

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 2009

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. 2007AP220

Cir. Ct. No. 2002PR1095

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN THE MATTER OF THE ESTATE OF STANLEY J. FREDERICKS:

MARY ANN JEZUIT,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

v.

**MICHAEL J. FREDERICKS , INDIVIDUALLY AS POWER OF ATTORNEY
FOR STANLEY J. FREDERICKS, MICHAEL J. FREDERICKS ,
PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY J.
FREDERICKS AND WILLIAM FREDERICKS,**

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Michael Fredericks¹ and his son, William Fredericks, appeal a judgment that awards Mary Ann Jezuit \$239,054.68 from Michael or the estate, and compels William to return a dwelling to the estate. The judgment is based on a jury finding that Stanley Fredericks was not competent and was subject to Michael's undue influence when he signed a quitclaim deed transferring the residence to William. The Fredericks raise numerous issues on appeal. Jezuit cross-appeals, arguing that she is entitled to punitive damages. We affirm the judgment.

BACKGROUND

¶2 Stanley's will bequeathed a residence to Jezuit. However, approximately three weeks before he died, Stanley executed a quitclaim deed transferring the residence to his grandson, William. Jezuit initially commenced this action as an untimely claim against the estate. She eventually amended her complaint to plead an objection to the inventory of the estate under WIS. STAT. § 879.63 (2007-08)² and breach of fiduciary duty by Michael.

¶3 At trial, Jezuit presented evidence on Stanley's competency to execute the deed. Dr. Shane Wernsing examined Stanley's medical records and opined that he was not competent. Stanley's medical records indicate that on the day he signed the quitclaim deed he was disoriented as to time.

¹ Michael Fredericks appeals individually and as Power of Attorney for Stanley J. Fredericks and as the Personal Representative of Stanley's estate.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Jezuit also presented evidence on the two-prong and four-prong tests for undue influence. The two-prong test requires proof of a confidential or fiduciary relationship and the existence of suspicious circumstances. *Malmar v. Stimac*, 73 Wis. 2d 192, 202, 243 N.W.2d 435 (1976). The four-prong test for undue influence requires proof of susceptibility, opportunity to untimely influence, a disposition to influence, and a coveted result. *Id.*

¶5 The court concluded as a matter of law that Stanley and Michael had a fiduciary relationship because Michael possessed and recently utilized a power of attorney with respect to Stanley. Jezuit presented numerous witnesses to establish suspicious circumstances. Attorney Michael Tobin, Stanley's longtime attorney, testified that he felt pressured by Michael to prepare a transfer deed. Tobin refused. Michael then approached Attorney Gerald Boisits to prepare the deed and, along with Michael's wife and William, to present the deed to Stanley for his signature. Boisits had never spoken to Stanley before and had not reviewed his estate plan. Stanley's sisters testified to Stanley's longstanding intent that the real estate in question go to Jezuit, including a conversation shortly before he went to the hospital. Family members were discouraged by Michael's wife from visiting Stanley in his last days, ostensibly because he was allowed no visitors other than medical personnel. Stanley's sister testified that she later found out that was not the case.

¶6 Regarding the four-prong test, Jezuit presented evidence from Dr. Wernsing that Stanley was susceptible to undue influence. Williams' opportunity to influence Stanley was accomplished through the attorney he hired, Michael's wife and his son, who were the only people present when the deed was signed. The disposition to influence was shown by his hiring of attorney Boisits and, through his wife, discouraging other relatives from visiting Stanley. Finally,

the coveted desired result consisted of obtaining for his son, William, a residence valued at \$140,000.

¶7 The jury also heard evidence of Michael's use of an eighteen-year-old power of attorney to cash in Stanley's annuity that had named Stanley's four sisters as beneficiaries. Michael exercised his rights under the power of attorney even though he had not had any contact with Stanley for more than five years. The effect of cashing in the annuity and depositing it in a money market account was that the \$140,000 proceeds would then flow through the estate where Michael was a primary beneficiary, rather than going to Stanley's sisters.

¶8 The Fredericks' witnesses denied any wrongdoing and claimed Stanley was competent to execute the deed. Dr. Robert Goldmann, Stanley's physician, testified as a fact witness regarding Stanley's physical health. He was not, however, allowed to offer an opinion as an expert regarding Stanley's mental condition because Goldmann was not identified as an expert witness as required in the scheduling order and because Goldmann did not profess to have expertise on that question. The court also ruled that the dead man's statute, WIS. STAT. § 885.16, disqualified William and Susan Fredericks from testifying regarding their conversations with Stanley before his death.

¶9 The jury found that Stanley was not competent when he signed the deed. It also found that suspicious circumstances were present in the transfer and that Michael had not established that he did not unduly influence Stanley. The verdict also included findings that Stanley was susceptible to undue influence, Michael had an opportunity to unduly influence Stanley, he had the disposition to influence Stanley and he achieved a desired result. The court answered the verdict questions relating to Michael's fiduciary relationship with Stanley and the amount

of damages that would compensate Jezuit for the lost property. The court entered an order for judgment requiring William to return the property to the estate and requiring the estate or Michael to pay Jezuit \$239,054.68 in which damages consisted of the value of the house plus attorney fees and costs.

