**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

August 19, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-2511**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**IN RE THE ESTATE OF GEORGE MILAS, DECEASED:**

**JUDITH FISCHER AND RAYMOND MILAS,**

**APPELLANTS,**

**V.**

**VANESSA HENNINGFIELD,**

**RESPONDENT.**

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APPEAL from an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Reversed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Judith Fischer and Raymond Milas (Judith and Raymond) appeal from an order of the circuit court which: (1) concluded that their father, George Milas (Milas), was not unduly influenced by Vanessa Henningfeld (Henningfeld) on October 14, 1988 when he made his will; and (2)

admitted the will into probate. We conclude that the circuit court applied an incorrect legal standard when it analyzed whether Henningfeld unduly influenced Milas because the court did not consider whether slight evidence of susceptibility existed at the time the will was executed. We also conclude that the facts found by the circuit court are sufficient to establish slight evidence of susceptibility, as a matter of law. Accordingly, we reverse.

## BACKGROUND

Henningfeld met Milas in June of 1988, when she came to his house to sell him a nursing home insurance policy. Milas was then seventy-one years old and Henningfeld was thirty-five. The two became friends. Milas had difficulty communicating due to his heavy Lithuanian accent; he had some memory problems; and he needed assistance with his finances.

Approximately four months after they met, at Henningfeld's suggestion, Milas and Henningfeld went to Attorney Frank Kinast's office to make a new will for Milas. The will he executed on October 14, 1988 left his entire estate to Henningfeld, rather than to Judith and Raymond, Milas's two children, who had been the beneficiaries under his previous will. On the same day, Milas also gave Henningfeld his power of attorney, thereby giving her significant control over his financial matters.

Henningfeld attended most subsequent meetings between Milas and Kinast, who was representing Milas in his divorce from his second wife. She attempted to control the litigation, to exclude the attorneys from the process, and to interfere with the court proceedings. In 1989, as part of a complaint against Kinast for the representation he provided to Milas during the divorce, Henningfeld wrote a letter to the Board of Attorneys Professional Responsibility. In it, she

contended that Milas had difficulty communicating and acting in his own best interest during June 1988.

On June 2, 1989, Milas went to Kinast's office without Henningfeld and attempted to revoke the October 14, 1988 will by drawing a line through it and writing at the bottom of the will that he revoked it. However, on August 23, 1993, shortly after suffering a stroke, Milas executed another will again leaving his entire estate to Henningfeld.

Milas died in November 1996. Thereafter, Henningfeld offered the August 23, 1993 will for probate, and Judith and Raymond objected. Following a trial, the circuit court concluded that the 1993 will was the product of undue influence because Henningfeld had the opportunity and the disposition to influence Milas; had achieved the coveted result; and that Milas was susceptible to undue influence. The court found that from the inception of their relationship in June or July 1988 through the signing of the 1993 will, Henningfeld unduly influenced Milas.

Thereafter, Henningfeld offered the October 14, 1988 will for probate, and Judith and Raymond again objected. The circuit court concluded that Milas had not validly revoked the 1988 will; however, the court concluded that Milas died intestate because the 1988 will was not revived by the doctrine of dependent relative revocation. Henningfeld appealed. We concluded that the circuit court erred in finding that Milas died intestate, and we remanded to the circuit court for further proceedings.

On remand, the circuit court held a hearing to determine whether the October 14, 1988 will was affected by the undue influence of Henningfeld. After a trial, the circuit court concluded that Judith and Raymond had not met their

burden of proving undue influence because they had not proved that when he executed the will, Milas "was so susceptible to undue influence that he could not have made another choice." The circuit court made no specific ruling regarding testamentary capacity.[1] This appeal followed.

## DISCUSSION

### Standard of Review.

Where a circuit court has made factual findings that underlie the issue of undue influence, we will not upset those findings unless they are clearly erroneous. *See* Section 805.17(2), STATS.; ***Odegard v. Birkeland***, 85 Wis.2d 126, 134, 270 N.W.2d 386, 390 (1978). Whether a circuit court used the proper legal standard to apply to the facts of record in determining whether undue influence existed is a question of law which we review *de novo*. *See* ***Arnold v. Robbins***, 209 Wis.2d 428, 432, 563 N.W.2d 178, 179 (Ct. App. 1997). Additionally, whether the facts found by the circuit court fulfill that legal standard is a question of law. *See* ***Nottleson v. DILHR***, 94 Wis.2d 106, 115-16, 287 N.W.2d 763, 768 (1980).

