

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 1, 2012

Diane M. Fremgen
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. 2011AP1032

Cir. Ct. No. 2009CV266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**DONN F. THOMAS, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF ADELAIDE THOMAS,**

PLAINTIFF-APPELLANT,

v.

ANITA PETERSON AND HUMANE SOCIETY OF UNITED STATES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Barron County:
TIMOTHY M. DOYLE, Judge. *Affirmed; attorney sanctioned.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Donn Thomas sued Anita Peterson and the Humane Society of United States, alleging they unduly influenced his mother, Adelaide Thomas, to designate them as payable-on-death beneficiaries of a

certificate of deposit (CD).¹ A bench trial was held, and after Thomas presented his case, the circuit court granted Peterson and the Humane Society's motion to dismiss. Thomas appeals, alleging that the court applied incorrect legal standards for undue influence and that, using the correct legal standards, the facts found by the court establish that Adelaide was unduly influenced. We reject Thomas's arguments and affirm.

BACKGROUND

¶2 Adelaide purchased a \$100,000 CD from Johnson Bank on July 30, 2008. She initially designated Thomas as the payable-on-death beneficiary of the CD. However, on October 13, 2008, Adelaide revoked the initial beneficiary designation and instead named Peterson, a neighbor, and Barbara Smith, Thomas's ex-wife, as payable-on-death beneficiaries. On March 25, 2009, Adelaide changed the CD beneficiaries again, removing Smith and adding the Humane Society. Adelaide passed away on April 14, 2009, at age ninety-three.

¶3 Thomas was named the personal representative of Adelaide's estate. He sued Peterson and the Humane Society, alleging they exerted undue influence over Adelaide to induce her to make them beneficiaries of the Johnson Bank CD.² The case proceeded to a bench trial.

¶4 At trial, multiple witnesses testified regarding Adelaide's personality. Steven Swann, Adelaide's former financial advisor, testified Adelaide

¹ Throughout this opinion, we refer to Donn Thomas as Thomas and Adelaide Thomas as Adelaide.

² Thomas also sued Smith, but he later stipulated to her dismissal from the case.

was vain and was susceptible to compliments. He testified she was “emotionally volatile” and “when she lost her temper, she lost her temper severely[.]” Adelaide would frequently lose her temper with Thomas and threaten to disinherit him.

¶5 Marjorie McEachern, who had been Adelaide’s friend for at least fifty years, testified Adelaide needed an extreme amount of attention—“more attention than anyone [McEachern] ever knew.” Adelaide sought compliments and flattery, and would become upset if the people around her did not pay enough attention to her. McEachern described Adelaide as “manipulative.”

¶6 Patricia Rausch, who had cleaned Adelaide’s house for twenty-five years, also testified Adelaide loved attention. Rausch stated, “[I]f you were giving Adelaide attention, that’s what she liked, then you were high on the list. If you didn’t jump when she needed you to, then you were off the will[.]” People who failed to pay attention to Adelaide “weren’t going to get the goodies[.]” Rausch also testified Adelaide became unhappy if Thomas and his wife, Cindy, went on trips without her. Specifically, Adelaide became upset with Thomas in October 2008, the same month she removed him as a beneficiary, because he and Cindy went to Bayfield and did not bring her along.

¶7 Thomas agreed with the other witnesses’ assessments of Adelaide’s personality, testifying that she was vain, liked to be flattered, and liked to be the center of attention. Thomas testified he had a good relationship with Adelaide, but she became difficult to please during the last three years of her life. He confirmed that Adelaide became upset with him in October 2008 after he failed to take her on a trip to Bayfield.

¶8 Thomas also testified regarding Adelaide’s relationship with Peterson. He stated Peterson lived across the street from Adelaide and

occasionally helped Adelaide by getting her groceries, putting gas in her car, feeding the birds, taking her shopping, and walking her dog. Thomas did not find out until after Adelaide's death that she had designated Peterson as a beneficiary of the CD.

