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2014 IL App (5th) 140011-U

NOTICE
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NO. 5-14-0011

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

<i>In re</i> ESTATE OF OLIVER H. BATES,)	Appeal from the
Deceased)	Circuit Court of
)	Christian County.
(Sarah Tzakis, f/k/a Sarah Bates,)	
)	
Petitioner-Appellant,)	
)	
v.)	No. 10-P-66
)	
The Estate of Oliver H. Bates, Deceased, and)	
Rebecca Mizeur, f/k/a Rebecca Myers, Individually)	
and as Executor of the Estate of Oliver H. Bates,)	
Deceased,)	Honorable
)	Allen F. Bennett,
Respondents-Appellees).)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting summary judgment in favor of the respondents where there were genuine issues of material fact as to the decedent's testamentary capacity and whether the decedent executed his will as a result of undue influence.

¶ 2 The petitioner, Sarah Tzakis, appeals from the order of the circuit court of Christian County entering summary judgment in favor of the respondents, the estate of Oliver H. Bates, deceased, and Rebecca Mizeur, individually and as executor of the

estate. For the reasons which follow, we reverse the decision of the circuit court and remand for further proceedings.

¶ 3 Oliver Bates executed a will on February 27, 2003, when he was approximately 74 years old. He died on October 14, 2010. He was survived by two daughters, Rebecca Mizeur and Sarah Tzakis. Rebecca was named as executor of the will, with Dean McWard, Oliver's nephew, as successor executor. The contested will, which was admitted to probate in October 2010, directed that Oliver's real estate consisting of 280 acres, which was worth an estimated \$1.2 million, be given to Rebecca, while Sarah received a rental home and real estate located in Taylorville, Illinois.

¶ 4 The action contesting the will was brought by Sarah and alleged the following grounds for invalidating the will: lack of testamentary capacity; undue influence; intentional interference with an expectancy; and fraudulent inducement. The intentional-interference-with-an-expectancy and fraudulent-inducement counts were thereafter voluntarily dismissed by Sarah. Therefore, this appeal only involves the testamentary-capacity count and undue-influence count and, as such, our discussion will be limited to those issues. Regarding the testamentary-capacity count, the petition alleged that Oliver had been "going through" hospitalizations and was suffering from dementia as well as the effects of severe memory loss at the time that his will was executed. The petition alleged that Oliver was taking "a number" of medications. The petition also alleged that Oliver's "limited mental capacity" was "glaring and obvious from even the most simple of observation that a guardianship petition was finally sought" in 2006. According to the petition, Oliver did not have the mental capacity to identify the natural objects of his

bounty, did not have the mental capacity to understand and appreciate the nature and extent of his property, and further did not have the mental capacity to understand and determine the disposition of his property.

¶ 5 Count II of the petition alleged that Rebecca exercised undue influence on Oliver in the preparation and execution of the will. According to the petition, Rebecca served as Oliver's caretaker and therefore had a fiduciary relationship with him. The petition alleged that Rebecca had "engaged in various improper acts and practices affecting" Oliver, which included having discussions relating to his finances and estate planning. The petition also alleged that Rebecca was instrumental in, and directly participated in, the decision to prepare a will, she had procured the attorney who drafted the will, and she had transported Oliver as necessary to the attorney's office. In addition, the petition alleged that Rebecca had isolated Oliver from family members, failed to pass on messages and communications to Oliver, and screened his communications from others. The petition alleged that Rebecca maintained a position of dominance over Oliver as a result of her position as his caretaker and the fact that Oliver was in a "weakened mental and physical state" and that she had taken advantage of the trust and confidence placed in her by Oliver by "securing the bulk" of his estate.

¶ 6 On September 26, 2013, Rebecca filed a motion for summary judgment. The motion argued, in pertinent parts, that Oliver had not been diagnosed with dementia by his treating physician of approximately 20 years until March 2004, more than one year after the will execution. According to the motion, Oliver's treating physician testified in his deposition that Oliver had an appointment with him on March 3, 2003, and that Oliver

knew who he was, what he owned, and who his children were on this date, and even months after the will execution on October 17, 2003, when Oliver had discussed his farm and his daughters at another appointment. The motion noted that Dean McWard, who had worked on Oliver's farm, had testified in his deposition that although Oliver had declined after 1999, Oliver knew the farm ground that he owned, knew who his children were, and knew what was going on with the farm ground the majority of the time.

