COURT OF APPEALS
DECISION
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Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP1395 **Cir. Ct. No. 2016PR455**

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

IN RE THE ESTATE OF JAMES HAGERTY:

LORI JEAN HAGERTY,

APPELLANT,

V.

KAY ELLEN HAGERTY,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County: EVERETT MITCHELL, Judge. *Reversed and cause remanded for further proceedings*.

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

¶1 PER CURIAM. Lori Hagerty appeals an order of the Dane County Circuit Court which granted summary judgment in favor of Kay Hagerty and dismissed Lori's complaint against Kay.[1] The complaint alleged that Kay unduly influenced Lori's and Kay's father, James Hagerty, to execute a deed conveying his house to Kay. Lori argues that the grant of summary judgment was an error because there are genuine issues of material fact concerning whether Hagerty was unduly influenced to execute the deed. We agree with Lori, reverse the order of the circuit court, and remand for further proceedings.

BACKGROUND

¶2 For background, we recount those undisputed facts necessary to place the parties' arguments in context. We refer to additional facts germane to the issue of undue influence in the discussion that follows.

¶3 Hagerty was born in January 1929 and had four children, Lori, Kay, Lynn, and James, Jr. Hagerty owned a house in Madison. Lori lived with Hagerty from 1990 to 2001. Beginning in 2010 and until the time of his death in 2016, Kay lived in Hagerty's home.

¶4 In December 2013, Hagerty was injured in an automobile accident and hospitalized. In February 2014, while residing in a nursing home and rehabilitating from the accident, Hagerty executed a deed conveying to Kay his

[1] Because they share a last name, for clarity we refer to the parties, Lori and Kay, by their first names throughout this opinion. Additionally, we refer to the parties' siblings, Lynn Herman and James Hagerty, Jr., by their first names. We generally refer to the decedent, James Hagerty, as Hagerty.

house in Madison. At that time, the house had a fair market value of approximately $205,000, and there was no mortgage on the house.

¶5 After Hagerty died in June 2016, Lynn was named the personal representative of Hagerty's estate.

¶6 In February 2017, Lori commenced this action against Kay. The complaint alleges that Kay obtained title to Hagerty's house through undue influence. Lori requests the deed conveying the house to Kay be declared void and the property be made an asset of Hagerty's estate.

¶7 Kay filed a motion for summary judgment. The circuit court granted Kay's motion for summary judgment on the undue influence claim and dismissed the complaint.

¶8 Lori appeals.

DISCUSSION

¶9 Under Wisconsin law, there are two methods to prove undue influence. Wisconsin case law refers to those as the "four-element test" and the "two-element test." Lori contends that the circuit court erred by granting summary judgment in favor of Kay because there are genuine issues of material fact regarding each element of both tests. We agree that there are genuine issues

of material fact regarding each element of both tests and reverse the circuit court's grant of summary judgment.[2]

I. Standard of Review and Summary Judgment Methodology.

¶10 This court reviews a grant of summary judgment de novo, using the same methodology employed by the circuit court. ***Bank of New York Mellon v. Klomsten***, 2018 WI App 25, ¶31, 381 Wis. 2d 218, 911 N.W.2d 364. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2). The moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sec. 802.08(2).

¶11 On summary judgment, a moving party defendant, such as Kay, makes a prima facie case for summary judgment by showing a defense that would defeat the claim. ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). Additionally, as the moving party, Kay "bears the burden of establishing the absence of a genuine, that is, disputed, issue of material fact." ***Midwest Neurosciences Assocs., LLC v. Great***

[2] In October 2017, which was outside of the six-month window in which a party may amend his or her complaint as a matter of right pursuant to WIS. STAT. § 802.09 (2017-18), Lori filed a motion to amend her complaint. (All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.) The amended complaint alleged that Kay unduly influenced Hagerty to execute a codicil to his will in March 2014, and that the pertinent deed was not lawfully authenticated. The circuit court did not rule on the motion seeking leave to amend the complaint, and Lori does not challenge the court's failure to rule. Thus, the parties do not dispute that the original complaint is operative. Accordingly, we express no opinion regarding whether Hagerty was unduly influenced to execute the codicil or whether the deed was lawfully authenticated.

Lakes Neurosurgical Assocs., LLC, 2018 WI 112, ¶80, 384 Wis. 2d 669, 920 N.W.2d 767.