¶9 Kerry Boucher, a Johnson Bank employee, testified she helped Adelaide change the payable-on-death beneficiary of the CD on October 13, 2008. Adelaide told Boucher she wanted to change the beneficiary because she was unhappy with Thomas, who did not help her enough. She told Boucher she was designating Peterson as a beneficiary because Peterson "helps her out with whatever she needs[.]" Although Peterson may have brought Adelaide to the bank on October 13, Boucher testified Peterson did not sit in on the October 13 meeting.

¶10 Peterson testified she had been Adelaide's neighbor for twenty-nine years. She stated she and Adelaide were friends, but they did not belong to the same social circle. Peterson testified she sometimes ran errands for Adelaide, drove Adelaide places, or walked her dog. Peterson also testified that, in July 2008, Adelaide told Peterson she wanted to invest some money at a local bank. Adelaide asked Peterson where Peterson invested her money, and Peterson responded that she had recently renewed a CD at Johnson Bank. Peterson testified she told Adelaide, "[Y]ou could go talk to them [at Johnson Bank] and maybe they could help you decide." She also told Adelaide the name of the banker she usually dealt with at Johnson Bank. Peterson and Adelaide did not discuss who the payable-on-death beneficiary would be if Adelaide purchased a CD at Johnson Bank.

¶11 Finally, Peterson testified that she and Adelaide were both founding members of the Barron County Humane Society. Other witnesses confirmed

Adelaide's interest in animal welfare. Additionally, Thomas testified Adelaide made small donations to the Humane Society of United States in 2005, 2006, 2007, and 2008.

¶12 At the close of Thomas's case, Peterson and the Humane Society moved to dismiss, pursuant to WIS. STAT. § 805.17(1).³ The circuit court made detailed findings of fact. The court found that Adelaide was not a woman who could be easily manipulated, and instead was someone "quite given to manipulating others, to threats to disinherit, to no longer be your friend." She liked to be flattered and catered to, and "if you didn't do these things for her, she'd get you back." Consistent with these personality traits, the court found that Adelaide removed Thomas as the beneficiary of the Johnson Bank CD "of her own free will" because she was upset that he had not taken her to Bayfield in October 2008.

¶13 The court also found there was no evidence of anyone ever achieving a financial advantage over Adelaide by catering to her need for flattery and attention. Specifically, there was no evidence that Peterson had attempted to manipulate or take advantage of Adelaide, or that Peterson had a disposition to unduly influence Adelaide. The court found Adelaide and Peterson were "close neighbors," and Peterson helped Adelaide with errands and other tasks. However, they were not in the same social circle and were not social equals. Peterson was not in a better position to unduly influence Adelaide than anyone else, and she did not have any particular "in" with Adelaide that permitted her to exert undue

³ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

influence. The court found that Peterson told Adelaide that Peterson had purchased a CD at Johnson Bank and gave Adelaide the name of a Johnson Bank employee, but they did not otherwise discuss Adelaide's purchase of the CD.

¶14 Finally, the court found it was not surprising that Adelaide designated the Humane Society as a beneficiary of the CD. Adelaide had contributed to the Humane Society for several years and was interested in its mission, both at the local and national levels. Furthermore, the court found there was no evidence the Humane Society made any effort to influence Adelaide's beneficiary designation.

¶15 Based on these findings, the court concluded Thomas had failed to establish that Peterson and the Humane Society unduly influenced Adelaide. The court therefore dismissed Thomas's complaint.

DISCUSSION

¶16 Undue influence must be proved by clear and convincing evidence. *See Johnson v. Merta*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). 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. WIS. STAT. § 805.17(2); *Odegard v. Birkeland*, 85 Wis. 2d 126, 134, 270 N.W.2d 386 (1978). However, whether the facts found by the court fulfill the legal standard of undue influence is a question of law that we review independently. *See Bantz v. Montgomery Estates, Inc.*, 163 Wis. 2d 973, 978, 473 N.W.2d 506 (Ct. App. 1991).