¶ 7 In further support of Oliver's testamentary capacity, the motion indicated that Oliver had given informed consent for two invasive medical procedures, the first occurring less than one month from the will execution and the other occurring nearly two years later, without the need of a guardian or power of attorney. In addition, attached to the motion was an affidavit from David Fines, the attorney who had drafted Oliver's will, in which he opined that Oliver had the requisite testamentary capacity to execute a will. Further, the motion pointed to Sarah's testimony in her deposition where she had indicated that she was not around Oliver during the time that his will was executed and did not have any evidence as to his testamentary capacity at that time.

¶ 8 In addition, the motion argued that there was no genuine issue of material fact as to whether Oliver was subject to undue influence by Rebecca when he executed his will. The motion argued that there was not a fiduciary relationship between Oliver and Rebecca at the time of the will execution. The motion indicated that a fiduciary relationship was not established through the existence of a power of attorney as Fines's affidavit revealed that the will was executed before Oliver had executed a durable power of attorney giving Rebecca power of attorney over his property and finances. The motion

argued that the evidence revealed that Oliver was not a dependant party in that he was a stubborn, independent man and he lived alone, provided for himself, worked on his farm, cooked his meals, and drove to and attended estate planning meetings with his attorney. The motion argued that Sarah had alleged nothing more than a "typical family relationship" between Oliver and Rebecca. The motion also argued that Sarah could not show that Rebecca prepared or procured the preparation of the disputed will as Rebecca was not present during the meetings between Fines and Oliver nor had she accompanied Oliver to those appointments as evidenced by Fines's affidavit.

¶ 9 In response, Sarah argued that the following evidence indicated that Oliver lacked testamentary capacity to execute a will: Rebecca admitted in deposition testimony that Oliver had confused Sarah with Rebecca at a grocery store on one occasion; Dean McWard testified in his deposition that he had interacted with Oliver on a daily basis and opined that "any time after 1999 was a gray area" with regard to Oliver's competency; Dean's testimony that Oliver did not always know the farm ground that he owned or who his children were; Oliver's physician's testimony that Oliver had reported that he was having memory problems in March 2003; and the physician testimony that dementia was a gradually progressive disease that could take between three to five years to become severe.

¶ 10 Regarding undue influence, Sarah argued the following supported her position that there was a fiduciary relationship between Oliver and Rebecca where Rebecca was the dominant party: Oliver's physical and mental health was declining as he suffered from depression and was becoming increasingly forgetful and confused; he required assistance

from family members to set up his medications; Rebecca had accompanied him to his doctor appointments and was cooking for him; he was diagnosed with dementia in 2004; physician testimony that determining whether a patient could give informed consent was not the same as determining testamentary capacity; and Oliver had a vitamin B12 deficiency and regularly failed to get his replacement shots in the months surrounding the will execution, which his physician warned could affect his memory and central nervous system. Sarah also argued that the evidence indicated that Oliver had placed the management of his economic and financial affairs with Rebecca.

¶ 11 Sarah further argued that the evidence revealed that Rebecca participated in the procurement or preparation of the will in that Rebecca testified in her deposition that she had initiated the need for Oliver to speak with an attorney to discuss his plan if "something happens" while having hernia surgery, the billing statement for the preparation of Oliver's will indicated that the bill was sent to Rebecca pursuant to her instructions, and testimony that Rebecca had told her mother that she had taken Oliver to the attorney's office. Sarah also pointed to evidence which indicated that Oliver's attorney had always been Dan Franklin, but he did not have Franklin prepare his will. Instead, Oliver had Fines, who had been Rebecca's attorney on unrelated matters prior to and at the time of the will execution, prepare the will.

¶ 12 In November 2013, a hearing was held on the motion for summary judgment. At the time that the trial court made its ruling on the motion, it had before it the pleadings, the affidavit of the attorney who prepared the will, the written and oral arguments of the attorneys, and numerous depositions. The evidence relevant to the issues of testamentary

capacity and undue influence can be summarized as follows.

