2015 IL App (4th) 140229-U

NO. 4-14-0229

FILED
May 21, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of J.L. WADE, a/k/a	)	Appeal from
JESSE LORAINE WADE, Deceased,	)	Circuit Court of
SUSAN WADE BARR,	)	Pike County
Petitioner-Appellant,	)	No. 07P40
v.	)	
MERCANTILE TRUST & SAVINGS BANK,	)	
Executor of the Estate of J.L. WADE;	)	
MERCANTILE TRUST & SAVINGS BANK, as	)	
Trustee of the J.L. WADE Trust Dated	)	
March 22, 2001, as Amended; J.L. WADE	)	
FOUNDATION, INC.; MIMI CHUNMEI HU; and	)	Honorable
THE UNIVERSITY OF ILLINOIS FOUNDATION,	)	Diane M. Lagoski,
Respondents-Appellees.	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly refused petitioner's proposed jury instruction on undue influence.

(2) The trial court did not abuse its discretion in excluding evidence regarding occurrences after May 4, 2004, the last date decedent signed a testamentary device, on relevancy grounds.

(3) Petitioner failed to establish the trial court erred in excluding deposition testimony in decedent's 2001 guardianship proceeding from admission in the will and trust contest; petitioner forfeited her argument by not supporting it with legal authority and introduced an argument not raised at trial.

(4) The trial court did not err in denying petitioner's motion for a directed verdict on the issue of undue influence.

(5) The trial court did not err in denying petitioner's motion for a mistrial.

¶ 2 In 2007, petitioner, Susan Wade Barr, initiated this suit contesting testamentary devices executed by her father, Jesse Loraine Wade (J.L.). Under the challenged devices, petitioner was essentially disinherited. At trial, petitioner presented evidence supporting two theories. Petitioner argued J.L. lacked the necessary testamentary capacity to execute the testamentary devices and J.L. was unduly influenced to alter his previous will and trust by two of petitioner's cousins, Courtney Wade and Michael Wade, and J.L.'s live-in assistant, Mimi Chunmei Hu.

¶ 3 A jury considered the will contest while the trial court ruled on petitioner's trust contest. Both ruled in petitioner's favor on the latter testamentary devices, but found the earlier devices, which significantly lessened petitioner's gift, valid.

¶ 4 Petitioner appeals, arguing the trial court erred by (1) refusing to give petitioner's tendered jury instruction on undue influence, (2) excluding testimony regarding events occurring after the date J.L. last signed a testamentary device, (3) excluding from trial the deposition testimony of unavailable witnesses who testified in the guardianship proceedings that resulted in the appointment of a guardian for J.L., (4) denying her motion for a directed verdict after petitioner presented testimony giving rise to the unrebutted presumption of undue influence, (5) denying her motion for judgment notwithstanding the verdict (judgment *n.o.v.*), and (5) denying her motion for a mistrial based on the improper admission of inflammatory and prejudicial evidence. We affirm.

¶ 5 I. BACKGROUND

¶ 6 J. L. died in June 2007 at the age of 94. During his lifetime, J.L., a very

intelligent man, was an astute businessman. He created and operated a company called Nature House, Inc, in Pike County. J.L. was self-made and private. He married Marjorie and had one child, petitioner. J.L.'s relationship with Marjorie was tumultuous due to Marjorie's alcoholism. This, according to the trial court, resulted in J.L.'s having a very close relationship with petitioner. Petitioner was the apple of J.L.'s eye, and he doted on her. In August 1996, J.L. executed testamentary documents leaving petitioner the bulk of his estate. Petitioner was also named executor of the estate and successor trustee of a trust created at the same time.

¶ 7 J.L.'s plan to leave his estate to his daughter changed. In March 2001, J.L. executed a will (2001 Will) and a trust agreement (2001 Trust Agreement), altering the arrangements he made in 1996 and decreasing the devise to petitioner to $1 million. According to the 2001 Will, J.L.'s estate would go the trust estate, J.L. Wade Trust, created under the 2001 Trust Agreement. Bank of America was designated as the executor of the 2001 Will and successor trustee. J.L. was the trustee. Under the 2001 Trust Agreement, the J.L. Wade Trust was to employ Hu during J.L.'s lifetime, and, if she remained employed by J.L. at his death, a home in Scottsdale, Arizona, as well as $100,000. Petitioner was to receive $1 million, so long as she did not challenge the validity of the 2001 Will or the 2001 Trust Agreement. The balance of the estate was to be given to the University of Illinois Foundation for scholarship purposes. In the 2001 Trust Agreement, J.L. identified his nephew, Michael, as his physician and designated Michael as the one to determine when J.L. could no longer manage his affairs.