¶17 In Wisconsin, there are two distinct methods of proving undue influence. The first method is a four-prong test, under which the objector must

prove: (1) the testator's susceptibility to undue influence; (2) an opportunity to unduly influence; (3) a disposition to unduly influence; and (4) the achievement of a coveted result. See *Fischbach v. Knutson*, 55 Wis. 2d 365, 373, 198 N.W.2d 583 (1972). Under the second method, a two-prong test, the objector must establish: (1) a confidential or fiduciary relationship between the testator and the beneficiary; and (2) "suspicious circumstances" surrounding the beneficiary designation. See *id.*

¶18 Thomas's complaint alleged that both Peterson and the Humane Society unduly influenced Adelaide to designate them as beneficiaries of the Johnson Bank CD. We first address Thomas's claim against the Humane Society, and then turn to his arguments regarding Peterson.

I. The Humane Society

¶19 We conclude the circuit court properly dismissed Thomas's claim against the Humane Society for three reasons. First, the Humane Society contends Thomas lacks standing to challenge the March 25, 2009 beneficiary designation. The Humane Society notes that Adelaide designated Thomas as the payable-on-death beneficiary of the CD on July 30, 2008. However, Adelaide revoked the July 30 designation on October 13, 2008 and named Peterson and Smith as beneficiaries. The Humane Society was not named a beneficiary until March 25, 2009. Because Thomas was no longer a beneficiary on March 25, 2009, the March 25 designation had no effect on him. The Humane Society therefore argues Thomas lacks standing to challenge the May 25 designation because Thomas had no personal interest or stake in the controversy at that time. See *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶5, 333 Wis. 2d 402, 797 N.W.2d 789. Thomas has not responded to the Humane Society's standing argument, and

we therefore deem it conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶20 Second, on appeal, Thomas has failed to develop an argument that the Humane Society unduly influenced Adelaide. He does not explain how the evidence regarding the Humane Society satisfies either the four-prong or two-prong test for undue influence. We need not address undeveloped arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶21 Third, even if we addressed the merits, Thomas's claim against the Humane Society would fail. The record is completely devoid of evidence that the Humane Society unduly influenced Adelaide. For instance, there is no evidence of any communications between the Humane Society and Adelaide, aside from Adelaide's occasional contributions to the Humane Society during the last few years of her life. Thus, under the four-prong test for undue influence, Thomas cannot establish the second element—that the Humane Society had an opportunity to unduly influence Adelaide. Under the two-prong test, Thomas cannot establish the first element—a confidential or fiduciary relationship between the Humane Society and Adelaide. Accordingly, Thomas has failed to prove undue influence by clear and convincing evidence, and the circuit court properly dismissed his claim against the Humane Society.

II. Peterson

¶22 With respect to Peterson, Thomas first argues the circuit court engrafted additional elements onto the four-part and two-part tests for undue influence, and therefore used incorrect legal standards to determine whether Peterson unduly influenced Adelaide. Thomas also argues that, using the proper

legal standards, the court’s factual findings establish undue influence by clear and convincing evidence. We address and reject Thomas’s arguments in turn.

The circuit court used the correct legal standards for undue influence.

¶23 It is undisputed that the circuit court recited the proper elements of both the four-prong and two-prong tests for undue influence. However, Thomas argues the circuit court added an element to these tests by requiring him to show a previous instance in which Adelaide had been unduly influenced. In support of his argument, Thomas points to the court’s statement that the court “didn’t hear a single example of anyone ever achieving a financial advantage over [Adelaide] by catering to her need for flattery and attention.” Thomas also cites the court’s statement, “I can’t find that [Adelaide] had any kind of track record of being taken advantage of because of her personality quirks.”

