McClintock*, 112 S.W. 405, 414 (Ark. 1908).

i. "A belief grounded on evidence, however slight, necessarily involves the exercise of the mental facilities of perception and reason; and where this is the case, no matter how imperfect the reasoning process may be, or how erroneous the conclusion reached, it is not an insane delusion."

h. *Cooper v. Cooper*, 485 S.W.2d 509 (Ky. Ct. App. 1972).

i. In a 1951 will, testator split his estate in equal parts to his two nephews.

ii. In 1965, testator reduced one of the nephew's share of testator's estate from ½ to $1.

iii. Nephew sued, claiming the other nephew slowly embittered the testator against him.

iv. The Kentucky Court of Appeals found credible evidence to support jury's finding that the testator had an insane delusion consisting of an idea that plaintiff was unfaithful in giving advice to the testator concerning the title to his farm and that this was unwarranted.

v. There was evidence that other nephew routinely attacked any actions taken by plaintiff at the same time testator's health was quickly deteriorating.

vi. Court upheld jury's decision to award plaintiff his ½ of the estate as defined in 1951 will.

i. *Odom v. Hughes*, 748 S.E.2d 839 (Ga. 2013).

i. There was evidence from which a jury could conclude that Testator suffered from a delusion that her relatives had "stolen" her house when the deed memorializing her transfer of the property to them showed that such was not the case.

ii. The jury's verdict that the will should be set aside was based upon evidence of undue influence as well.

j. *In re Estate of Strittmater*, 53 A.2d 205 (N.J. Eq. 1947). An example of the interplay between lack of capacity and insane delusions.

i. The decedent appeared to have a normal childhood. She never married and lived with her parents until age 32, when her parents died (in 1928). A few years after their deaths, however, she began to write vicious comments about her father ("My father was a corrupt, vicious, and unintelligent savage. . . . Blast his wormstinking carcass and his whole damn breed.") and to a lesser degree her mother ("That Moronic she-devil . . ."). *Id.* She looked forward to the day when all males were put to death at birth. She became a member of the National Women's Party a few years before her parents' death and did volunteer work for them up until her death. She died with a will leaving her estate to the National Women's Party.

ii. The Decedent's relatives, whom she saw rarely, sued, claiming she lacked capacity.

iii. Her doctor testified that she suffered from paranoia.

iv. The trial court found that the Decedent believed in "feminism to a neurotic extreme." *Id.* The New Jersey Supreme Court ruled that because of her insanity, particularly her insane delusions about men, Decedent lacked the requisite mental capacity to execute a will and invalidated her will.

IV. Undue Influence Applicable to Will Contests, Trust Contests and Intentional Interference with Inheritance

A. A party may establish undue influence in the execution of a will or trust by the use of a Four-Part test or a Two-Part test. Only one test needs to be met for the objector to prevail. *See Hoeft v. Friedli (In re Estate of Friedli)*, 164 Wis. 2d 178, 185, 473 N.W.2d 604 (1991).

B. **Wis. Stat. § 701.0406: "Creation of trust induced by fraud, duress, or undue influence.** A trust is void to the extent its creation was induced by fraud, duress or undue influence."

C. Four-Part Test

1. Opportunity to Influence. This element simply requires that the person had access to the deceased. Generally stipulated to or easy to prove.

2. Disposition or Proclivity to Influence. Disposition to unduly influence means more than a desire to obtain a share of the estate. It "implies a

willingness to do something wrong or unfair." *Becker*, 76 Wis. 2d at 350; *Hamm v. Jenkins (In re Estate of Hamm)*, 67 Wis. 2d 279, 289-290, 227 N.W.2d 34 (1975); *Brehmer v. Demien (In re Estate of Brehmer)*, 41 Wis. 2d 349, 356, 164 N.W.2d 318 (1969).

3. Susceptibility

   a. Susceptibility to undue influence involves a consideration of such facts as the person's "age, personality, physical and mental health, and ability to handle business affairs." *Lee v. Kamesar (In re Estate of Kamesar)*, 81 Wis. 2d 151, 159, 259 N.W.2d 733 (1977).

   b. Susceptibility must be found to exist when the will was executed. *See Odegard v. Birkeland (In re Estate of Glass)*, 85 Wis. 2d 126, 141, 270 N.W.2d 386 (1978).

   c. Although generally only evidence regarding the testator's condition up to and on the date the will was executed is relevant to susceptibility, in some circumstances, incidents occurring after the execution are relevant if they are indicative of a pattern of behavior. *See Bethesda Church v. Menning (In re Estate of Christen)*, 72 Wis. 2d 8, 20, 239 N.W.2d 528, 534 (1976).

   d. Evidence of meeting a younger man, belief of a romantic relationship, of executing a power of attorney and a will within months of meeting the younger man that gave all property to him to the exclusion of testator's children, lack of ability to communicate in English all constituted sufficient evidence of susceptibility as a matter of law. *Fischer v. Henningfield (In re Estate of Milas*), No. 98-2511, 1999 W: 627680 (Wis. Ct. App. Aug. 19, 1999).

4. Unnatural or Coveted Result. This element goes to the naturalness or expectedness of the bequest. *Hoffmann v. Wis. Valley Tr. Co. (In re Estate of Steffke*), 48 Wis. 2d 45, 49, 179 N.W.2d 846 (1970); *Hamm*, 67 Wis. 2d at 291-292. The fact that the testator has excluded a natural object of his bounty is a "red flag of warning." *Hydanus v. McMahan (In re Estate of Culver*, 22 Wis. 2d 665, 673, 126 N.W.2d 536 (1964). But that fact alone does not render the disposition unnatural where a record shows reasons as to why a testator would leave out those who may be the natural beneficiaries of his bounty. *See Cooper v. Zold (In re Will of Cooper*), 28 Wis. 2d 391, 137 N.W.2d 93 (1965).