¶ 13 Christine McWard, Oliver's niece, testified in her deposition that she believed Oliver was of sound mind and had his own opinions until approximately 2000. However, after 2000, she noticed that Oliver was having vision and memory problems, that he frequently appeared confused, and that he was not acting like himself. She testified that "[e]verybody told" Oliver what to do and that he would do "anything" for Rebecca. She thought Oliver's behavior was unusual in 2003 when she had visited him and he had offered to give her some of his personal possessions. She noticed that conversations with Oliver became "less complex" as time progressed. She was "so disturbed" by Oliver's condition that she expressed her concerns to her parents. Her mother also suffered from Alzheimer's and she opined that Oliver's dementia progressed "more quickly" than her mother's. Sometime between 2003 and 2005, Rebecca's dog fell in a well on Oliver's property and Oliver had forgotten that the dog was there. The dog remained in the well for several days until it finally died. Also, during that time frame, Oliver had confused Rebecca with Cathy. Christine opined that by 2005, Oliver was "highly confused."

¶ 14 Dean McWard, Oliver's nephew, testified in his deposition that he had farmed Oliver's property from approximately 1983 until the farm tenancy was terminated in 2006. He frequently assisted his uncle by writing checks and deposit slips and by occasionally taking him to doctor's appointments and on other errands when requested. Although Oliver had been declared mentally incompetent in 2006, Dean believed that Oliver began declining in 1999. Dean acknowledged that Oliver knew the farm ground that he owned and who his children were "most of the time," and Dean thought that

Oliver knew what was occurring on his farm. Dean learned sometime in 2004 that Oliver had not paid his income taxes for the 1999 through 2002 tax years when Oliver received a letter from the IRS, which revealed that Oliver's property was going to be seized for delinquent taxes. Dean noted that Oliver did not seem concerned about the situation.

¶ 15 Cathy Bates, Sarah and Rebecca's mother, testified in her deposition that she and Oliver were divorced in November 1990, and Sarah moved with her while Rebecca stayed with Oliver. She testified that Rebecca had said that she had taken Oliver to the attorney's office to discuss estate planning. Rebecca had also said that Oliver had executed a will, but that she did not know the contents of the will. However, Rebecca subsequently made comments indicating that she had some knowledge regarding the will contents. Rebecca had said that Sarah was going to receive the rental house and that the sisters were supposed to divide the farm. Cathy testified that Oliver was sometimes difficult to contact by phone, but that Rebecca always knew where to find him. At Oliver's request, Cathy had frequently written out checks from Oliver's checking account for Sarah's expenses when she was in school. Cathy explained that Oliver regularly came to her house so they could sit down and pay these bills. Cathy testified that Oliver had good hygiene and took pride in his appearance when they were married, but she noticed on several occasions between 1999 and 2004 that his clothing appeared dirty. She explained that it was obvious that he was not taking care of himself. The change in his appearance was upsetting to her because it was unusual, and she had attempted to talk to him about her concerns.

¶ 16 Richard Delvalle, Oliver's physician, testified in his deposition that Oliver had

been diagnosed with a vitamin B12 deficiency in February 2000. Oliver was supposed to make regular visits to the doctor to get replacement shots, but he did not do this on a consistent basis. Delvalle explained that a B12 deficiency affected a person's memory and could result in cognitive behavior changes, such as depression, dementia, and personality changes. Delvalle reported that Oliver had complained about memory loss and he believed that Oliver suffered from depression, but he did not believe that either was related to the B12 deficiency. Although Oliver had complained of memory loss, Delvalle testified that he would not have an issue with Oliver signing some legal documents in February 2003 as he believed that Oliver had a "good grip on the big picture" and the determination as to how to divide Oliver's property was within Oliver's capacity. Delvalle indicated that Oliver had doctor appointments on March 3, 2003, and October 17, 2003, and Delvalle believed that Oliver knew his family and farm and had the mental capacity to make a plan concerning the distribution of his property.

¶ 17 Delvalle testified that Rebecca had reported to him in March 2004 that Oliver was having problems knowing the days of the week and the months of the year. Delvalle explained that at this point, he was "pretty sure" that Oliver suffered from dementia and that this was the first time that he felt it worthwhile to consider this diagnosis. He explained that dementia was a gradually progressive disease and that it took a "pretty long time to become severe," with three to five years being the average. He explained that dementia was a "spectrum of a disorder" and that it was difficult to pinpoint when the disease started. He believed that Oliver's dementia was at the mild end of the spectrum at this time.