¶ 8 Amendments were made in May 2002 (2002 Amendment) and in January 2004 (2004 Amendment). J.L. also signed a codicil in May 2004 (2004 Codicil). In the 2002 Amendment, J.L. reduced the gift to his daughter to $300,000 and confirmed the 2001 Trust

Agreement "[i]n all other respects." In the 2004 Amendment, J.L. named Mercantile Trust & Savings Bank (Mercantile) as successor trustee. In the 2004 Codicil, J.L. appointed Mercantile as the executor of his 2001 Will.

¶ 9 The month of J.L.'s death, Mercantile petitioned the trial court to admit into probate the 2001 Will and the 2004 Codicil. Approximately six months later, in December 2007, petitioner filed suit, contesting the 2001 Will, the 2001 Trust, the two amendments, and the 2004 Codicil.

¶ 10 A. Petitioner's Argument at Trial

¶ 11 At trial, petitioner attempted to show J.L. had been improperly influenced by his sister-in-law, Wilma Wade; his nephews, Michael and Courtney; Hu; and his estate-planning attorney, William Keller, to abandon his testamentary plans to leave petitioner his estate. Petitioner relies largely on evidence of the December 2001 court order that found J.L. lacked the mental capacity to manage his person and estate fully. Petitioner further points to evidence showing J.L. moved from Illinois to Arizona, where he spent much of his time with Wilma, Michael, and Courtney, and, while there, petitioner was denied access to J.L. by Hu, Michael, and Courtney. Petitioner further points to evidence showing J.L. dramatically changed his opinion of petitioner upon spending more time with Wilma, Michael, and Courtney in Arizona.

¶ 12 Petitioner further sought to prove at trial J.L. lacked the requisite mental capacity to alter his will and trust. Petitioner relied on expert and lay testimony showing J.L.'s mental faculties began diminishing before 1999 and J.L. lacked testamentary capacity when he signed the 2001 Will, the 2001 Trust, the amendments, and the 2004 Codicil.

¶ 13 B. Respondents' Arguments at Trial

¶ 14 In contrast, respondents maintained at trial J.L. had the necessary mental capacity to alter his testamentary plan. Respondents pointed to expert testimony, as well as testimony by J.L.'s counsel, regarding the creation of the testamentary documents. Respondents further argued no undue influence occurred, as neither Wilma, Michael, nor Courtney received anything under the will or the trust, and Hu, who received a house and $100,000, received little compared to the work she did for J.L. Respondents' position is that J.L. changed his testamentary plan because he felt betrayed by his daughter after she placed an article in a local newspaper questioning his judgment, she initiated guardianship proceedings against him, and she refused to vacate property owned by J.L. until he began eviction proceedings.

¶ 15 C. Trial Court's Summary of the Evidence

¶ 16 A three-week trial was held in May 2013. Before entering judgment, the trial court summarized the evidence for the record. J.L. was very bright and an astute businessman who was proud of his accomplishments. While not afraid to speak of his accomplishments, he was also a private man. J.L. was also accustomed to his power.

¶ 17 J.L. was married to Marjorie, and the two had one child, petitioner. J.L.'s marriage was tumultuous, but he had a very close and intense relationship with his daughter. The two adored each other. J.L. doted on petitioner and determined she would have the best of everything. J.L. and petitioner's relationship changed, however, beginning in 1999. J.L., at that time, was approximately 86 years old. Around this time, J.L.'s younger brother, Walter Wade, developed cancer. This caused J.L. great distress. J.L. began to question his future and rethink his business plans. During Walter's final months, J.L. spent much time with Walter and his family, including Walter's wife, Wilma, and his sons, Michael and Courtney. Petitioner, at this

time, was either in Alabama or Connecticut. She was not with Walter Wade's family.

¶ 18 A noticeable change in the relationship of petitioner and J.L. occurred at Walter's funeral. Michael and petitioner provided differing descriptions of what occurred that day. The trial court determined it did not know exactly what occurred, but something happened. At this point in time, J.L. began to believe petitioner was an alcoholic who drank too heavily and was unable to handle the business. Wilma told petitioner she overheard Walter and J.L. discuss these beliefs. During this time, there was a shift in J.L.'s allegiance from petitioner and toward Michael, Courtney, and Wilma.