5. A proponent of a will can defeat the four part test by disproving any of the four elements required.

D. Two-Part Test

1. The two-element test is based upon a confidential or fiduciary relationship between the testator and the beneficiary and the existence of suspicious circumstances, which leads to a rebuttable presumption of undue influence. *Dejmal v. Merta (In re Estate of Dejmal*), 95 Wis. 2d 141, 155-56, 289 N.W.2d 813 (1980).

    a. Confidential or Fiduciary Relationship

        i. Generally, a Power of Attorney for Finances or other fiduciary relationship is sufficient to satisfy this element.

        ii. A confidential relationship exists only if the favored beneficiary "can dictate the contents and control or influence the drafting" of the will. *Rahr v. E. Wis. Tr. Co. (In re Estate of Fechter*), 88 Wis. 2d 199, 220, 277 N.W.2d 143 (1979).

        iii. The relationship of parent and child does not, by itself, establish a "confidential relationship" as that term of art is used in the two-factor test for undue influence. *Sensenbrenner v. Sensenbrenner (In re Estate of Sensenbrenner*), 89 Wis. 2d 677, 688-690, 278 N.W.2d 887, 892-893 (1979).

        iv. Evidence, however, that the child procured a person to draft the parent's will can establish that "confidential relationship," if there is "control or influence" over the drafting, *Hoffmann*, 48 Wis. 2d at 51.

        v. A power of attorney for healthcare may not create a confidential or fiduciary relationship. A medical power of attorney did not create a fiduciary relationship concerning financial or estate planning matters. *See First Nat'l Bank v. Wernhart*, 204 Wis. 2d 361, 370, 555 N.W.2d 819 (Ct. App. 1996)(An agent is a fiduciary only "with respect to matters within the scope of his agency").

        vi. Regardless of the relationship between the party and the testator, the ultimate question to be determined is "whether the free agency of the testator has been destroyed.: *See Patterson v. Jensen (In re Will of Faulks*), 246 Wis. 319, 359, 17 N.W.2d 423.

        vii. The following factors indicate the existence of a confidential relationship: where the testator relies "heavily on another person for transportation, maintaining her household, assisting her in taking medication, making translations for her, and assisting her in financial matters."

Malmar v. Stimac (In re Malnar's Estate), 73 Wis. 2d 192, 203, 243 N.W.2d 435 (1976).

b. Suspicious Circumstances

i. Suspicious circumstances may be established by evidence that: (1) the beneficiary participated in the drafting or execution of the will; (2) the testator was feeble-minded or weak and especially vulnerable to influence; or (3) the provisions of the will are not natural and just. *See Will of Faulks*, 246 Wis. At 359.

ii. "It is well settled that where the party to be benefited by the will has a controlling influence or agency, or is particularly active in procuring the execution of the will, it is universally regarded as a very suspicious circumstance, requiring the fullest explanation. … Especially is this so where such active agent occupies a confidential relation to such testator; as in the case of attorney and client, physician and patient, priest and parishioner, or other relationship calculated to inspire confidence and trust in such testator." *Id.* at 347.

iii. The suspicious circumstances requirement is satisfied by "proof of fact such as the activity of the beneficiary in procuring the drafting and execution of the will or a sudden and unexplained change in the attitude of the testator, or some other somewhat persuasive circumstance." The basic question is whether the "free agency of the testator has been destroyed." *Onderdonk v. Keepman (In re Estate of Taylor*), 81 Wis. 2d 687, 696, 260 N.W.2d 803 (1978).

iv. Evidence of suspicious circumstances can be if children are not informed of the change in an estate plan, that a testator's own lawyer was not contacted about an important legal matter regarding the estate plan, and if a beneficiary hires their own lawyer to prepare the estate documents for testator. *See e.g.*, *Burneske v. Estate of Kramer*, No. 2006AP1170, 2007 WL 2442341 (Wis. Ct. App. Aug. 30, 2007).

v. Factors to be considered in proving undue influence are age, personality, physical and mental health and ability to handle business affairs. *Kehrberg v. Pribnow (In re Estate of McGonigal*), 46 Wis. 2d 205, 174 N.W.2d 205 (1970).

vi. The infirmities of old age, such as forgetfulness do not incapacitate one from making a valid will. *Schultz v. Lena*

(In re Estate of Phillips), 15 Wis. 2d 226, 231, 112 N.W.2d 591 (1961).

vii. A person under guardianship has been held to have the capacity to make a valid will. *See Dobrecevich v. Brandt (In re Estate of Dobrecevich*, 14 Wis. 2d 82, 109 N.W.2d 488 (1961).

viii. The burden is on the objector to prove by clear, satisfactory and convincing evidence that the will was the result of undue influence. *See Freitag. Solverson (In re Will of Freitag*), 9 Wis. 2d 315, 318, 101 N.W.2d 108 (1960).

c. When the objector proves the existence of both elements by clear and satisfactory evidence, a rebuttable presumption of undue influence is raised. The burden of going forward with the evidence then shifts to the proponent of the will. If rebutting testimony is introduced the inference still persists, but a trier of the facts is not required to accept the inference and may reject it and accept the rebutting evidence. However, one "need not contradict the evidentiary facts giving rise to the inference but may introduce such facts as would permit the rejection of the inference of undue influence." *Vargo v. Beaudry (In re Estate of Komarr*), 46 Wis. 2d 230, 241, 175 N.W.2d 473 (1970). If the objector proves the requisite elements of undue influence by clear, satisfactory, and convincing evidence, a rebuttable presumption of undue influence arises. *Sensenbrenner*, 89 Wis. 2d at 687.

d. Once the presumption is established, the burden then shifts to the will's proponent to "introduce sufficient evidence to rebut the presumption." *Malnar*, 73 Wis. 2d at 205.

e. In most cases, proof of undue influence rests upon circumstantial evidence. *Milbrot v. Persha (In re Estate of Milbrot*), 43 Wis. 2d 108, 168 N.W.2d 129 (1969).