¶12 This court views the summary judgment materials "in the light most favorable to the party opposing summary judgment." ***United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.***, 2013 WI 72, ¶12, 349 Wis. 2d 587, 836 N.W.2d 807. "[I]f more than one reasonable inference can be drawn from the undisputed facts, summary judgment is not appropriate." ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶47, 305 Wis. 2d 538, 742 N.W.2d 294.

II. Undue Influence.

A. General Principles.

¶13 To repeat, there are two methods by which an objector to a transfer of property may prove undue influence: the four-element test and the two-element test. ***Glaeske v. Shaw***, 2003 WI App 71, ¶27 n.12, 261 Wis. 2d 549, 661 N.W.2d 420; ***Hoeft v. Friedli***, 164 Wis. 2d 178, 184-85, 473 N.W.2d 604 (Ct. App. 1991); ***Freitag v. Solverson***, 9 Wis. 2d 315, 317, 101 N.W.2d 108 (1960). We observe that many undue influence cases concern a challenge to the execution of a will. But, "[u]ndue influence in the execution of an inter vivos conveyance is proved in the same way that undue influence is proved in the execution of a will." ***First Nat. Bank of Appleton v. Nennig***, 92 Wis. 2d 518, 536, 285 N.W.2d 614 (1979) (referring to both the four-element test and the two-element test).

¶14 The four-element test requires an objector to prove by "clear, satisfactory, and convincing evidence": "(1) susceptibility to undue influence, (2) opportunity to influence, (3) disposition to influence, and (4) coveted result." ***Freitag***, 9 Wis. 2d at 317 and ***Hoeft***, 164 Wis. 2d at 185.

¶15 The two-element test requires an objector to prove: (1) "a confidential [or fiduciary] relationship between the [grantor] and the one alleged to have exercised undue influence"; and (2) "suspicious circumstances surrounding" the transfer of property. ***Rahr v. East Wisconsin Tr. Co.***, 88 Wis. 2d 199, 219, 277 N.W.2d 143 (1979); ***Hoeft***, 164 Wis. 2d at 184; *see also* ***Onderdonk v. Keepman***, 81 Wis. 2d 687, 701, 260 N.W.2d 803 (1978) (applying two-element test to determine validity of purported lease and bill of sale executed by decedent). If the objector demonstrates the existence of both elements by clear, satisfactory, and convincing evidence, a rebuttable presumption of undue influence arises. ***Rahr***, 88 Wis. 2d at 219; ***Wickert v. Burggraf***, 214 Wis. 2d 426, 429, 570 N.W.2d 889 (Ct. App. 1997).

¶16 A plaintiff can rely on either or both tests in the same trial to attempt to prove undue influence and can prevail based on either test. *See* ***Hoeft***, 164 Wis. 2d at 185; ***Hamm v. Jenkins***, 67 Wis. 2d 279, 283, 227 N.W.2d 34 (1975). Lori relies on both tests. The circuit court ruled that Lori is not entitled to a trial under either test, and the circuit court may have intended to rule that the undisputed evidence showed Lori could not prevail as to either test. We now explain why we conclude that Kay has failed, regarding each element of both tests, to demonstrate that there is no genuine issue of material fact. We begin with the four-element test.

B. There Is a Genuine Issue of Material Fact Regarding Each Element of the Four-Element Test.

1. Susceptibility.

¶17 The first element, susceptibility to undue influence, involves the examination of factors such as the grantor's "age, personality, physical and mental

health and ability to handle business affairs." ***Lee v. Kamesar***, 81 Wis. 2d 151, 159, 259 N.W.2d 733 (1977). Susceptibility to undue influence is established "[i]f consideration of these factors demonstrates that the [grantor] was unusually receptive to the suggestions of others." ***Johnson v. Merta***, 95 Wis. 2d 141, 156-57, 289 N.W.2d 813 (1980).