¶ 19 No evidence supported J.L.'s belief regarding petitioner's alcohol consumption or her business prowess. There was evidence petitioner was a social drinker, and she had consumed alcohol in J.L.'s presence, but not to the level of intoxication. In addition, petitioner had participated in the business as a director. She also had discussed business plans with her father "all the time." There was testimony petitioner sat on the board, and J.L. had initially planned for petitioner and her husband, Tom Barr, to return to Griggsville and run the company after Tom retired from his position in Alabama in September 2000. J.L.'s plan was that petitioner would run the business side of Nature House, while Tom would run the plant.

¶ 20 At some point, J.L. went to Arizona with Hu and stayed there. For a period of time, Hu and J.L. stayed with Wilma. He returned to Illinois but then returned to Arizona. By January 2000, J.L. made a decision regarding his business. Around this time, he sent a memorandum to Nature House employees, telling them he was "slowing down" and would "relinquish control." Petitioner learned J.L. began to sell properties, which led to a discussion between petitioner and J.L. in January 2000. During this discussion, petitioner questioned J.L.'s

decision to sell a piece of property called Perry Springs. J.L. became exceptionally angry with petitioner because she challenged him. From this discussion, there was a period of a lack of contact between them until March 20, 2001, when an article appeared in the local paper. In this article, written by petitioner's friend and approved by petitioner, petitioner stated she wished to purchase Perry Springs from J.L. The article infuriated J.L.

¶ 21 In 2001, petitioner commenced guardianship proceedings. Following a bench trial, J.L. was found to lack the capacity to manage his person and estate fully: J.L., "as a result of mental deterioration, as well as physical impairments of hearing and sight, is *not* fully capable of managing his person and estate." (Emphasis in original.) In December 2001, the trial court appointed Bank of America as a limited guardian of J.L.'s estate and Courtney as a limited guardian of J.L.'s person. The court stated the scope of the limited guardianships was to recognize J.L.'s current abilities and to encourage his maximum self-reliance and independence.

¶ 22 The trial court believed petitioner did not expect that her efforts in challenging her father would cause him to turn on her. From 1999 until his death, J.L. spent most of his time with Michael, Courtney, and Hu, his caregiver.

¶ 23 In 2000, J.L. began investigating the possibility of changing his estate plan. He had a meeting with Keller. By March 2000, J.L. was prepared to revoke his 1996 will and sign a new will and trust agreement. Hu drove J.L. to his meetings with Keller. Hu was not in the office with J.L. during the meetings with Keller or Larry Gramke, J.L.'s accountant. Neither Michael nor Courtney was present for those meetings. J.L. explained to Keller he wanted to leave Hu a house because she had sold her house in St. Louis to move to Arizona to take care of him.

¶ 24 The trial court noted Michael testified he did not talk to J.L. about petitioner, the business, or J.L.'s estate plan. The court found J.L. talked about his business constantly, but when he was not talking about his business, he was talking about his anger at petitioner. The court found Michael had no credibility on that matter. The court also did not believe Courtney when he testified, up to 2004, he had not seen anything in J.L. to make him think J.L. suffered dementia or Alzheimer's disease.

¶ 25 The trial court noted the testimony and allegations Michael, Courtney, and Hu prevented petitioner from seeing her father. This included testimony Hu padlocked gates leading to the house to prevent petitioner from entering the patio to knock on the door. The court noted "there may be some truth to that," but it highlighted Tom's testimony regarding a time when he called Courtney and asked if petitioner could see J.L. Courtney responded he would ask J.L. When Courtney returned Tom's telephone call, Courtney stated J.L. did not want to see petitioner and, "You know how J.L. is." Courtney and Mike did not challenge J.L. The court concluded the evidence showed J.L., when petitioner challenged him, said, "you are not my daughter anymore." The court stated Courtney and Michael may not be credible, but they were not stupid.

¶ 26 Keller testified he had lengthy discussions with J.L. and, during those discussions, J.L. told Keller what he wanted to do. One of the discussions was to make sure his daughter received nothing and had no control. J.L. also spoke to Keller regarding the foundation, scholarships, and keeping the business in Pike County.