2. An Out-of-State Case Example Limiting Impact on the "Presumption" in the Two Part Test: *Clinger v. Clinger (In re Estate of Clinger*), 872 N.W. 2d 37 (Neb. 2015).

a. Decedent (Mom) had six children. 4 contested the Will, 2 did not. In 2001, the contestants initiated conservatorship proceedings for their mother, which really upset her. Shortly thereafter, Mother executed a will leaving substantially more to the 2 children who did not initiate proceedings. In 2011, Mother executed another will with some minor changes.

b. Contestants relied on the two-part test and appealed the Court's failure to instruct the jury about this presumption.

c. In holding that the term "presumption" should not be used, the Nebraska Supreme Court noted:

i. "But where a contestant has met the burden of going forward and a proponent has met the burden of producing contrary evidence in response, the language of presumption becomes unimportant and potentially misleading."

ii. "We reaffirm our prior holding . . . and declare that the concept referred to as a 'presumption of undue influence' in will contests is not a true presumption. We discourage continued use of this terminology, particularly in a matter tried to a jury."

3. Example Showing the Presumption Lives On: *Cresto v. Cresto*, 872 N.W. 2d 37 (Kan. 2015).

a. 2 children of Decedent challenged Decedent's will wherein Decedent left everything to their second step-mother (Decedent's third wife). District Court ruled that Step-Mother had exerted undue influence over the Decedent "through the actions of her daughter's paramour" who was the attorney that drafted the will. The Court of Appeals reversed the finding of undue influence because it found insufficient evidence to support a finding of suspicious circumstances.

b. The Kansas Supreme Court reversed the Court of Appeals finding: The Step-Mother's daughter's significant other assisted Decedent in drafting the Will which ultimately would benefit Step-Mother's daughter and cut out the Decedent's 2 children. The Court found a confidential relationship with Step-Mother "through the agency" of daughter's significant other, who was the lawyer.

c. Court found that because Step-Mother did not rebut the presumption of undue influence, the will was to be set-aside.

E. Psychological indications of undue influence

1. Common "red flags" include:

a. A relationship in which the testator depends on someone in a position of trust for emotional or physical needs;

b. Isolation and sequestration of the testator;

c. Change in family relationships or dynamics;

d. Recent bereavement;

e. Family conflict;

f. Physical disability

g. Testator has non-specific psychological factors such as death-bed wills, sexual bargaining,

h. Serious medical illness with dependency and regression;

i. Personality disorders;

j. Substance abuse;

k. Mental disorders including dementia, delirium, mood and paranoid disorders;

l. The beneficiary instigates or procures the will;

m. Contents of the will include unnatural provisions;

n. Contents of the will favor the beneficiary;

o. Contents of the will are not consistent with previous wishes; and

p. Other documents besides the will have changed at the same time.

2. Undue influence generally occurs when the perpetrator takes deliberate actions to gain control of the testator, including any of the following:

a. Isolating the testator from others, or controlling phone calls, visits, and mail;

b. Creating a "siege mentality" by convincing the testator that no one else cares for them and only the perpetrator can care for the testator;

c. Creating dependency by manipulating the testator's activities, food, and medication;

d. Promoting powerlessness by threatening the victim with harm, neglect, or abandonment; and

e. Keeping the victim unaware of reality.

Matrix Health Care Specialists, Issues on Aging, *Undue Influence and Financial Exploitation* (2002), http://www.matrixadvocare.com/newsletters/V14_N2.pdf.

V. Alternatives to a Will Contest: Actions for Intentional Interference with Inheritance and Constructive Trust

A. Because of the diverse ways in which property can be transferred, e.g., through trusts, pay on death designations, joint ownership, etc., a traditional will contest may not be the optimal means for remedying a transfer which does not reflect the free will of the transferor.

B. In such cases, an alternative cause of action, such as a suit for intentional inference with inheritance or a suit for the imposition of a constructive trust, may provide a more appropriate avenue of relief.

C. **Intentional Interference with Inheritance – Legal Remedy for Damages**

1. **Elements of Intentional Interference with Inheritance**: To recover from a claim for intentional interference with inheritance in Wisconsin, the plaintiff must establish:

   a. An expectancy;

   b. Intentional interference with that expectancy;

   c. Tortious conduct to the decedent by the defendant, such as fraud, defamation, bad faith, or undue influence;

   d. A "reasonable certainty" that plaintiff would have received a legacy but for the actions of defendant; and

   e. Damages. *See Harris v. Kritzik*, 166 Wis. 2d 689, 695, 480 N.W.2d 514 (Ct. App. 1992) (*citing* Restatement (Second) of Torts § 774B cmt. d, at 59 (1970)).

2. "Expectancy"

   a. Black's Law Dictionary defines expectancy as "[t]he possibility that an heir apparent, an heir presumptive, or a presumptive next of kin will acquire property by devolution on intestacy, or the possibility that a presumptive beneficiary will acquire property by will." Expectancy, BLACK'S LAW DICTIONARY (9th ed. 2009).

   b. Beneficiaries of a revoked will have sufficient expectancy of inheritance to challenge the terms of the later will. *Estate of Woelz*, 9 Wis. 2d 458.

   c. Intestate heirs in Wisconsin have sufficient expectancy to bring an action. See *Anderson by Smithson v. McBurney by Stebnitz*, 160 Wis. 2d 866, 875, 467 N.W.2d 158 (Ct. App. 1991).

d. Actual knowledge of the inheritance at the time of the decedent's death does not appear to be required in Wisconsin.

3. "Reasonable Certainty" that Plaintiff Would Have Received a Legacy

a. Defendant's conduct must have eliminated plaintiff's inheritance rights. But for the defendant, plaintiff would have received property.

b. The Harris Court relied on the following comment from the Restatement in defining reasonable certainty:

> "If there is reasonable certainty established by proof of a high degree of probability that the testator would have made a particular legacy or would not have changed it if he had not been persuaded by the tortious conduct of the defendant and there is no evidence to the contrary, the proof may be sufficient that the inheritance would otherwise have been received. The fact that it was the defendant's tortious act that makes it not possible to prove with certainty may be taken into consideration by the court."

c. For example, if there are two separate plaintiffs, one of whom would be entitled to an inheritance through an old will and the other whom would be entitled to an inheritance via intestacy, they both have standing under this fourth element if the reason they are not to inherit is due to the tortuous actions of the defendant.