¶18 Kay does not dispute on appeal that Lori could introduce admissible evidence of the following at trial regarding the factors of Hagerty's age, personality, and physical and mental health. In February 2014, when he executed the deed conveying the property to Kay, Hagerty was 85 years old. In December 2013, two months prior to executing the deed, Hagerty was hospitalized for treatment following an automobile accident. During Hagerty's hospital stay, his durable power of attorney for health care became effective when two physicians signed a certification of incapacity indicating that Hagerty "lack[ed] the capacity to manage" his health care decisions. After his discharge, Hagerty was transferred to a nursing home to rehabilitate. Hagerty was diagnosed with cognitive linguistic impairment, dementia, and senile degeneration of the brain and, in formal cognitive testing, Hagerty "used humor to mask deficits or difficulties." On the day before Hagerty executed the deed, nursing staff "reported behaviors of increased wandering/confusion" and placed a "[W]anderguard bracelet"[3] on Hagerty.

¶19 Against this evidentiary backdrop that could support a finding of susceptibility to undue influence, Kay makes several arguments in support of her

[3] A Wanderguard bracelet is a device which sounds an alarm when the patient wearing it tries to exit the facility. *See* ***Marshall v. La Mesa Rehab. & Care Ctr.***, No. CV-15-02082-PHX-DLR, 2017 WL 6441836, at *2 (D. Ariz. Dec. 18, 2017).

contention that the only reasonable inference from the summary judgment materials is that Hagerty was not susceptible to undue influence. We reject each argument.

¶20 Kay first contends that "the undisputed evidence establishes that [Hagerty] was assisted by an attorney in performing the transactions in this case," and Attorney Haskins had no concerns regarding his "capacity." However, putting aside the issue of whether the testimony of this single witness could be dispositive, there are factual disputes regarding that contention, including limited opportunities for Attorney Haskins to have an informed opinion. As examples, Attorney Haskins stated only that she "may have talked" to Hagerty about the deed over the phone prior to drafting the deed. Also, Attorney Haskins was not present when Hagerty executed the deed, and Attorney Haskins did not meet with Hagerty until *after* he executed the deed.

¶21 Second, Kay argues that "[i]n susceptibility determinations, timing is important," and "[a] person with impaired mental powers will often have periods of lucidity …." Kay relies on case law concerning the issue of testamentary capacity and asserts that, "[w]hile testamentary capacity differs in some respects from susceptibility, both share the requirement that the testator must be capable of making a free choice on the specific date(s) of the transaction(s) in question."

¶22 Kay's assertion fails because, under Wisconsin law, the particular question is not whether Hagerty was capable of executing the deed but, rather, whether he was susceptible to undue influence. Our supreme court describes susceptibility as "receptiveness to other's suggestions." ***Odegard v. Birkeland***, 85 Wis. 2d 126, 140, 270 N.W.2d 386 (1978) (quoting ***Kehrberg v. Pribnow***, 46 Wis. 2d 205, 213, 174 N.W.2d 256 (1970)). The supreme court has held that "[t]he

element of susceptibility to undue influence is not to be confused with the question of competency to make a will." *See* ***Odegard***, 85 Wis. 2d at 140. Our supreme court has also stated: "The question is not whether the testator [or grantor] is aware of [his or] her property and natural heirs but whether [his or] her natural defenses are lowered leaving [him or] her unable to resist the suggestions of a stronger, more determined individual." ***Id.***

¶23 On the other hand, the test for testamentary capacity has the following three elements: (1) the testator must "comprehend the nature, the extent, and the state of affairs of his property"; (2) the testator "must know and understand his [or her] relationship to persons who are or who might naturally … be expected to become the objects of his [or her] bounty from which he [or she] must be able to make a rational selection of his beneficiaries"; and (3) the testator must "understand the scope and general effect of the provisions of his [or her] will." ***O'Brien v. Lumphrey***, 50 Wis. 2d 143, 146, 183 N.W.2d 133 (1971). So, although a court considers some similar factors in determining the separate questions of undue influence and capacity, "the object of the consideration is different." ***Odegard***, 85 Wis. 2d at 140. For those reasons, Kay's reliance on testamentary capacity case law misses the mark and can not support her argument for summary judgment on the issue of susceptibility to undue influence.