¶ 27 D. Expert Testimony

¶ 28 A number of experts testified for both sides at trial. For petitioner, Dr. Jane Velez, a licensed clinical psychologist, testified. Dr. Velez examined J.L. in June 2001 in

connection with the guardianship proceedings. Dr. Velez determined J.L.'s intelligence quotient was well below average, which did not correlate to the expected IQ range for his education and occupation. Dr. Velez opined J.L.'s reading was at a fourth-grade level and observed J.L. could not recall the paragraph she read to him. Dr. Velez stated J.L. believed the year was 1932 and it was October rather than June. Dr. Velez opined J.L. suffered dementia, as well as paranoia, and concluded J.L. would not have had the mental ability to understand the nature and extent of his property, nor the will and trust.

¶ 29 Also testifying for petitioner was Dr. John Day, a clinical psychologist. Dr. Day did not examine J.L. He examined the reports and provided opinions on the observations and methodologies of the other testifying experts. Dr. Day concluded J.L. had a diagnosis of dementia, Alzheimer's type, which had an irreversible course. Dr. Day believed J.L.'s dementia began as early as 1994. Dr. Day further opined J.L. did not have the ability to make a disposition of his property in accordance with a plan formed in his mind in March 2001. Dr. Day further opined J.L. did not have the ability to know the nature and extent of his property or the natural objects of his bounty at that time.

¶ 30 For respondents, Dr. Frank Froman, a licensed clinical psychologist, testified. He examined J.L. in July 2001. Dr. Froman performed a competency evaluation of J.L. and concluded J.L. was competent and knew the natural objects of his bounty. J.L. listed for Dr. Froman a number of his assets. J.L. articulated he had thoughts of providing for other family members as well. Dr. Froman observed no signs J.L. suffered paranoidal delusions. Dr. Ron Kingsley, a licensed psychologist with a Ph.D. in clinical psychology, examined J.L. during the guardianship proceedings. Dr. Kingsley also examined J.L. before the guardianship proceedings.

He performed an intelligence test and ascertained J.L.'s IQ score was on the high end of the average range. J.L. willingly complied with Dr. Kingsley's examinations and was "slightly bemused that someone might be questioning or [be] concerned about his competence." Dr. Kingsley's opinion at the end of his examination of J.L. was that J.L. was a "fully competent individual."

¶ 31 Respondents also called Dr. Lee Johnson, a physician with a specialty in psychiatry, to testify. According to Dr. Johnson, he evaluated J.L. on July 30, 2001. As part of Dr. Johnson's evaluation, he reviewed the psychological assessments performed by Dr. Kingsley and Dr. Froman. Dr. Johnson interviewed J.L. for one hour. J.L. was oriented to time, place, and person. He exhibited no signs of psychosis. J.L. acknowledged he had difficulty remembering details of everyday living but was aware he could remember remote experiences better. Dr. Johnson opined J.L. was able to make judgments and decisions. J.L. was concerned about the continuation of his business. He wanted to maintain control of his business. J.L. was concerned about petitioner's judgment, especially her use of alcohol. J.L. was entertaining different possibilities about with whom to leave his business. J.L. thought his nephews in Arizona might become part of the business. Dr. Johnson opined J.L. had the mental ability to know the natural objects of his bounty, know his property, and to dispose of his property in accordance with a plan formed in his mind.

¶ 32 E. Trial Outcome

¶ 33 Before entering judgment, the trial court made credibility findings regarding the expert testimony. Regarding Dr. Velez, the court found her testimony "all over the place" and found Dr. Velez "arrogant and angry." The court observed Dr. Velez tested J.L. and, while J.L.

had issues, the testing put him in the average range. Dr. Velez spent six hours with J.L., which, the court determined, would have been difficult for someone over 80. The trial court found Dr. Day to be a good witness but observed Dr. Day did not examine J.L. This was problematic for the trial court. The court found Dr. Johnson's testimony the most persuasive.