DISCUSSION

¶10 The Fredericks first argue that the circuit court should have granted their motion for summary judgment because Jezuit’s initial claim against the estate was untimely. Jezuit amended her complaint to plead an action under WIS. STAT. § 879.63. That statute imposes no deadline for bringing an action to add property to the inventory of an estate. Because Jezuit abandoned her “claim against the estate,” her untimely filing of the initial claim is irrelevant.

¶11 The Fredericks next argue that Jezuit should not have been allowed to amend her complaint because they did not consent to the amendment. However, their consent was not necessary under WIS. STAT. § 802.09(1) because the amendment was granted by leave of the court. In fact, the court suggested the filing of an amended complaint. In addition, the Fredericks’ attorney withdrew the parts of the motion for summary judgment regarding jurisdiction and the statute of limitations.

¶12 The Fredericks also contend the remaining portion of the summary judgment motion, dealing with the merits of the undue influence claim, should have been granted. Summary judgment is only appropriate if the supporting papers show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2). The Fredericks argue that there was no evidence of suspicious circumstances, no evidence of Michael’s opportunity to unduly influence Stanley, and no evidence

that Michael benefitted from the transfer of the property to William. The same argument is repeated under sections of their brief relating to a motion to dismiss at the close of the plaintiff's case, challenges to the jury instructions and verdict form, and arguments relating to their posttrial motions. The answer is the same as to each of these arguments. Jezuit presented sufficient evidence to defeat summary judgment and to support the jury's verdict.

¶13 The suspicious circumstances included Stanley's abrupt decision to, in effect, disinherit Jezuit despite statements he made before he went to the hospital. Michael's decision to retain an attorney to draft and present the quitclaim deed after Stanley's attorney refused, along with evidence that relatives were discouraged from visiting Stanley, constitute suspicious circumstances, particularly when coupled with Michael's actions regarding the annuity. Michael's opportunity to influence Stanley was established despite their estrangement. Michael's selection of Attorney Boisits and the presence of his wife and son adequately establish his opportunity to influence Stanley through others. The Fredericks cite no authority for the proposition that the opportunity to influence the testator does not include the activity of surrogates such as an attorney and family members. Michael's benefit from the undue influence consisted of obtaining a free house for his son. Again, the Fredericks cite no authority for the proposition that the undue influence must directly benefit the person providing the influence rather than a close family member. To the contrary, the concept of a coveted result includes obtaining for oneself or another a benefit that a person would not normally receive. *Becker v. Zoschke*, 76 Wis. 2d 336, 349, 251 N.W.2d 431 (1977).

¶14 The Fredericks next argue that Dr. Goldmann should have been allowed to testify as an expert witness. The court properly exercised its discretion

when it limited Goldmann's testimony to exclude expert opinion testimony because the Fredericks failed to comply with the scheduling order. In addition, Goldmann testified in his deposition that he was not qualified to give an expert opinion regarding Stanley's mental ability to execute legal documents.

¶15 The Fredericks next argue that the trial court improperly exercised its discretion when it allowed testimony regarding Michael's liquidation of Stanley's annuity account. Jezuit's amended complaint alleged that Michael breached his fiduciary duty as personal representative with regard to the annuity transaction. The trial court ultimately ruled that Jezuit lacked standing to raise that issue. However, Michael's decision to liquidate the annuity account was introduced as other acts evidence to show Michael's motive, intent, opportunity and preparation. *See* WIS. STAT. § 904.04(2). The evidence was relevant to show suspicious circumstances, an element of the two-prong test for undue influence. It was also relevant to establish Michael's disposition to unduly influence, which "implies grasping and overreaching, and a willingness to do something wrong or unfair." *Evans v. Krueger*, 83 Wis. 2d 259, 282, 265 N.W.2d 529 (1978). The Fredericks did not establish that introducing evidence regarding the annuity was substantially more prejudicial than probative. Therefore, under the test set out in *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998), the court properly admitted the evidence. The Fredericks argue that liquidating the annuity was not a "prior bad act" because it occurred three days after Stanley signed the quitclaim deed. Nothing in WIS. STAT. § 904.04(2) requires that the other crime, wrong or bad act precede the charged offense.

¶16 The Fredericks next argue that they were prejudiced by the court's refusal to allow William and Susan to testify regarding their conversations with Stanley. However, they do not identify any specific error in the court's

enforcement of WIS. STAT. § 885.16, the dead man’s statute. The core meaning of the statute is that “it disqualifies a witness to a transaction or communication with a decedent from testifying about that transaction or communication in his or her favor, or in favor of any party to the case claiming under the witness.” *Bell v. Neugart*, 2002 WI App 180, ¶17, 256 Wis. 2d 969, 650 N.W.2d 52. The Fredericks offer no specific argument that the dead man’s statute did not apply.