¶24 Next, in response to the uncontested facts that health care professionals came to the conclusions that, near the time of the execution of the deed, Hagerty did not have the capacity to manage his health care decisions, and had dementia and senile degeneration of the brain, Kay argues that Hagerty was nonetheless "stubborn" and could perform word search puzzles. Even putting aside the amorphous nature of the adjective "stubborn," assuming those assertions are true, Kay does not satisfy her burden to show that there is only one reasonable

inference regarding Hagerty's susceptibility to undue influence. *See* ***Midwest Neurosciences***, 384 Wis. 2d 669, ¶80 (the moving party bears the burden of establishing the absence of a genuine disputed issue of material fact). Accordingly, evidence that Hagerty's cognitive abilities were deteriorating leading up to the execution of the deed is probative of susceptibility and demonstrates a genuine issue of fact regarding this element.

¶25 Before discussing the remaining elements of the four-element test, we address a preliminary issue raised by Kay which concerns each of the next three elements of the four-element test. That is, whether evidence regarding the opportunity that *Lynn* had to unduly influence Hagerty, or regarding her disposition to do so, are material to Lori's claim against *Kay* under the four-element test. Kay contends, without citation to authority, that Lynn's involvement in procuring the deed is immaterial because Lori does not name Lynn as a named defendant. Kay further asserts that Lori's arguments "improperly present a moving target between Kay … and … Lynn." We reject this contention. Of importance to this case, Wisconsin law recognizes that:

> Where a deed was procured by undue influence, *it is immaterial that in the procurement thereof the immediate beneficiary did not participate, or that a third person acted with the beneficiary in exercising such undue influence*. This rule has been said to be essential to justice, since if it were otherwise, a designing person could escape the consequences of his [or her] wrong by causing conveyances to be made to third persons who would hold the property for him [or her].

Ward v. Ward, 62 Wis. 2d 543, 556, 215 N.W.2d 3 (1974) (emphasis added). Moreover, the coveted result element under the four-element test has repeatedly been held to "include[] obtaining for one-self *or another* a benefit such person would normally not receive and its reception is unjust to someone else." ***Cooper***

v. Zold, 28 Wis. 2d 391, 399, 137 N.W.2d 93 (1965) (emphasis added); *see also* ***Becker v. Zoschke***, 76 Wis. 2d 336, 349, 251 N.W.2d 431 (1977); ***Ward***, 62 Wis. 2d at 557. Accordingly, Lori may demonstrate a genuine issue regarding the elements of opportunity to influence, disposition to influence, and coveted result by establishing material facts concerning Lynn's actions to unduly influence Hagerty.

2. Opportunity.

¶26 With that preliminary issue resolved, we turn to the second element, opportunity to influence. This requires a consideration of "the opportunity of the person charged to exercise such influence on the susceptible person to procure the improper favor." ***Freitag***, 9 Wis. 2d at 317. "'[O]pportunity' here does not mean mere physical propinquity or possibility of personal contact, but the fact that interviews or personal transactions between the parties were had, followed by the accomplishment of the desired end." ***Ward***, 62 Wis. 2d at 554 (quoting ***Winn v. Itzel***, 125 Wis. 19, 33-34, 103 N.W. 220 (1905)).

¶27 In the circuit court, Kay's brief in support of the motion for summary judgment did not address the opportunity element "because Kay lived with her Dad." Accordingly, Kay conceded that a genuine issue of material fact exists regarding whether she had the opportunity to unduly influence Hagerty. *See* ***Gibson v. Overnite Transp. Co.***, 2003 WI App 210, ¶9, 267 Wis. 2d 429, 671 N.W.2d 388 ("Generally, we will not consider on appeal arguments not made to the trial court."). Nevertheless, even absent this concession, we would conclude that Kay has failed to meet her burden to show there is no genuine issue of material fact that Kay or Lynn did not have the opportunity to unduly influence

Hagerty. Kay makes a number of contentions regarding this element, and we reject each.

¶28 Kay first asserts that Lori has not met her evidentiary burden on this element. We do not consider this assertion because it ignores the summary judgment standard under which Kay must make a prima facie case that there is no genuine issue of material fact on this element. *See* ***Midwest Neurosciences***, 384 Wis. 2d 669, ¶80.