¶ 18 Leo Swiney, a friend of Oliver's since high school, testified in his deposition that he worked for Rebecca's husband. Swiney described Oliver as strong willed and a man who was not easily manipulated. He rarely saw Oliver after 2000, but on the few occasions that he saw Oliver, he did not observe Oliver having any memory problems. Swiney believed that Oliver knew who his family was and knew what property he owned.

¶ 19 Rebecca testified in her deposition that she did not notice Oliver having memory problems before 2004 and that he just had "normal old person issues." She contacted his doctor when she first noticed his memory loss in 2004. She initially said that she did not believe her father suffered from dementia at this time, but she later acknowledged that her father may have suffered from a "little bit of dementia." She explained that his memory problems had not affected his daily life until 2006, when he was placed in a nursing home. She had restricted some family members from visiting Oliver in the nursing home because she was concerned about his adjustment there. From 2000 until Oliver's death, she occasionally went to his doctor appointments with him. She believed that he was "down in the dumps," which she opined was caused by his divorce, living alone with only a few of his family members talking to him consistently, and working on the farm alone. By 2003, she was putting his medication in a pill box for him each week so that he would take the correct medicine. In late 2006, she noticed that he was wearing the same clothing multiple days in a row. Guardianship was established in late 2006.

¶ 20 Rebecca acknowledged that she had assisted her father with writing checks and paying bills after her mother moved out of the house. She described Oliver as a collector and explained that he was a "Depression baby" in that he did not like throwing anything

away. Sometime between 2004 and 2005, Rebecca began bringing food to him because she was concerned that he was not eating properly. Before that, he would frequently come to her house during the week and eat with her family.

¶ 21 Rebecca acknowledged that she told Oliver that he needed to talk with an attorney and have a living will prepared in case anything went wrong with his hernia surgery, which was scheduled in March 2003. He thereafter made the decision to schedule an appointment with David Fines because he knew Fines's family and he did not want his previous attorney to represent him. Rebecca did not recall scheduling the appointment for him, but explained that he might have used her phone because she was on vacation the week the phone call was made and he was staying at her house. She did not take him to the appointment and did not know how he got there. She did not know that he was having a will prepared and she had not seen the will until after the guardianship proceedings were in progress. Oliver never discussed the will contents with her, except for telling her in 2004 that she was getting his "stuff," which she understood to be his personal property.

¶ 22 Rebecca acknowledged that she had requested that David Fines mail her the billing statement for the preparation of the legal documents because Oliver had a tendency not to pay his bills in a timely manner. Although the statement made reference to a will, she explained that she did not notice that reference and did not realize her father had executed a will. Rebecca discovered that her father executed a will when she was searching his house for documents during the guardianship proceedings. Rebecca had received an email from Sarah revealing that she had heard that Oliver had written her out

of his will. In response, Rebecca mailed Sarah a copy of the will. They never discussed the contents of the will.

¶ 23 Sarah testified in her deposition that she did not have any evidence that her father was of unsound mind and memory on February 27, 2003, because she was not around him on that date. In the summer of 2002, she was talking to Oliver about his family history and he had a hard time recalling it. She acknowledged that although Rebecca already had power of attorney over Oliver, Rebecca wanted her to be a coguardian. During the guardianship proceedings, Sarah had received an email from a cousin warning her that Rebecca had written her completely out of Oliver's will. Sarah then asked Rebecca about Oliver's will. Rebecca said that she had a copy of the will and that Oliver had given Sarah his rental house and left the farm property to both of them, with Rebecca making the decision as to how it was to be divided. Rebecca also emailed Sarah the first page of the will. Sarah explained that she did not receive a complete copy of the will until after Oliver died.

¶ 24 On December 18, 2013, the trial court entered summary judgment in favor of Rebecca, finding no genuine issue of material fact existed as to the issues of whether Oliver lacked testamentary capacity to execute his will and whether Oliver was subject to undue influence when he executed the will. With regard to the testamentary-capacity issue, the court noted that it was uncontroverted that Oliver's will was properly attested to by witnesses, all of whom had sworn before a notary public that Oliver was of sound mind and memory on February 27, 2003. Regarding the undue-influence count, the court found that there was no genuine issue of material fact that Oliver was not unduly

influenced by Rebecca to execute his will and that Rebecca did not prepare or procure the preparation of the will. The court noted that Rebecca was not Oliver's power of attorney at the time that the will was executed. Accordingly, the court concluded that Sarah had failed to present disputed genuine issues of material facts as to each and every element of lack of testamentary capacity and undue influence. Sarah appeals.