4. Limitations Issues: Wisconsin has applied the three-year intentional tort statute of limitations found in Wis. Stat. § 893.57 to tortious interference with inheritance. *Harris v. Kritzik*, 166 Wis. 2d at 694; *see also Tilstra v. Bou-Matic, LLC*, 1 F. Supp. 3d 900, 909 (W.D. Wis. 2014) (discussing history of application of Wis. Stat. § 893.57 to tortious interference with contract.)

5. Case Examples:

a. Plaintiff sued based on alleged promise of the decedent thwarted by the influence of the decedent's son. *Harris*, 166 Wis. 2d 689.

i. Plaintiff alleged that the decedent orally offered her $5,000,000 upon his death for "all of the services and companionship of a wife." *Id.* at 691. Plaintiff sued the decedent's son who allegedly embarked upon a course of action that ultimately caused the decedent's separation from the plaintiff.

ii. Court first adopted the tort of intentional interference with inheritance in Wisconsin.

iii. Court denied plaintiff relief and granted summary judgment to the son because the plaintiff could not prove the fourth element of the tort, that there was a "reasonable certainty" she would inherit absent the actions of the son. *Id.* at 697.

iv. Relevant to this decision was the court's belief that this alleged contract was based solely on sex. Therefore, the contract was void even if it did exist.

b. Plaintiffs sued to recover an inheritance obtained through a marriage shortly before the decedent's death at a time when decedent's competency was at issue. *Guske v. McLeod*, No. 2010-CV-1576 (Washington Cty. filed Nov. 8, 2010).

i. Washington County District Court

ii. The trial court held that this was a viable cause of action for three separate parties in the same suit.

iii. Party 1 and 2 were beneficiaries of a prior will. The original will could not be found.

iv. Party 3 would have inherited through intestacy if the probate court refused to enforce the will offered into evidence by Party 1 and 2.

v. Parties 1, 2, and 3 never had the opportunity to determine the legitimacy of their respective claims because defendant married testator one month prior to her death. As such, he received everything through probate.

vi. Parties 1, 2, and 3 challenged the legitimacy of the marriage, but the Probate Court ruled that under Wisconsin law a marriage cannot be negated after the death of a spouse. (The Wisconsin Supreme Court reversed on this issue, holding that a declaratory judgment action may be used to challenge the validity of a marriage even after the death of one of the parties to the marriage. *McLeod v. Mudlaff (In re Estate of Laubenheimer*), 2013 WI 76, ¶ 65, 350 Wis. 2d 182, 833 N.W.2d 735).

vii. Trial judge held that, even though it cannot be certain which of parties would have taken absent the alleged wrongful conduct by defendant, a cause of action still exists.

viii. The trial court held that each party had a sufficient expectation under element 1 and that each party also had sufficient proof as to their reasonable certainty to inherit.

ix. "From a legal standpoint… the court is unaware of any [] authority, for the proposition that in order to prevail on a claim for intentional interference with expected inheritance a particular heir of the deceased must be absolutely certain that they, rather than other heirs, will ultimately receive the decedent's property."

c. Plaintiffs sued the executor for failure to follow the testator's directions for an amendment to testator's Will and distribution of tangible personal property. *Cardenas v. Schober*, 783 A.2d 317 (Pa. 2001)

i. Testator signed a contract with an executor through which the executor agreed to carry out the testator's wishes with regard to her will.

ii. The plaintiffs alleged that the decedent made handwritten documents leaving personal property to the plaintiffs and that the executor failed to following these directions.

iii. The plaintiffs claimed that the executor intentionally failed to provide for the amendment of testator's will according to her wishes.

iv. Summary judgment was granted to executor.

v. On appeal, the court held that there were sufficient facts alleged in the complaint to sue for intentional interference with inheritance.

vi. Plaintiffs alleged they could prove the amendments to the will were made by the testator.

vii. Plaintiffs offered proof that executor had signed a contract to carry out any and all testamentary desires of testator.

viii. Plaintiffs offered proof that executor intentionally failed to follow an amendment to the will in order to benefit himself.

d. Plaintiff sued third party for intentional interference with inheritance *while testator was still living*. *Whalen v. Prosser*, 719 So. 2d 2 (Fla. Dist. Ct. App. 1998).

i. Florida Court of Appeals

ii. Husband took plaintiff in as a surrogate son, and they had a very special relationship until husband's death in 1979.

iii. Surviving wife named plaintiff her power of attorney, as they remained friends.

iv. Plaintiff alleged that he was a residuary beneficiary for the estate of wife, and that when wife's health deteriorated, the defendants convinced wife to change her estate plan.

v. Plaintiff contended that wife did not have the mental capacity to make changes to her estate plan.

vi. Court refused to allow this cause of action prior to the death of testator, holding that one does not have a protectable interest in a mere expectancy.

vii. Prior case law only allowed exception to this general rule when the alleged tortfeasor had died while the testator was still living.

viii. As Opposed to … *Harmon v. Harmon*, 404 A.2d 1020 (Mo. 1979).

a) Supreme Court of Maine allowed plaintiff to sue his brother and his brother's wife for tortious interference with inheritance even though the testator at issue, their mother, was still living.

b) Plaintiff alleged that the defendants convinced their 87 year old mother to transfer valuable property to the defendants.

c) Plaintiff alleged that by a will in 1976 and by her more recent statements, the mother indicated it was her intention that plaintiff receive at least a ½ interest in his property. The lifetime transfer effectively disinherited plaintiff.

d) The policy considerations in favor of allowing the case go forward while mother is living included:

1) the availability of witnesses to the allegedly tortious acts while their memories are relatively fresh,

2) the present availability of relevant exhibits, and

3) the prospect that the court may gain testimony of the aged mother, which may be determinative here.

e. Plaintiff residual beneficiaries of a trust sued trustee for tortious interference with inheritance. *Firestone v. Galbreath*, 25 F.3d 323 (6th Cir. 1994).