¶29 Kay next contends that, assuming Hagerty's dementia was "so severe that [he] was … incapable of making rational decisions on his own … [and] it would have been impossible for Kay to subtly influence [Hagerty] … because he … would not have had a sufficient ability to retain or comprehend the results of her … undue influence." The argument collapses beneath its own weight. The argument is no more than speculation that facts that tend to demonstrate susceptibility simultaneously defeat the opportunity element. At best, Kay's argument establishes only that there is a factual dispute concerning this element. Additionally, Kay does not cite to any authority which has held, or even suggested, that there is an inverse relationship between susceptibility and opportunity. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

¶30 Kay further asserts that she was not present at the time the deed was executed and, therefore, did not have the opportunity to influence Hagerty. This argument is easily dispatched. Hagerty obviously made the decision to execute the deed prior to the execution, and there is no dispute that Kay had ample access to Haggerty before the execution of the deed. A reasonable factfinder could find

clear, satisfactory, and convincing evidence of opportunity because opportunity "does not mean mere physical propinquity or possibility of personal contact, but the fact that interviews or personal transactions between the parties were had, followed by the accomplishment of the desired end." ***Ward***, 62 Wis. 2d at 554 (quoting ***Winn***, 125 Wis. at 33-34). Kay does not cite to any authority which holds that the influencer must be present at the time the deed is executed and, as far as we are aware, this would be a shocking and illogical proposition. *See* ***Pettit***, 171 Wis. 2d at 646.

¶31 For those reasons, Kay fails to show there is no genuine issue of material fact regarding the opportunity to influence.

3. Disposition to Influence.

¶32 The third element, disposition to influence, "means something more than a mere desire to obtain a share of an estate. It implies a willingness to do something wrong or unfair." ***Rahr***, 88 Wis. 2d at 217 (quoting ***Schultz v. Lena***, 15 Wis. 2d 226, 232, 112 N.W.2d 591 (1961)).

¶33 We conclude that the summary judgment record demonstrates a genuine issue of material fact concerning whether Kay and Lynn had the disposition to influence Hagerty to execute the deed conveying the house to Kay, thereby reducing the residue of Hagerty's estate from which Lori would take an equal share.

¶34 Evidence that bears on this issue includes the following. Lori had poor relationships with Kay and Lynn. When asked to describe her relationship with Lori, Kay stated "I have no relationship with her." Regarding Lori, Kay felt she "grew up with a liar, a thief, and a cheat from a child." When asked whether it

was her opinion that Lori had taken advantage of Hagerty, Kay responded, "It's my opinion, yes," and "[i]t's been a life of that. Lifetime behavior." Lori and Lynn had a close relationship "when [they] grew up," but that relationship deteriorated over time. Between the time that Kay moved in with Hagerty in 2010 and Hagerty's death in 2016, Lori and Lynn had "[v]ery little" contact. When asked whether she felt that Lori had received "enough from her parents," Lynn responded: "I'm certain that could be – that it probably appears that way but I didn't force her hand at any time to ask to borrow money from my dad."

¶35 Additionally, the record demonstrates a genuine issue of material fact regarding whether Kay and Lynn "isolated" Hagerty and prevented Lori from having contact with him. According to Lori, the following events occurred. Lori attempted to visit Hagerty's house between twenty and thirty times from 2013 to 2015, but no one would open the door or respond when Lori knocked on the door. When Lori called the house, no one would answer the phone. After Hagerty's automobile accident and hospitalization, Lynn did not inform Lori of what had occurred because she "already knew from the first [accident] that [Lori] would not assist." Nor did Lynn inform Lori that Hagerty was conveying the house to Kay.

¶36 Viewing the evidence in the light most favorable to Lori, as we must, we conclude that a factfinder could reasonably determine that Kay and Lynn did not like Lori and did not think she had been a supportive child and, therefore, had a motive to influence Hagerty so as to deprive Lori of an equal share of Haggerty's assets.

¶37 Accordingly, there is a genuine issue of material fact regarding this element. *See* ***Schmidt***, 305 Wis. 2d 538, ¶47.

4. Coveted Result.

¶38 The fourth element, coveted result, "goes to the naturalness or expectedness of the bequest," ***Hamm***, 67 Wis. 2d at 291, and "includes obtaining for one-self or another a benefit such person would normally not receive and its reception is unjust to someone else." ***Cooper***, 28 Wis. 2d at 399. The record demonstrates a genuine issue of material fact concerning whether the execution of the deed conveying the house to Kay was a coveted result.

¶39 Prior to the execution of the deed in February 2014, Hagerty's testamentary plan had been in place since October 2004 with no modifications. Hagerty's will provided that the residue of his estate would go to his children in equal shares. The will did not provide for a specific gift to any of the children. By conveying the house to Kay, Hagerty reduced the residue of his estate, thereby increasing the percentage of his assets that Kay would ultimately receive and reducing the percentage of his assets that would go to the remaining children.