¶ 34 Regarding testamentary capacity, the trial court found J.L., in 2001, when the trust agreement was executed, had the ability to know the nature and extent of his property and the natural objects of his bounty. The court found J.L. was able to dispose of his property in accordance with a plan formed in his mind. The court highlighted a memorandum by Keller regarding Keller's meeting with J.L. in 2002. At that time, J.L., in 2002, did not want to leave his daughter anything. The only reason he left petitioner something was to prevent her from contesting the will, as Keller suggested. J.L. agreed. The trial court determined J.L. was clear enough at this point in time to be able to make that decision. Regarding the 2002 Amendment, the court found J.L. was not as clear as he was in 2001, but it noted the standard to have testamentary capacity "is not terribly high." The court found J.L. knew the natural objects of his bounty and had the ability to make a disposition in accordance with the plan formed in his mind.

¶ 35 The trial court observed there was conflicting testimony in regard to the 2004 Amendment. At times J.L. could not speak, but at others he was cognizant enough to have a conversation with Mercantile about setting up the trust. The court attributed these differences to the nature of Alzheimer's disease, where patients have some good times of the day and some bad times of the day. The court found J.L. lacked testamentary capacity in 2004.

¶ 36 Regarding petitioner's allegations of undue influence, the trial court could not find evidence of specific conduct to support a claim of undue influence. The court agreed there was

access and opportunity, but found no specific conduct by Hu, Courtney, or Michael.

¶ 37 The trial court also ruled against petitioner on her allegations of undue influence on the basis of a dominant-and-subservient relationship. The court found a caregiver relationship between Hu and J.L. The court concluded J.L. was completely dependent on Hu, but the court determined neither Hu, nor Michael or Courtney, dominated J.L. or prepared or caused the preparation of the trust or the amendments. The court observed, even though Hu took J.L. to each meeting, there was no evidence suggesting she was involved in the preparation of the will. The court found, even though Hu received a house, "it's not enough from the evidence to find undue influence."

¶ 38 The jury reached a verdict, finding the 2001 Will valid but setting aside the 2004 Codicil. The judge set aside the 2004 Amendment, but found the 2001 Trust Agreement and the 2002 Amendment valid.

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 A. Petitioner's Proposed Jury Instruction on Undue Influence

¶ 42 Petitioner first contends the trial court erred in denying her tendered jury instruction on undue influence. Petitioner's proposed instruction included Keller, J.L.'s attorney who drafted J.L.'s testamentary devices. The trial court, however, allowed respondents' tendered instruction that excluded Keller. Petitioner argues, under *In re Estate of Hoover*, 155 Ill. 2d 402, 615 N.E.2d 736 (1993), even though Keller was not a direct beneficiary, the influence of a third party can be imputed to those who actually benefitted and Keller's influence should be imputed to Hu.

¶ 43 The parties dispute the appropriate standard of review of this alleged error. Petitioner, citing *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13, 951 N.E.2d 1131, argues the standard of review is *de novo*. Respondents maintain the appropriate standard of review, when one challenges a decision denying a proposed jury instruction, is abuse of discretion.

¶ 44 In general, whether to give or deny a proposed jury instruction is a decision falling within the trial court's discretion. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505, 771 N.E.2d 357, 371 (2002). "The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law." *Id.* However, as stated in *Studt*, "[w]hen the question is whether the applicable law was conveyed accurately, *** the issue is a question of law, and our standard of review is *de novo.*" *Studt*, 2011 IL 108182, 951 N.E.2d 1131.

¶ 45 This question is close. If petitioner is correct and *Hoover* requires the inclusion of Keller as a third party, then a question arises as to whether the law was accurately conveyed. However, if there is factual issue on whether Keller should be included, the standard would be an abuse of discretion. Ultimately, we need not decide which standard applies in this circumstance. Under either standard, our decision is the same: the trial court did not err in denying petitioner's tendered instruction.

¶ 46 Undue influence that will invalidate is defined as " 'any improper *** urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely.' " *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 460, 448 N.E.2d 872, 875 (1983) (quoting *Powell v. Bechtel*, 340 Ill. 330,

338, 172 N.E. 765, 768 (1930)). Undue influence may be inferred in cases where one's power has been imposed upon the testator in such a way as to have induced the testator to "make a devise or confer a benefit contrary to his deliberate judgment and reason." *Hoover*, 155 Ill. 2d at 411, 615 N.E.2d at 740.