i. Court of Appeals held that residual beneficiaries could state a claim, though it would be difficult for plaintiffs to prove.

ii. On remand, the District Court held that the plaintiffs could not prove that they had more than a mere possibility of an inheritance and dismissed plaintiffs' complaint. *Firestone v. Galbreath*, 895 F. Supp. 917, 929 (S.D. Ohio 1995).

f. Plaintiff, brother of decedent, sued decedent's caretaker for intentional interference with inheritance. *Schilling v. Herrera*, 952 So. 2d 1231 (Fla. Dist. Ct. App. 2007).

i. Florida trial court found that summary judgment was appropriate because the defendant did not owe a duty to the decedent.

ii. Appellate court reversed, holding that breach of a duty is not an element needed for this cause of action.

iii. Relevant facts:

a) Caregiver converted her garage into a bedroom for the decedent when his medical condition worsened.

b) Caregiver was being paid for services.

c) Caregiver complained she was not getting enough money.

d) While living in the caregiver's garage, decedent became completely dependent on caregiver.

e) Caregiver convinced the decedent to make a new will naming her as the sole beneficiary of the decedent's estate.

f) When the decedent passed away, caregiver failed to let plaintiff know for over four months until after the expiration of the creditor's period had passed and the caretaker had petitioned the probate court for discharge of probate.

g) If probate proceedings can be used to address plaintiff's allegations, this cause of action may not

lie. *Wilson v. Fritschy*, 55 P.3d 997 (N.M. Ct. App. 2002).

h) Testator's niece and nephew, who had an expectancy interest in testator's prior revocable trust and pour-over will, brought an action against testator's accountant alleging that accountant exercised undue influence in persuading testator to execute a new estate plan providing for a charity the accountant favored.

i) New Mexico Court of Appeals held that they do not recognize the tort of intentional interference with inheritance when probate proceedings are still available to address alleged inequities.

j) Because the plaintiffs could have addressed their undue influence claims fully in the probate proceedings, the court refused to give them "another bite at the apple."

iv. Similarly, the Supreme Court of Illinois refused to allow a plaintiff to move forward on this theory when he failed to question the validity of the will in probate, and the six months he had to do so had long passed. See *Robinson v. First State Bank of Monticello*, 454 N.E.2d 288 (Ill. 1983).

v. Compared to: *Shriners Hosp. for Children v. Bauman (In re Estate of Ellis,*), 923 N.E.2d 237 (Ill. 2009).

a) The Supreme Court of Illinois held that the six month limitation to bring up a claim in probate did not apply to a charitable hospital claiming tortious interference with inheritance.

b) The court said the six month period applied to a 'will contest' and there are distinct differences between a will contest and the tort of tortious interference with inheritance. A will contest is not to secure a personal judgment, but is rather a quasi in rem proceeding to set aside a will.

c) Conversely a claim for intentional interference with inheritance is a claim for damages.

vi. See also *Bjork v. O'Meara*, 986 N.E.2d 626 (Ill. 2013) (holding that because probate proceeding did not provide meaningful relief, six month will contest limitation did not apply to tortious interference with inheritance).

g. Decedent's significant other sued decedent's sister for lying and misleading the defendant with regards to the decedent's execution of a will. *Beckwith v. Dahl*, 141 Cal. Rptr. 3d 142 (App. Dep't Super. Ct. 2012).

i. Decedent was set to have dangerous surgery on his lungs.

ii. Plaintiff and decedent had been in a 10-year relationship.

iii. Decedent's sister was his only living family member.

iv. Before surgery, decedent asked plaintiff to locate a will so he could sign it and give property to plaintiff.

v. Sister convinced plaintiff not to give decedent a will because a trust was preferable for tax purposes.

vi. Decedent died in surgery.

vii. Sister ignored all of plaintiff's inquiries into the probate process.

viii. Eventually sister emailed plaintiff to let him know that everything went to her because she was a family member.

ix. California Court of Appeals adopted the tortious interference with inheritance cause of action but noted that the tort requires that tortious conduct be directed at the decedent, not the plaintiff.

x. In the original complaint, plaintiff only discussed how the sister had lied to him. This was not sufficient to satisfy the third prong.

xi. Court allowed plaintiff to amend his complaint because trial court dismissed based on the conclusion that California did not recognize this tort.

h. Plaintiff sued attorney for omitting plaintiff as a beneficiary under the testator's will. *Chase v. Bowen*, 771 So. 2d 1181 (Fla. Dist. Ct. App. 2000).

i. Florida Court of Appeals held as a matter of law that an attorney who changes a will to comport with the beneficiary's wishes cannot be found to have intentionally interfered with the inheritance of a beneficiary.

i. Plaintiff sued her brother asserting that he interfered with her prospective inheritance by exerting undue influence on their mother. *Doughty v. Morris*, 871 P.2d 380 (N.M. Ct. App. 1994).

i. No question as to mother's competency prior to her death.

ii. When mother became ill, son asked bank to prepare a letter assigning mother's savings account and certificates of deposit into joint accounts between mother and son.

iii. Evidence that mother repeatedly indicated she did not know why her son was requiring her to sign the letter.

iv. Mother died. Son got all proceeds from the joint account, despite mother indicating on numerous occasions that she wanted brother and sister to split everything.

v. The New Mexico Court of Appeals held that under these facts, the sister had a viable cause of action against the brother.

j. Plaintiff sued his adoptive father's second wife asserting that she interfered with his inheritance through misrepresentation. *DeHart v. DeHart*, 986 N.E.2d 85 (Ill. 2013).

i. Father was in his 80's and had recently re-married a woman in her 50's. There were questions surrounding his competency.

ii. Plaintiff alleged that the second wife lied to his father by stating that the plaintiff was dead or that the adoption had not made him his son and was not legally binding.

iii. The Supreme Court of Illinois held that these allegations were sufficiently tortious to state a claim for interference.