¶17 The Fredericks next argue that the court utilized a misleading, confusing and highly prejudicial special verdict.³ They argue that the court improperly shifted the burden of proof on question number 8: “Has Michael Fredericks shown that he did not unduly influence Stanley Fredericks?” The court did not improperly instruct the jury on this question. Under the two-prong test for undue influence, upon proof of a confidential or fiduciary relationship and suspicious circumstances, a rebuttable presumption of undue influence is raised. *See Lee v. Kamesar*, 81 Wis. 2d 151, 164, 259 N.W.2d 733 (1977). The court answered the second verdict question concluding as a matter of law that Stanley and Michael had a fiduciary relationship. The jury answered the third question, finding suspicious circumstances were present in the transfer of the real estate. Therefore, a rebuttal of presumption of undue influence was created and the court appropriately required Michael to rebut the presumption. Although the court did not use the term “rebuttable presumption” in the jury instruction, the effect of requiring Michael to overcome the presumption correctly states the law. As to all other questions, the court appropriately instructed the jury that Jezuit had the burden of proof.

³ Most of the argument under this section of the brief challenges the sufficiency of the evidence. That matter has been addressed above and we will not repeat our analysis at this point.

¶18 The Fredericks also argue that the special verdict should not have included question nine: “What sum of money will fairly and reasonably compensate Mary Ann Jezuit for her damages?” That question was answered by the court. The Fredericks argue that the jury should not have been exposed to the question because it raised an inference that Jezuit was damaged. No objection to question number nine was raised in the jury instruction and verdict conference. Therefore, the objection was waived. *See* WIS. STAT. § 805.13(3).

¶19 The Fredericks also argue that judgment against William was not appropriate because none of the verdict questions mention William. William is a party to this action because he was the title holder to the property Jezuit sought to return to the inventory of the estate. As the beneficiary of Michael’s wrongdoing, William is an appropriate party even though none of the allegations directly involved William. The Fredericks cite no authority for the proposition that William must be included in the verdict before he can be ordered to return property to the estate.

¶20 The Fredericks next argue that the court should have read Wisconsin Civil Jury Instruction 352 regarding the presumption of Stanley’s competency. The court did instruct the jury that a person is presumed to have sufficient competency to sign a deed and transfer property. We conclude that the instruction given adequately informed the jury of the presumption of competency.

¶21 The Fredericks next argue that the order for judgment and judgment are ambiguous and confusing. They argue that Jezuit is entitled to the residence, not the cash value of the residence under the terms of the will. The order for judgment and the transcript of the posttrial hearing allow a \$140,000 credit against the total amount of the judgment if the estate transferred the residence to Jezuit.

There is no double counting of the value of the house. If the Fredericks elect to retain the house, they are not aggrieved by that choice.

¶22 The Fredericks also challenge the portion of the order for judgment that allows recovery of future attorney fees for the cost of defending the verdict on appeal. They argue that the award of attorney fees is not allowed under WIS. STAT. RULE 809.25. The circuit court awarded the future attorney fees pursuant to WIS. STAT. §§ 879.33, 879.37 and 879.63. The Fredericks do not argue the applicability of those statutes. Therefore, we will not address the issue. *See State v. Allen*, 2004 WI 106, ¶26 n.8, 274 Wis. 2d 568, 682 N.W.2d 433 (issue not argued is waived). The Fredericks also complain that the order for judgment required the return of all early distributions by November 17, 2006, one month before the order for judgment was signed. They do not identify any penalty that was imposed for violating the order. They do not argue that the court exceeded its authority to preserve the assets of the estate. We conclude the issue is not adequately briefed to establish that the Fredericks are aggrieved by the discrepancy.

¶23 Finally, the Fredericks request a new trial in the interest of justice. They repeat arguments already considered and rejected by this court. We conclude that the merits were fully and fairly tried, justice has not miscarried, and there is little likelihood that retrial would result in a different verdict. *See State v. Darcy N.K.*, 218 Wis. 2d 640, 667-68, 581 N.W.2d 567 (Ct. App. 1998).

¶24 In her cross-appeal, Jezuit argues that the trial court improperly exercised its discretion by not presenting the issue of punitive damages to the jury. Punitive damages are available only when the conduct is sufficiently aggravated. *Strenke v. Hogner*, 2005 WI 25, ¶38, 279 Wis. 2d 52, 694 N.W.2d 296. In

Strenke, the court noted that “not every drunk driving case will give rise to punitive damages. Only when the conduct is so aggravated that it meets the elevated standard of an ‘intentional disregard of rights’ should a circuit court send the issue to a jury.” *Id.*, ¶42. In this case, Fredericks’ undue influence is not distinguishable from any other undue influence case. We agree with the circuit court that Fredericks’ actions as found by the jury are not sufficiently egregious to warrant punitive damages.

By the Court.—Judgment affirmed.

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