### Undue Influence.

A will procured by undue influence is void. *See* ***Estate of Von Ruden***, 55 Wis.2d 365, 373, 198 N.W.2d 583, 586 (1972). Undue influence sufficient to invalidate a will may be proven by two methods. The first method is a four-element test that requires the challenger of the will to prove that: (1) the decedent was susceptible to undue influence; (2) there existed the opportunity to

[1] Because the court made no finding on testamentary capacity, we do not review that issue. *See* ***Becker v. Zoschke***, 76 Wis.2d 336, 350-51, 251 N.W.2d 431, 437 (1977).

influence the decedent; (3) there was a disposition to influence the decedent; and (4) the coveted result was achieved. *See* ***Odegard***, 85 Wis.2d at 135, 270 N.W.2d at 391. When the challenger of a will establishes three of the four elements by clear, satisfactory and convincing evidence, only slight evidence of the fourth element is required. *See* ***id.***

The second method by which to prove undue influence has two components: (1) a confidential relationship between the testator and the favored beneficiary and (2) suspicious circumstances surrounding the making of the will. *See* ***id.*** If the challenger proves both elements by clear, satisfactory and convincing evidence, a rebuttable presumption of undue influence is raised and the burden of rebutting the presumption shifts to the proponent. *See* ***Johnson v. Merta***, 95 Wis.2d 141, 160-61, 289 N.W.2d 813, 822 (1980).

Although only one test need be met for the objector to prevail, *see* ***Hoeft v. Friedli***, 164 Wis.2d 178, 185, 473 N.W.2d 604, 606 (Ct. App. 1991), Judith and Raymond offered both theories. We do not disturb the circuit court's conclusion with regard to the two-component method because the court applied the proper legal standard, and the court's finding that Judith and Raymond failed to meet their burden of proving a confidential relationship and suspicious circumstances was not clearly erroneous.

With regard to the four-element test, the circuit court found that although Henningfeld received the coveted result and had the disposition and the opportunity to influence Milas, Milas was not susceptible to undue influence because he tried to revoke the 1988 will several months later. The court reasoned:

> [T]he only question before this Court is whether Mr. Milas, on the date of the execution of the will, was so susceptible to undue influence that he could not have made another

> choice, and I conclude he could have made another choice as evidenced by what he actually did a few months later.

Thus, the court concluded that Judith and Raymond had met their burden of proving, by clear and convincing evidence, three of the four necessary elements but that they had not sufficiently proved susceptibility. We do not disturb the circuit court's findings with regard to the elements of disposition, opportunity and coveted result, as they are amply supported by the record. Rather, the legal standard that the court applied in determining whether slight evidence of susceptibility existed, is the focus of our review.

**Slight Evidence of Susceptibility.**

Susceptibility has been defined as "capable of submitting to an action, process, or operation," "open, subject, or unresistant to some stimulus, influence, or agency," or "impressionable, responsive." WEBSTER'S NEW COLLEGIATE DICTIONARY 1174 (1977); *see* ***Odegard***, 85 Wis.2d at 140, 270 N.W.2d at 393. It has also been defined as "receptiveness to other's suggestions." ***Estate of McGonigal***, 46 Wis.2d 205, 213, 174 N.W.2d 256, 260 (1970). The supreme court has also instructed that when determining whether a testator is susceptible to influence by a particular person, a circuit court should consider the testator's age, personality, physical and mental health, and ability to handle business affairs. *See* ***Odegard***, 85 Wis.2d at 140, 270 N.W.2d at 393. If consideration of these factors demonstrates that the testator's natural defenses were lowered, leaving him susceptible to the suggestions of a stronger, more determined individual, or that the testator was unusually receptive to the suggestions of another to whom he consistently deferred on matters of personal importance, then the susceptibility element is established. *See* ***id.***; ***Johnson***, 95 Wis.2d at 156-57, 289 N.W.2d at 820. Additionally, a circuit court should

consider whether there is evidence that the testator was dependent on the person accused of undue influence, as dependence may indicate susceptibility. *See* ***Bethesda Church v. Menning***, 72 Wis.2d 8, 18, 239 N.W.2d 528, 533 (1976).