¶24 Thomas takes the court’s statements out of context. The court made these statements while discussing the susceptibility element of the four-prong test for undue influence. Specifically, the court was addressing Thomas’s argument that Adelaide’s desire for flattery and attention made her particularly susceptible to being unduly influenced. In response to Thomas’s argument, the court merely observed that, notwithstanding Adelaide’s long track record of seeking compliments and attention, there was no evidence that anyone had ever used compliments or flattery to take financial advantage of her. Thus, the court rejected Thomas’s contention that Adelaide’s personality made her susceptible to undue influence. The court’s observations were proper, in light of Thomas’s argument. The court did not require Thomas to prove a previous instance of undue influence.

¶25 Thomas next argues the circuit court erred by requiring him to prove that Peterson was in a better position to unduly influence Adelaide than any other

individual. However, the court required no such thing. Instead, in response to Thomas’s argument that Peterson was particularly close to Adelaide and, consequently, had a unique opportunity to unduly influence her, the court observed that Peterson was not in any better position to unduly influence Adelaide than Adelaide’s other friends or family members. The court noted Peterson did not have any particular “in” with Adelaide that permitted her to exert more influence than anyone else. Thus, the court concluded Thomas had not established an opportunity to unduly influence Adelaide—the second element of the four-prong test. The court did not require Thomas to prove an additional element.

¶26 Thomas also contends the court erroneously required him to prove that Adelaide had a fiduciary relationship with Peterson. He asserts that, under the first element of the two-prong test, he was only required to prove a confidential relationship, not a fiduciary relationship. However, the court actually stated it could not find any evidence of a “confidential *or* fiduciary relationship” between Adelaide and Peterson. (Emphasis added.) The court’s words tracked language used in multiple supreme court and court of appeals opinions discussing the two-prong test for undue influence. *See, e.g., Malnar v. Stimac*, 73 Wis. 2d 192, 202, 243 N.W.2d 435 (1976) (objector must prove that beneficiary’s relationship with testator was “‘confidential or fiduciary’ in nature”); *Fischbach*, 55 Wis. 2d at 373 (objector must prove existence of a “a confidential or fiduciary relationship”); *Glaeske v. Shaw*, 2003 WI App 71, ¶27, 261 Wis. 2d 549, 661 N.W.2d 420 (same). Accordingly, the court’s use of the term “fiduciary relationship” was proper, and the court did not add an element to the two-prong test.

The circuit court’s findings of fact do not establish undue influence.

¶27 Thomas next argues that, using either the four-prong or two-prong test, the circuit court’s findings of fact establish “as a matter of law” that Peterson unduly influenced Adelaide.⁴ We disagree.

¶28 The circuit court’s findings of fact do not establish the first element of the four-prong test—that Adelaide was susceptible to undue influence. Based on the trial testimony, the court concluded Adelaide was not a woman who could be easily manipulated. Instead, the court found that Adelaide was “quite given to manipulating others” by threatening to disinherit them or withdraw her friendship. Adelaide liked to be flattered and would retaliate against those who did not pay her enough attention. For instance, the court found that Adelaide removed Thomas as the beneficiary of the Johnson Bank CD because she was upset that he did not take her to Bayfield in October 2008. The court also found there was no evidence that anyone had ever achieved a financial advantage over Adelaide by catering to her need for flattery and attention. Accepting these facts as true, the only reasonable conclusion is that Adelaide was not susceptible to undue influence.

¶29 Moreover, based on the circuit court’s findings of fact, Thomas has not satisfied the third element of the four-prong test—a disposition to unduly influence. The circuit court specifically found there was no evidence Peterson had a disposition to unduly influence Adelaide. As evidence of Peterson’s disposition to unduly influence, Thomas asserts that Peterson “recommend[ed] that [Adelaide]

⁴ Thomas concedes that none of the circuit court’s factual findings are clearly erroneous.

invest her money at Johnson Bank[.]” However, the circuit court did not find that Peterson “recommended” that Adelaide invest at Johnson Bank. Instead, the court found that: (1) Adelaide asked Peterson where she invested her money; (2) Peterson responded she had recently purchased a CD at Johnson Bank; and (3) Peterson gave Adelaide the name of a Johnson Bank employee. These findings do not support a conclusion that Peterson “recommended” that Adelaide invest at Johnson Bank. Furthermore, even assuming Peterson recommended Johnson Bank to Adelaide, that alone would not establish a disposition to unduly influence. There is simply no link between Peterson’s “recommendation” of Johnson Bank to Adelaide and Adelaide’s decision to later designate Peterson as a beneficiary of the CD.