k. Plaintiff sued his sister alleging that she abused her power of attorney relationship with their father as well as the joint bank account she shared with him. *Kelley v. Kempfer*, No. 5-11-0512, 2012 WL 7110384 (Nov. 9, 2012).

i. The trial court directed the verdict against plaintiff after his case in chief, holding that she could not have interfered with plaintiff's expectancy since she was an equal owner of the bank account with their father.

ii. The Illinois Court of Appeals reversed, holding that regardless of the fact that she was a joint owner on the bank

account, the plaintiff still put forth evidence that her use of the account was tortious toward her father.

l. Plaintiff sued the decedent's friend asserting that defendant misrepresented to the decedent that plaintiff was greedy and had refused to pay for work performed. *Golly v. Eastman (In re Estate of DiMatteo*), No. 1-12-2948, 2013 WL 4428899 (Ill. App. Ct. Aug. 16, 2013).

i. Plaintiff alleged that because of those misrepresentations, the decedent revoked a prior will that left everything to him and replaced it with a will that left everything to the defendant.

ii. Both plaintiff and defendant were unrelated friends of the decedent.

iii. The Illinois Court of Appeals reversed the trial court's dismissal of the plaintiff's complaint for failure to state a claim, holding that plaintiff did not need to be related to the decedent in order to have an expectancy.

m. Plaintiff sued a bank, the bank's vice president, and a court investigator for interfering with his expectancy under decedent's will. *McWreath v. Cortland Bank*, No. 2010-T-0023, 2012 EL 2522933 (Ohio Ct. App. June 29, 2012).

i. Plaintiff did in fact take under decedent's will, but the defendants had suspected foul play.

ii. Defendants filed frivolous probate proceedings, which caused plaintiff to spend approximately $10,000 in defense.

iii. The Ohio Court of Appeals held that the plaintiff could state a claim for tortious interference since he would have received that $10,000 under the will but for defendants' filing allegedly frivolous proceedings.

D. **Constructive Trusts – Equitable Remedy with Broad Application**

1. **Elements of Constructive Trusts**: The Wisconsin Supreme Court has ruled that a constructive trust may be imposed when:

a. Title to the property is held by someone who in equity and good conscience should not be entitled to beneficial enjoyment, and

b. Title was obtained through "fraud, duress, … commission of a wrong, or… any form of unconscionable conduct." *Hackl v. Hackl (In re Estate of Hackl*), 231 Wis. 2d 43, 54, 604 N.W.2d 579 (Ct.

App. 1999) (citing *Wilharms v. Wilharms*, 93 Wis. 2d 671, 679, 287 N.W.2d 779 (1980).

2. A cause of action for the imposition of a constructive trust is broader than that of the similar equitable cause of action for unjust enrichment.

    a. The Wisconsin Supreme Court has recognized a claimant's right to a constructive trust remedy even after acknowledging unjust enrichment was not a viable option.

    b. See *Sulzer v. Diedrich*, 2003 WI 90, ¶¶ 18, 30, 263 Wis. 2d 496, 510, 664 N.W.2d 641 (claimant was entitled to the imposition of a constructive trust even though an element "necessary to establish unjust enrichment, namely the requirement that a benefit be conferred upon the defendant by the plaintiff, did not exist.").

    c. See also *Wilharms*, 93 Wis. 2d at 680 (1980) (after acknowledging that the plaintiff was not the person who conferred the benefit on the defendant, the court noted that the defendant's actions still may warrant the imposition of a constructive trust).

3. Case Examples:

    a. Plaintiffs sought the imposition of a constructive trust over property they would have received under a previous will revoked by the decedent through a subsequent will executed by the decedent shortly before his death under suspicious circumstances. *Glojek v. Glojek*, 254 Wis. 109, 35 N.W.2d 203 (1948)

        i. Plaintiffs were children of decedent.

        ii. Decedent married defendant.

        iii. Decedent entered into a prenuptial agreement limiting the amount of the estate that would go to defendant to ¼ of all the property.

        iv. Defendant convinced decedent to make her joint owner of numerous properties he owned.

        v. Defendant assisted decedent in changing his will at a time when decedent was allegedly very weak and susceptible to undue influence.

        vi. Supreme Court of Wisconsin considered the imposition of a constructive trust an appropriate remedy under these circumstances, even though defendant owed no fiduciary duties to decedent or his children.

vii. "While, due to the fact that this court in cases heretofore discussed has emphasized the relevancy of a fiduciary relationship to the raising of a constructive trust, it might be supposed that such a relationship is somehow an essential condition to the raising of a trust, that is not the law. It is the rule that 'where the owner of property transfers it, being induced by fraud, duress or undue influence of the transferee, the transferee holds the property upon a constructive trust for the transferor.' Restatement of Restitution, sec. 166. "

b. Action for the imposition of a constructive trust over life insurance proceeds brought by children of deceased insured. The plaintiffs claimed that they had a right to such proceeds under a prior divorce stipulation and these proceeds were wrongfully disbursed to a second wife upon father's death. *Richards v. Richards*, 58 Wis. 2d 290, 206 N.W.2d 134 (1973).

i. The Wisconsin Supreme Court held that the father naming his second wife as beneficiary of life insurance policy, in violation of a prior divorce decree through which he was obligated to name his children as beneficiaries, was a proper foundation for imposing a constructive trust.

ii. The court held that the second wife received the life insurance funds as a constructive trustee for benefit of the children, even though the second wife did not act with any improper motive or intent and had been unaware of the policy until after her husband's death.

c. Constructive trust imposed to retain the marital property interests of a murdered wife in the pension benefits of the killing husband. *Estate of Hackl*, 231 Wis. 2d 43.

i. Bradley Hackl was convicted of murdering his wife, Diane, and sentenced to life in prison.

ii. Bradley claimed that Diane's marital property interest in his pension terminated upon her death, and consequently the pension must be classified as his individual property.

iii. The Court of Appeals of Wisconsin held that Bradley had no interest in Diane's half of his pension.

iv. "Wisconsin courts have long been committed to the principle that a murderer should not be permitted to profit from his or her crime."