In ***Bethesda Church***, an elderly woman, who was devoutly religious and was survived by many nieces and nephews who had been the objects of her generosity in previous wills, became very close with the pastor of Bethesda Church. *See* ***id.*** at 9, 239 N.W.2d at 529. Thereafter, she wrote a new will leaving everything to the church and nothing to her family. In examining the claim of undue influence, the circuit court found that the testator relied on her minister for transportation, choice of attorney, frequent social visits and management of her financial affairs, thereby becoming dependent on him. *See* ***id.*** at 19-20, 239 N.W.2d at 534. The supreme court concluded that her dependency was relevant to proving susceptibility to undue influence. *See* ***id.*** at 17-18, 239 N.W.2d at 533.

Additionally, susceptibility must be found to exist when the will was executed. *See* ***Odegard***, 85 Wis.2d at 141, 270 N.W.2d at 393. Accordingly, the testimony of the attorney who drafted the will and the witnesses to it are very important. *See* ***Schultz v. Lena***, 15 Wis.2d 226, 235, 112 N.W.2d 591, 597 (1961). 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***, 72 Wis.2d at 20, 239 N.W.2d at 534.

Here, the circuit court found that Milas, who was seventy-one years of age, became very close with Henningfeld, who was thirty-five. When they met, Milas was in the process of divorce. The court found that Milas really didn't want

the divorce and that Henningfeld intervened in that proceeding. The circuit court also found that Milas wanted to please Henningfeld and that she led Milas to believe that there was a romantic relationship between them.

It is uncontested that within four months of meeting Henningfeld, he gave her a power of attorney over his financial affairs and executed a will giving her all his property, to the exclusion of his two children. It is also undisputed that he relied on her for transportation and she managed his personal as well as financial affairs.[2]

Because Milas attempted to revoke the 1988 will several months after he executed it, the circuit court concluded that Milas was not susceptible to undue influence. However, the question is not, as the circuit court concluded, whether Milas was "so susceptible to undue influence that he could not have made another choice." Rather, the question is whether in October of 1988, Milas was open and responsive[3] to suggestions by Henningfeld that he make her the beneficiary of his will. Additionally, in order to prove susceptibility, the circuit court need find facts that are sufficient to show only "slight evidence" of susceptibility because it had already found the other three elements of undue influence by clear and convincing evidence.[4] However, the circuit court did not

[2] She called the attorney to get an appointment to make a new will; drove him to the attorney's office; wrote letters on his behalf; and generally managed his affairs.

[3] Open and responsive to suggestions is the test of susceptibility. *See* ***Odegard v. Birkeland***, 85 Wis.2d 126, 140, 270 N.W.2d 386, 393 (1978).

[4] The lesser burden of proof is a recognition of the difficulty of proving undue influence due to the secrecy which attends such affairs. *See* ***Bethesda Church v. Menning***; 72 Wis.2d 8, 14, 239 N.W.2d 528, 531 (1976); ***Johnson v. Merta***, 95 Wis.2d 141, 155, 289 N.W.2d 813, 819 (1980).

fully examine the facts it found relative to susceptibility under the correct legal standard and the lesser burden of proof; therefore, we conclude it erred. Additionally, because of Milas's age, his dependence on Henningfeld, his vulnerability due to problems communicating in English and an unwanted divorce, and his desire to please Henningfeld, with whom he thought he was romantically involved, sufficient facts were found by the circuit court to fulfill the legal standard of slight evidence of susceptibility, as a matter of law. Therefore, we conclude that the 1988 will is void.

## CONCLUSION

The circuit court applied an incorrect legal standard when it concluded that Henningfeld did not unduly influence Milas in his execution of the October 14, 1988 will because the court failed to consider whether slight evidence of susceptibility existed at the time the will was executed as evidenced by Milas's age, personality, physical and mental health, ability to handle personal business affairs up to and on October 14, 1988 and dependence on Henningfeld. Because we conclude that the facts found by the circuit court are sufficient to establish slight evidence of susceptibility, as a matter of law, we reverse.

*By the Court.*—Order reversed.

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