¶40 From these facts, a factfinder could reasonably conclude that the execution of the deed was an unexpected departure from Hagerty's testamentary plan to provide for each of his children by dividing his entire estate equally among them. We reject Kay's arguments to the contrary.

¶41 Kay's first argument on this element is that Lori has the burden to show there is a genuine factual dispute. This argument, like much of Kay's briefing in this court, demonstrates a fundamental misunderstanding of the standard for summary judgment. Contrary to Kay's assertion, as the moving party, she has the burden to show there is no genuine dispute of material fact. *See* ***Midwest Neurosciences***, 384 Wis. 2d 669, ¶80.

¶42 Second, Kay argues that the objector's showing on this element must be "more than simply receiving a benefit that a sibling did not receive." Kay cites ***Johnson***, which held that "[t]he essential question is whether [the beneficiary] has, for no apparent reason, been favored in the will to the exclusion of a natural object of the testator's bounty." ***Johnson***, 95 Wis. 2d at 159. It is true that "[n]either the cutting out of an heir nor the giving of a share of the estate to the alleged influencer is ipso facto an unnatural disposition," ***Guldhaug v. Martin***, 275 Wis. 380, 387, 82 N.W.2d 196 (1957). However, ***Johnson*** is distinguishable in a critical factual respect. In ***Johnson***, the Wisconsin Supreme Court stated that:

> [t]he record contains no evidence that any of these heirs ever took any real interest in [the decedent] or her family, or attempted to be of assistance to them. Appellants even now in their brief make no claim that they maintained any relationship with [the decedent] while she was alive, but state only that she 'never showed animosity' toward them.

Johnson, 95 Wis. 2d at 160. In this case, on the other hand, Lori contends that she and Hagerty "had a very close relationship." From 1990 to 2001, Lori assisted Hagerty with his activities of daily living. Even though Kay moved in with Hagerty in 2010, Lori contends that Kay "had limited contact with [Hagerty] and [his wife] for more than 30 years" prior to that. Thus, this is not a situation in which undisputed evidence shows that Hagerty naturally favored a longtime more attentive child over other children with whom he had a limited relationship. The record does not establish that there are no factual issues regarding Lori's and Kay's relationship with Hagerty.

¶43 Kay next argues that, because Hagerty consulted an attorney regarding the deed, the result was not coveted but, rather, a product of Hagerty's own choice. We reject this argument for a reason already discussed, in

paragraph 20, above, namely that there is a genuine issue concerning whether and when Hagerty in fact spoke with Attorney Haskins regarding the deed.

¶44 On this summary judgment record, we can not conclude that the only reasonable inference is that there was no coveted result. Accordingly, summary judgment is inappropriate regarding this element. *See* ***Schmidt***, 305 Wis. 2d 538, ¶47.

¶45 Because the record demonstrates genuine issues of material fact regarding each element of the four-element test, the circuit court erred by granting summary judgment in favor of Kay and dismissing Lori's complaint. We now consider whether Kay has demonstrated that there is no genuine issue of material fact as to each element of the two-element test.

C. There Is a Genuine Issue of Material Fact Regarding Each Element of the Two-Element Test.

¶46 For clarity, we repeat the two parts of the two-element test: "(1) a confidential or a fiduciary relationship between the [grantor] and the favored beneficiary, and (2) suspicious circumstances surrounding" the execution of the deed. ***Hoeft***, 164 Wis. 2d at 184.

¶47 As an initial matter, we address whether Lori's allegations concerning Lynn's involvement in procuring the deed are material to Lori's claim against Kay under the two-element test. The parties dispute whether, under the two-element test, the confidential or fiduciary relationship must exist between the grantor (here, Hagerty) and the immediate beneficiary (here, Kay). Lori contends that "[u]nder the two-element test the plaintiff must prove a confidential or fiduciary relationship between the [grantor] and the beneficiary or someone acting

for the benefit of the beneficiary ….” In contrast, Kay asserts that, under the two-element test, the confidential or fiduciary relationship must exist between the grantor and the immediate beneficiary.