v. The trial court imposed a constructive trust over half of the pension proceeds which represented the deceased spouse's marital property interest. The appellate court affirmed this order.

d. Similarly, *Wilson v. Hendrie (In re Will of Wilson*), 5 Wis. 2d 178, 92 N.W.2d 282 (1958), in which the will of a wife, who was murdered by her husband, provided for the distribution of assets, if husband does not survive wife, to the children of husband but not the wife, a constructive trust could be imposed to avoid the husband receiving an indirect benefit of his children inherently through husband's murder of the wife.

e. Principle that a murderer should not be permitted to profit from his or her crime applies to the intentional killing of another. *Gedlin v. Safran (In re Estate of Safran*), 102 Wis. 2d 79, 306 N.W.2d 27 (1981).

i. Son pled no contest to 'reckless homicide' of his mother.

ii. Mother left all her property to her son in a will.

iii. Residuary beneficiaries under the will challenge her son's ability to collect under the will.

iv. Trial court rules in favor of residuary beneficiaries and implements a constructive trust over her son's property.

v. Wisconsin Supreme Court holds that one may not inherit from an individual he intentionally kills. Her son never pled to the intentional killing of his mother. Case was remanded to trial court to determine if her son intentionally killed his mother.

f. If it can be shown that husband changed beneficiaries in the policies in order to defraud, or otherwise unconscionably deprive his wife of the policy proceeds, then these actions may warrant the imposition of a constructive trust. *Wilharms v. Wilharms*, 93 Wis. 2d 671 (1980).

i. Trial court implemented a constructive trust over life insurance proceeds in favor of decedent's wife.

ii. Decedent and his wife were in the middle of receiving a divorce. Family court commissioner issued a temporary order restraining either party from disposing of assets except in the usual and ordinary course of business.

iii. The decedent/husband, thereafter, changed the beneficiary of his life insurance proceeds from his soon to be ex-wife to his mother.

iv. Husband commits suicide.

v. Wife sought a constructive trust to be placed over proceeds.

vi. Court noted that a constructive trust is appropriate remedy when a spouse violates terms of divorce stipulation and thereafter dies.

vii. See also *Singer v. Jones*, 173 Wis. 2d 191 (Ct. App. 1992). A constructive trust imposed when father violated a divorce order by changing the beneficiary of his life insurance policy from his minor daughter to his second wife.

g. Constructive trust imposed to recover funds obtained through undue influence exerted over an incompetent individual and used to pay down mortgage and to make other improvements to a home of a third party. *Vance v. Thiede*, 246 Wis. 2d 669 (Ct. App. 2001) (unpublished)

i. Guardians of Whiteaker claimed that Thomas exerted undue influence over decedent for the purpose of obtaining his money.

ii. Thomas accompanied decedent to bank on a number of occasions while decedent took out money to issue checks to Thomas.

iii. Thomas used funds to pay off two mortgages on another person's house.

iv. Decedent gave Thomas $6,000 to pay for his mother's funeral expenses.

v. Decedent was diagnosed with Alzheimer's disease.

vi. Trial court found sufficient evidence that Thomas exerted undue influence:

a) Thomas seemed controlling of decedent when they appeared together at bank.

b) Reasonable for trial court to conclude Thomas had notice of decedent's diminished mental capacity.

vii. The use of a constructive trust was appropriately placed over the funds that Thomas used to pay off mortgage on third person's home and the $6,000 paid to use towards his mother's funeral expenses.

h. When plaintiff entrusted defendant with the investment of certain funds, but defendant refused to return the funds upon demand, a constructive trust could be imposed to negate defendant's unjust enrichment. *Gorski v. Gorski*, 82 Wis. 2d 248, 262 N.W.2d 120 (1978).

i. Plaintiff orally hired defendant to collect sums of money each year to be expended for plaintiff's living expenses.

ii. Plaintiff terminated the agreement after a number of years and asked for an accounting of the monies.

iii. Plaintiff alleged that defendant failed to return over $10,000 owed to plaintiff.

iv. Wisconsin Supreme Court held there was sufficient evidence to go to trial on the theory of constructive trust. When the complaint is interpreted as true, plaintiff sufficiently alleged that defendant was unjustly enriched by $10,000 while taking advantage of his confidential relationship with plaintiff.

i. Plaintiffs sought the imposition of a constructive trust over property defendant acquired through a suspicious marriage to decedent shortly before the decedent's death. *Guske v. McLeod*, No. 2010-CV-1576.

i. Plaintiffs were to inherit from decedent either through a will or intestacy.

ii. Defendant married decedent within months of her death, while the decedent was in a nursing home subject to an activated health care power of attorney, thus becoming decedent's sole beneficiary and wiping out plaintiffs' interests in decedent's estate.

iii. Plaintiffs sought a constructive trust be placed on estate assets.

iv. Defendant argued that he did not hold 'title' to the property because it was still technically in probate, and as such, the imposition of a constructive trust is not a valid request.

v. Defendant further argued that he was not unjustly enriched by the plaintiffs because he received no benefit from the plaintiffs.

vi. The court rejected both of the defendant's arguments and held that a constructive trust is available even in the absence of unjust enrichment.

vii. Court *cited* both *Sulzer*, 263 Wis. 2d 496 and *Wilharms*, 93 Wis. 2d 671, as proof that an imposition of a constructive trust may be utilized even if unjust enrichment is not viable claim.

j. A constructive trust could be imposed to negate the unjust enrichment obtained by a man, who knowing that a woman was possessed of property and was of unsound mind and suffering from physical disabilities from which she would shortly die, marries the woman with the intent of becoming the beneficiary of the woman's estate. *Patey v. Peaslee*, 131 A.2d 433 (N.H. 1957).

i. Plaintiffs attempted to annul a marriage between the defendant and the decedent.

ii. The Supreme Court of New Hampshire refused to annul the marriage based on the alleged fraud but allowed plaintiffs to amend their complaint to seek a constructive trust.