¶ 25 Sarah raises two issues on appeal. First, Sarah argues that the trial court erred in granting summary judgment because the evidence presented called into question Oliver's testamentary capacity to execute a will. Second, Sarah argues that the court erred in granting summary judgment because the evidence presented called into question whether Oliver executed his will as a result of Rebecca's undue influence.

¶ 26 Summary judgment is a drastic means of disposing of litigation and may only be granted when "the pleadings, depositions, admissions, and affidavits on file, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 510 (1993). A genuine issue of material fact exists where the material facts are disputed, or if the material facts are undisputed, reasonable persons could draw different inferences from the undisputed facts. *Id.* Therefore, summary judgment should be granted where the undisputed facts admit but one reasonable inference. *Id.* "Summary judgment should be granted with caution so that the right to trial on conflicting facts and inferences is not usurped." *In re Estate of Jessman*, 197 Ill. App. 3d 414, 419 (1990). In ruling on a summary judgment motion, the trial court must construe the pleadings, depositions, admissions, and affidavit on file in the light most favorable to the nonmoving party. *In re*

Estate of Hoover, 155 Ill. 2d 402, 410-11 (1993). We review a summary judgment ruling *de novo*. *Ciesiolkiewicz*, 243 Ill. App. 3d at 511.

¶ 27 A testator is presumed under the law to be competent to execute a will until proven otherwise. *In re Estate of Harn*, 2012 IL App (3d) 110826, ¶ 26. "To set aside a will on the grounds of lack of testamentary capacity, the petitioner must demonstrate that at the time the will was executed the testator lacked sufficient mental ability to know he was making a will, to know and remember the natural objects of his bounty, to comprehend the character and extent of his property and to make disposition of his property according to a plan formed in his own mind." *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1013 (1997). To be relevant, evidence of a lack of testamentary capacity must relate to a time at or near the time of the will execution. *Harn*, 2012 IL App (3d) 110826, ¶ 26. The relevant time period has not been defined; however, our supreme court has held that evidence of the mental condition of a testator two years before the will execution was relevant to show lack of testamentary capacity at the time of execution. *Kuster v. Schaumburg*, 276 Ill. App. 3d 220, 227 (1995); *Manning v. Mock*, 119 Ill. App. 3d 788, 805 (1983) (citing *Mitchell v. Van Scoyk*, 1 Ill. 2d 160 (1953)). "It is well settled that if a person has sufficient mental capacity to transact ordinary business and act rationally in the ordinary affairs of life, he or she has sufficient mental capacity to dispose of property by will." *Harn*, 2012 IL App (3d) 110826, ¶ 27.

¶ 28 Based on the record in the present case, the evidence presented was sufficient to create a genuine issue of material fact as to Oliver's testamentary capacity to make the 2003 will. Oliver's treating physician believed that Oliver suffered from dementia in

March 2004. Although Delvalle testified that he believed that Oliver was capable of making a testamentary plan in March 2003, Delvalle also testified that dementia was a gradually progressive disease that takes, on average, three to five years to become severe. Dean McWard, who interacted with Oliver on a daily basis, believed that Oliver's mental health began declining in 1999. Christine McWard, who also had regular contact with Oliver, testified that sometime after 2000, she noticed that Oliver began having problems with his memory and was frequently confused.

¶ 29 Additionally, Dean revealed that Oliver's farm property was in jeopardy of being seized by the IRS because Oliver had not paid his income taxes for the 1999 through 2002 tax years and that Oliver did not appear concerned about losing his property. Christine relayed an incident that occurred between 2003 and 2005 where Rebecca's dog had fallen in a well on Oliver's property and Oliver did not tell anyone about the dog because he had forgotten. Christine further testified that Oliver had confused Rebecca and his ex-wife Cathy. Sarah testified that he once confused her with Rebecca. Sarah testified that in 2002, she had discussed her family history with Oliver and she noticed that he had a hard time recalling his own family history. Rebecca testified that Oliver had "normal old person issues" in 2003.