¶48 We reject Kay’s argument. In ***Schlichting v. Schlichting***, 15 Wis. 2d 147, 112 N.W.2d 149 (1961), the Wisconsin Supreme Court considered a two-element undue influence claim involving a son who had a confidential relationship with his father. ***Id.*** at 155-56. There, the father conveyed a homestead tract, without any consideration, to a different son. ***Id.*** at 156. The Court stated that, under these circumstances, it was “immaterial” that the original transfer was not to the son with the confidential relationship, and that the son who received the land bore the burden of producing evidence that the conveyance was not the product of undue influence. ***Id.*** Following the logic of ***Schlichting***, we conclude that it is immaterial that the conveyance was to Kay and not to Lynn, the daughter who, as we shall see, had a fiduciary relationship with Hagerty. *See* ***id.***; *see also* ***Curkeet v. Eisenberg***, 20 Wis. 2d 537, 542, 123 N.W.2d 465 (1963) (prima facie case of undue influence where drafting attorney was not a beneficiary but mother was sole beneficiary).

¶49 We now turn to the question of whether summary judgment should be granted on the two-element test.

1. Fiduciary Relationship.

¶50 Kay concedes in her brief in this court that Lynn had a fiduciary relationship with Hagerty because she had his power of attorney for financial matters. Therefore, summary judgment is precluded for this element.

2. Suspicious Circumstances.

¶51 The second element, suspicious circumstances, is satisfied if the objector offers evidence regarding "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 persuasive circumstance." ***Kamesar***, 81 Wis. 2d at 166 (quoting ***Patterson v. Jensen***, 246 Wis. 319, 360, 17 N.W.2d 423 (1945)). The record demonstrates a genuine issue of material fact concerning suspicious circumstances, particularly those surrounding the delivery of the deed to Hagerty and its return to Attorney Haskins.

¶52 Attorney Haskins testified that she had an "informational" meeting with Kay about the deed. Kay claimed, however, that Kay's level of involvement in procuring the conveyance was "[n]one," and that Kay had no contact with Attorney Haskins regarding the conveyance. Kay said she "knew [Lynn] had spoken to [Attorney Haskins]" and Kay "purposely stayed out of it."

¶53 According to Lynn, Lynn told Attorney Haskins what Hagerty desired, but Hagerty was not present at that meeting. Attorney Haskins testified that she "may have talked" to Hagerty over the phone, but she did not meet with him until after he had executed the deed.

¶54 According to Attorney Haskins, Haskins was not present when Hagerty signed the deed, and Haskins does not know how the deed was delivered to Hagerty or how it was returned back to her possession. Upon receiving the deed again, Attorney Haskins dated and authenticated Hagerty's signature. Lynn thought that Attorney Haskins "must have" delivered the deed to Hagerty because Lynn did not, and Lynn was not present when Hagerty executed the deed.

¶55 In sum, the record contains conflicting accounts as to how the deed was delivered to Hagerty and returned to Attorney Haskins. On this record, a factfinder could reasonably conclude that suspicious circumstances existed surrounding the deed's execution. Kay makes several arguments regarding this element, and we reject each.

¶56 Kay contends that, to demonstrate suspicious circumstances, the objector must show more "than the mere fact that beneficiaries did not speak to each other or did not like each other." We fail to see how this argument demonstrates the absence of a genuine issue of material fact regarding suspicious circumstances, and Kay does not develop an argument in support of her contention.

¶57 Kay next asserts that the discrepancy between Lynn's and Attorney Haskins's testimony regarding how Hagerty received the deed is "meaningless" and "[w]hat matters is not who delivered the document, but whether James was acting of his own free will when he signed it." Kay's argument confuses suspicious circumstances in the two-element test with susceptibility under the four-element test. As we have noted, an objector demonstrates suspicious circumstances using facts "such as the activity of the beneficiary in procuring the drafting and execution of the will." ***Kamesar***, 81 Wis. 2d at 166 (quoting ***Patterson***, 246 Wis. at 360). The conflicting evidence regarding the manner in which the deed was executed creates a genuine issue regarding such activity.

¶58 Because the record demonstrates genuine issues of material fact regarding each element of the two-element test, the circuit court erred by granting summary judgment in favor of Kay.

CONCLUSION

¶59 For the foregoing reasons, the order of the circuit court is reversed and the cause is remanded for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.