iii. Plaintiffs amended complaint and alleged that defendant's ordinary fraud was sufficient to warrant a constructive trust on the property inherited by the defendant.

iv. Defendant asserted that this issue was precluded from being argued, because the New Hampshire Supreme Court had held that the fraud involved could not lead to the annulment of the marriage.

v. Court held, however, that a constructive trust issue was not precluded and could go to trial.

vi. "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud… or under… circumstances which render it unconscientious for the holder… to retain and enjoy the beneficial interest, equity impresses a constructive trust… in favor of the one… equitably entitled." (Quoting 4 Pomeroy's Eq. Jur. § 1053 (5th Ed)). *Id.* at 436.

vii. Plaintiffs were set to inherit from decedent until the allegedly tortious marriage between defendant and decedent.

viii. "Since the transfer to the defendant did not occur during the lifetime of his former wife, it is obvious that no action could have been brought by her to recover it or to prevent the defendant from taking his statutory share as her widower, short of an action for annulment of the marriage, which under the prior decision of this court could not have been maintained… The fact it was impossible for the defendant to bring an action during her lifetime affords no reason for denying the plaintiffs a remedy." *Id.*

k. Plaintiffs sought a constructive trust to recover property and funds they claimed should have been theirs through inheritance from their father. *Taylor-McDonald v. Taylor*, 245 S.W.3d 867 (Mo. Ct. App. 2008)

i. Daughters sought the imposition of a constructive trust as a result of undue influence exerted by brother upon their father. Trial court granted their request. Defendant appealed.

ii. Plaintiffs are father's children from first wife.

iii. When father's second wife became ill and subsequently died, defendant came to the aid of father.

iv. Defendant gained control of all of father's financial affairs.

v. Defendant had father move in with him. While father was in hospital, defendant spent a total of over $300,000 from a joint bank account, most of it completely unrelated to father's care.

vi. Missouri Court of Appeals found these facts sufficient for the imposition of a constructive trust.

vii. The court further noted that:

a) It did not matter that plaintiffs failed to bring this claim during probate process. "In a suit to establish a constructive trust, the plaintiff is not required to prove the inadequacy of the remedy at law and is 'able to elect freely between the relief which the law can give him and the constructive trust remedy." *Id.* at 874, citing 472 Bogert Trusts & Trustees 37-40 (2d ed. 1978).

b) "The plaintiff may seek to impose the constructive trust on the specific property after it has left the wrongdoer's hands, until it reaches the hands of a bona fide purchaser. The plaintiff may also seek to impose the constructive trust on, or to trace his property into, the proceeds of the property which are in the hands of the wrongdoer." *Id.* at 875.

l. Plaintiff sought the imposition of a constructive trust over property plaintiff had transferred to the defendant on the grounds that the retention of the property by the defendant and the subsequent ejection of the plaintiff from the property was in violation of a relationship of trust and confidence and constituted unjust enrichment. *Sharp v. Kosmalski*, 351 N.E.2d 721 (N.Y. 1976)

i. Plaintiff was extremely fond of defendant, who was 16 years his junior.

ii. Defendant assisted plaintiff when his wife died, and continued to help him with certain domestic tasks.

iii. Defendant denied plaintiff's invitation for marriage.

iv. Despite this, defendant continued her association with plaintiff and permitted him to shower her with gifts in an attempt to get her to marry him.

v. Defendant was given access to plaintiff's bank account and named as joint owner of plaintiff's farm.

vi. After a fight, defendant ordered plaintiff to leave the farm and litigation followed.

vii. According to the Court of Appeals of New York the equitable remedy of a constructive trust was appropriate here because of the relationship between the two parties.

viii. "The record in this case clearly indicates that a relationship of trust and confidence did exist between the parties and, hence, the defendant must be charged with an obligation not to abuse the trust and confidence placed in her by the plaintiff. The disparity in education between the plaintiff and defendant highlights the degree of dependence of the plaintiff upon the trust and honor of the defendant." *Id.* at 723.

m. Plaintiff beneficiaries of decedent's trust sought constructive trust, claiming funds from a joint investment account owned by decedent and decedent's niece. *Salem Evangelical Lutheran Church v.*

Kangas, No. 2013AP2064, 2014 EL 3582748 (Wis. Ct. App. July 22, 2014).

i. Plaintiffs showed that the account was not intended to be jointly owned and was not intended to be a gift to the niece.

ii. Upon the death of decedent, the investment company distributed the funds to the niece according to the titling of the account.

iii. The appellate court upheld a constructive trust, citing mistake, i.e., that since the decedent did not intend the account to be jointly owned or to be a gift to her niece, the distribution to the niece was a mistake, so a constructive trust in favor of the plaintiffs was appropriate

n. Plaintiff ex-wife sued her ex-husband's parents' estate for constructive trust, claiming that the parents orally promised to gift to her and her husband the home which they rented from the parents. *Henning v. Henning*, 962 N.Y.S.2d 189 (App. Div. 2013).

i. The court held that, even if the other elements for a constructive trust were established, the wife failed to show adequate reliance on the oral promise since she only made enough improvements to benefit her, her husband, and their children, and did not expend as much as she would have if she had owned the home outright.

o. Plaintiff children from father's first marriage stated a claim for constructive trust when they asserted that their stepmother breached an oral agreement with their father to change the beneficiary designation from her to them on an IRA, after the father had changed the same on a different IRA in the opposite order. *Matter of Harold*, 979 N.Y.S.2d 334 (App. Div. 2013).

i. Further, plaintiffs' claim was not barred by laches for being filed against stepmother's estate because she had passed unexpectedly only seven months after the passing of their father

p. Plaintiff, the adult son of his decedent father, stated a claim for constructive trust against his father's wife, alleging that she had tricked his father into marrying her and designating her as beneficiary of his life insurance by persuading him that he was the father of her recently-born child, while she was actually already in a marriage-like relationship with another man. *In re Estate of Couture*, 89 A.3d 541 (N.H. 2014).

i. The decedent had passed away only days before obtaining a divorce judgment from his wife.