¶30 As further evidence of Peterson’s disposition to unduly influence Adelaide, Thomas contends Peterson “persuade[d] Adelaide ... to keep [Peterson] as one of the beneficiaries of the [CD.]” However, the record citations Thomas provides do not support this assertion, nor do any of the circuit court’s findings of fact. Thus, Thomas’s argument that Peterson was disposed to unduly influence Adelaide fails.

¶31 The circuit court’s findings of fact do not establish either the first or third elements of the four-prong test for undue influence. Accordingly, the court’s findings do not compel, or even support, a conclusion that Peterson unduly influenced Adelaide under the four-prong test.

¶32 Applying the two-prong test, the court’s findings of fact do not establish the first element—a confidential or fiduciary relationship between Peterson and Adelaide. The court found that Peterson and Adelaide were “close neighbors,” but were not part of the same social circle. The court also found that

Peterson helped Adelaide with errands and other tasks. These facts, without more, do not even establish a close friendship, let alone a confidential or fiduciary relationship. Moreover, we have previously stated:

Certain relationships are ordinarily referred to as being confidential, such as the relations of attorney and client, physician and patient, and priest and parishioner. A close relationship is not, however, necessarily a confidential relationship. For example, the relationship of parent and child or husband and wife does not ordinarily create a confidential relationship[.]

Mielke v. Nordeng, 114 Wis. 2d 20, 27-28, 337 N.W.2d 462 (Ct. App. 1983) (citations omitted). If parent-child and husband-wife relationships do not ordinarily qualify as confidential relationships, it is difficult to see how Peterson and Adelaide's relationship could be deemed confidential.

¶33 Thomas argues that, because Adelaide relied on Peterson's financial advice, the two women had a confidential relationship as a matter of law. However, the single case Thomas cites does not support the proposition that providing financial advice automatically creates a confidential relationship. *See Rahr v. East Wis. Trustee Co.*, 88 Wis. 2d 199, 220, 277 N.W.2d 143 (1979).

¶34 Moreover, the circuit court did not find that Peterson gave Adelaide any financial advice. Instead, the court found that Peterson told Adelaide the name of Peterson's bank and gave Adelaide the name of a bank employee who had helped Peterson in the past. Thomas does not explain how providing this information constitutes providing financial advice. Thus, even assuming that providing financial advice creates a confidential relationship as a matter of law, the circuit court's findings of fact do not establish that Peterson provided financial advice to Adelaide. Accordingly, the court's findings do not compel a conclusion

that Peterson and Adelaide had a confidential relationship. Thomas has therefore failed to establish undue influence under the two-prong test.

¶35 Finally, we note that WIS. STAT. RULE 809.23(3) prohibits citation to unpublished opinions, except for authored opinions issued after July 1, 2009, which may be cited for their persuasive value. *See* WIS. STAT. RULE 809.23(3)(a)-(b). In his brief-in-chief, Thomas cited four unpublished cases, two of which are per curiam opinions and all of which predate July 1, 2009. Peterson and the Humane Society pointed out that these citations violated RULE 809.23(3). Thomas then cited yet another unpublished, per curiam opinion in his reply brief, exacerbating his initial violation. Accordingly, we sanction Thomas's counsel and direct that he pay the clerk of this court \$200 within thirty days of the release of this opinion. *See* WIS. STAT. RULE 809.83(2).

By the Court.—Judgment affirmed; attorney sanctioned.

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