¶ 30 Rebecca and Sarah both characterized their father as a collector, and Rebecca noted that Oliver was a "Depression baby," which resulted in him not getting rid of any of his personal possessions. However, Christine testified that in 2003, he had offered to give her some of his personal possessions. Cathy noticed that Oliver's appearance had changed in that he had previously taken pride in his appearance, but there were several

times between 1999 and 2004 where she observed that his clothing was dirty. Based on this evidence, we conclude that a question of material fact had been raised by Sarah concerning Oliver's testamentary capacity. Because this was a summary judgment proceeding, it was not for the trial court to resolve this question of material fact. See *Harn*, 2012 IL App (3d) 110826, ¶ 28. "The trial court's role was merely to determine that such a question existed." *Id.* Thus, summary judgment should not have been granted on the testamentary-capacity issue.

¶ 31 "In order to invalidate a will on the basis of undue influence, the petitioner must establish that the intent of the testator was overpowered and that he was induced to do or refrain from an act without free will, causing him to devise his property according to the plan of another person." *Roeseler*, 287 Ill. App. 3d at 1018. The influence must be directly connected with the execution of the will and operate at the time that the will was made. *In re Estate of Julian*, 227 Ill. App. 3d 369, 376 (1991). A *prima facie* case of undue influence is established where (1) a fiduciary relationship existed between the testator and a person receiving a substantial benefit under the will; (2) the testator was in a dependent situation in which the substantial beneficiaries were in dominant roles; (3) the testator reposed trust and confidence in such beneficiaries; and (4) a will was prepared or procured and executed in circumstances wherein such beneficiaries were instrumental or participated. *Roeseler*, 287 Ill. App. 3d at 1018. What constitutes undue influence will depend upon the circumstances of each case and proof of undue influence may be wholly inferential and circumstantial. *Id.* at 1018-19. A fiduciary relationship may either exist as a matter of law from the relationship of the parties, such as in an

attorney-client relationship, or may be found to exist in a more informal relationship that is moral, social, domestic, or personal in its origin. *Id.* at 1018.

¶ 32 In the present case, the evidence presented was sufficient to create a genuine issue of material fact that should be resolved by the trier of fact as to whether Oliver was unduly influenced by Rebecca in the execution of his February 2003 will. The record supports a reasonable inference that Rebecca was in a fiduciary relationship with the decedent and was in a position to dominate and control him and that the decedent reposed trust and confidence in Rebecca. The record reflects that Oliver relied on Rebecca, and other family members, for helping him to pay bills and write out checks dating back to when Rebecca was in high school. Rebecca testified that she had accompanied him to doctor's appointments on several occasions. In 2003, she was refilling his medicine box to make sure that he was taking the correct medicine. She was also cooking for him several times a week. The evidence indicated that Oliver was suffering from depression, lived alone on the farm, and spent a lot of time by himself. Oliver also suffered from a vitamin B12 deficiency and he failed to adhere to the recommended treatment. There was testimony that Oliver also suffered from memory loss during the time of the will execution and he was diagnosed with dementia, a gradually progressive disease, in 2004. Furthermore, the evidence indicated that although Sarah had a somewhat strained relationship with her father, he had attempted to provide equally for his daughters during his lifetime.

¶ 33 There was also evidence presented, that if believed, indicated that Rebecca had been a participant in the procurement of Oliver's will. Oliver's will was prepared by

David Fines, an attorney who had never represented Oliver before preparing the estate planning documents. Rebecca testified that Fines was not her attorney during this time period, but Fines's affidavit stated that Rebecca was a client "in that time period on unrelated matters." Rebecca testified that she did not know that her father had executed a will; however, she had requested that the attorney send her the billing statement for his services, which referenced a last will and testament. There was also testimony that prior to the guardianship proceedings, Sarah received from a cousin an email indicating that Rebecca had written Sarah out of Oliver's will. As with the issue involving testamentary capacity, we note that it was not for the trial court to resolve the question of material fact that had been raised by Sarah on the issue of undue influence as this was a summary-judgment proceeding. Thus, summary judgment should not have been granted on this issue.

¶ 34 For the reasons stated, we conclude that there are material issues of fact that would preclude the entry of summary judgment on the petitioner's will contest. Accordingly, the judgment of the circuit court of Christian County is hereby reversed and remanded for further proceedings.

¶ 35 Reversed and remanded.