

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1170

Cir. Ct. No. 2004CV295

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

NANCY BURNESKE,

PLAINTIFF-APPELLANT,

V.

ESTATE OF ESTHER V. KRAMER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Portage County:
FREDERIC FLEISHAUER, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Nancy Burneske appeals from a judgment voiding the deed transferring ownership of Esther V. Kramer's home to Burneske but not reserving a life estate for Kramer. The trial court found that Burneske unduly influenced Kramer and breached her fiduciary duty as power of attorney for

Kramer. Burneske claims that the record does not support the trial court's conclusion that Burneske breached her fiduciary duty to Kramer and exercised undue influence over her. We disagree and therefore affirm.

¶2 Kramer was the owner of a home in Rosholt, Wisconsin. She lived at the home until 2004 when she moved to an assisted living facility shortly before her death. She had two children, Burneske and Eugene Cartwright. Kramer died in December 2004.

¶3 The facts relevant to the contested deed are as follows. In November 2001, Kramer was hospitalized with pneumonia. During Kramer's hospitalization, Burneske discussed Kramer's mental health status and concerns for Kramer's "potential for confusion" with a nurse at the hospital. Kramer's doctor advised Burneske to obtain a health care power of attorney for Kramer. After Kramer left the hospital, Burneske stayed with her at Kramer's home in Rosholt for a week. After that week, Burneske brought Kramer to Burneske's home in Milwaukee for continued care and supervision for another week.

¶4 While staying at Burneske's home, Kramer met with an attorney, Timothy Witkowiak. Burneske had contacted Witkowiak because he was the attorney who had helped with Burneske and her husband's estate plan. Witkowiak met privately with Kramer at Burneske's home to discuss the terms of the estate plan, including a new will and power of attorney. They discussed the possibility of transferring her home to Burneske but reserving a life estate for Kramer. On November 19, 2001, Kramer signed the new will and durable power of attorney in the presence of Witkowiak and his assistant. The will gave Kramer's real and personal property, including the Rosholt home, to Burneske, stock investment

accounts to Cartwright, and divided all remaining assets equally. The power of attorney named Burneske as Kramer's attorney-in-fact.

¶5 After Kramer returned to Rosholt, Burneske continued to visit her every other weekend. Sometime after the meeting at Burneske's and before March 2002, Witkowiak received a message requesting that he prepare a quitclaim deed transferring Kramer's residence to Burneske. Witkowiak did not have a record of who left the message. The message did not contain instructions to include a life estate for Kramer. Witkowiak did not include a life estate in the deed he prepared. He mailed it to Burneske and she took it to Kramer. Kramer signed the deed with Burneske and her husband present. Burneske mailed the deed to Witkowiak, who authenticated it.

¶6 In December 2002, Burneske and Kramer discussed the expenses regarding the home and Kramer made a verbal commitment to pay rent. This discussion led to a disagreement and breakdown of the relationship between Burneske and Kramer. Kramer revoked Burneske's power of attorney in 2003, and executed a new will in 2004. Under the new will, one-half of her estate went to Cartwright and the remaining one half went to Faith Firkus, her neighbor.

¶7 In 2004, Burneske brought a small claims action to evict Kramer from her home. Kramer counterclaimed seeking to void the deed. Kramer's estate was substituted as a defendant after Kramer died. The circuit court concluded that Burneske exercised undue influence over Kramer and breached her fiduciary duty by obtaining the deed. The court voided the deed. Burneske appeals.

¶8 We will not upset a trial court's findings of fact unless they are clearly erroneous. *Estate of Taylor v. Keepman*, 81 Wis. 2d 687, 696, 260 N.W.2d 803 (1978). Whether the established facts satisfy a legal standard is a

question of law we review without deference to the trial court. *Arnold v. Robbins*, 209 Wis. 2d 428, 432, 563 N.W.2d 178 (Ct. App. 1997).

¶9 Undue influence may be proven under a four-element or a two-element test. *Estate of Hamm v. Jenkins*, 67 Wis. 2d 279, 283, 227 N.W.2d 34 (1975). 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. *Estate of Dejmal v. Merta*, 95 Wis. 2d 141, 155-56, 289 N.W.2d 813 (1980). The trial court used the two-element test.

¶10 Under the two-element test, when deciding if a confidential relationship existed between the testator and the beneficiary, the test is:

[T]he ease in which a confidant can dictate the contents and control or influence the drafting of such a will either as the draftsman or in procuring the drafting. If one is not the actual draftsman or the procurer of the drafting, the relationship must be such that the testator depends upon the advice of the confidant in relation to the subject matter of the will.

Estate of Kamesar v. Kamesar, 81 Wis. 2d 151, 164, 259 N.W.2d 733 (1977) (citation omitted). A fiduciary relationship is created when a power of attorney is granted. *Estate of Friedli v. Friedli*, 164 Wis. 2d 178, 186-87, 473 N.W.2d 604 (Ct. App. 1991). Holders of powers of attorney are prohibited from receiving or obtaining property from their wards, unless the power of attorney specifically grants that authority. *Praefke v. American Enter. Life Ins.*, 2002 WI App. 235, ¶16, 257 Wis. 2d 637, 655 N.W.2d 465.

¶11 Secondly, 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.” *Taylor*, 81 Wis. 2d at 702 (citation omitted). The basic question is “whether the free agency of the testator has been destroyed.” *Hamm*, 67 Wis. 2d at 294-95 (citation omitted).

¶12 Burneske contends that the trial court’s findings of fact regarding the breach of fiduciary duty and suspicious circumstances are clearly erroneous. She does not object to the application of law in this case. Burneske requests that we reassess the facts. However, we do not upset a trial court’s findings of fact unless they are clearly erroneous. *Taylor*, 81 Wis. 2d at 696. We examine the record only to see whether there is an evidentiary basis for the trial court’s determinations. *Hamm*, 67 Wis. 2d at 282.

¶13 The trial court concluded that there was a fiduciary relationship between Burneske and Kramer because Burneske was Kramer’s power of attorney. Burneske argues that she was not acting as Kramer’s attorney-in-fact when she delivered the deed. She claims that she merely acted as an intermediary in the transfer of Kramer’s house via the quitclaim deed. However, the trial court concluded that Burneske could not merely deliver the deed, but rather, as Kramer’s fiduciary, she was obliged to ensure that Kramer understood what she was signing.¹ The court concluded this omission was a breach of her fiduciary duty to Kramer. The facts concerning the transfer support the trial court’s conclusion that Burneske had a fiduciary relationship to Kramer and met the requirements for the first element of this test.

¹ Burneske cites no authority holding that a fiduciary may, when acting in a way that affects the principal’s economic interests, take off his or her fiduciary hat.

¶14 The trial court concluded that there were suspicious circumstances surrounding the will and quitclaim deed, including Burneske hiring her own lawyer to prepare the will and deed, and the change in the terms of Kramer's will. Other suspicious circumstances were the fact that Cartwright was not informed about the changes to Kramer's estate plan or the existence of the deed, that Kramer's lawyer was not called concerning the deed and the lack of a reservation of a life estate for Kramer in the deed. The trial court found that Burneske knew there was no reservation of a life estate in the deed, and it was suspicious that she did not inform Kramer about the missing life estate and did not read the deed to her mother. We conclude that these facts support the trial court's conclusion of suspicious circumstances and that conclusion is, therefore, not clearly erroneous.

¶15 The findings of fact made by the trial court concerning the breach of fiduciary duty and undue influence are not clearly erroneous and are supported by the record. The trial court's conclusions follow its found facts. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