¶ 47 Plaintiff's proposed jury instruction on undue influence states the following:

> "The Petitioner may establish undue influence as a ground of invalidity in two ways.
>
> First, she may introduce proof of specific conduct alleged to constitute undue influence. If you find that the Petitioner has proved undue influence by evidence of specific conduct, then your verdict should be that the document is not the valid last will of Jesse Loraine Wade.
>
> Second, she may establish undue influence as a ground of invalidity by proving each of the following propositions:
>
> 1. That there was a dominant-subservient relationship between Mimi Chunmei Hu, Dr. Michael Wade, Courtney Wade, or *William Keller*, and Jesse Loraine Wade whereby they or any one of them exercised dominance over Jesse Loraine Wade and Jesse Loraine Wade was dependent upon any one or more of them;
>
> 2. That Jesse Loraine Wade reposed trust and confidence in them;
>
> 3. That they or any one of them prepared or caused the

preparation of the document purporting to be the last will of Jesse Loraine Wade; and

4. That any one of them received a substantial benefit under the terms of the document, when compared to other persons who have an equal claim to Jesse Loraine Wade's bounty.

If you find that each of these propositions has been proved, then your verdict should be that the document is not the valid last will of Jesse Loraine Wade.

If you find that any of these propositions has not been proved, then your verdict should be that the document is the valid [l]ast will of Jesse Loraine Wade unless the Petitioner has proved one of the other alleged grounds of invalidity." (Emphasis added).

¶ 48 Petitioner's reliance on *Hoover* is unconvincing. Petitioner's theory rests on one sentence in *Hoover*: "[t]he influence may be that of a beneficiary or that of a third person which will be imputed to the beneficiary." *Hoover*, 155 Ill. 2d at 412, 615 N.E.2d at 740. *Hoover*'s statement of this sentence appears in its definition of what constitutes undue influence. *Id.* at 411-12, 615 N.E.2d at 740. The *Hoover* court did not analyze or hinge on the content of the sentence, nor did it include facts involving allegations an attorney engaged in undue influence.

¶ 49 In fact, *Hoover* does not involve facts where undue influencers were not also beneficiaries and where influence needed to be imputed. In *Hoover*, the plaintiffs, Robert Hoover and five of his seven children, were disinherited by their father/grandfather. *Id.* at 407, 615 N.E.2d at 738. Plaintiffs alleged a scheme involving the testator's wife, another of the

testator's sons, the plaintiff's son's ex-wife Nancy, and the other two of Robert's seven children, Courtney and Elizabeth. *Id.* at 409-10, 615 N.E.2d at 739. The *Hoover* decision involved an appeal from a decision granting summary judgment; it does not explain whether each of the undue influencers were beneficiaries. However, the underlying appellate court case, *In re Estate of Hoover*, 226 Ill. App. 3d 422, 428, 589 N.E.2d 899, 904 (1992), *rev'd in part Hoover*, 155 Ill. 2d at 421, 615 N.E.2d at 745, shows at least Nancy, Courtney, and Elizabeth were direct beneficiaries of the will and codicils. It is likely the testator's wife and other son also benefitted.

¶ 50 *Hoover* thus does not explain what facts are necessary for a trial court to *impute* the actions of an influencer onto a beneficiary. Neither does petitioner. In her reply brief, petitioner points to facts about Keller's conduct in drafting the will and trust documents, including talking with Michael and Hu, but none provide a reason to infer undue influence occurred or to impute Keller's actions onto Hu. None show why Keller would have a motive or receive a benefit for Hu to inherit under the will and trust over petitioner. Instead, as the trial court stated when denying petitioner's proposed instruction: "[T]he evidence is that Mr. Keller took nothing under the will, or the trust agreement, for that matter. *** I have no evidence, either inferential or circumstantial, that indicates that Mr. Keller substituted his will for that of the testator." Without evidence of a benefit, there is no reasonable inference the existence of a fiduciary relationship resulted in undue influence.

¶ 51 Petitioner essentially asks this court to impute Keller's influence on J.L. to the beneficiary of J.L.'s will and trust to satisfy the elements of undue influence without a reasoned rationale for doing so. Such a holding would subject every attorney drafting a will or a trust into undue-influence actions when anyone is left out of a testamentary plan. Petitioner has provided

no case showing a court has held an attorney with no evidence of benefitting from the testamentary plan or with any connection to the beneficiaries may serve as the basis of an undue-influence claim. We will not be the first to so hold.

¶ 52 Petitioner has not established the trial court erred in denying her proposed instruction. We find no error under the abuse-of-discretion standard or under the *de novo* standard.

¶ 53 B. The Exclusion of Testimony of Events after May 4, 2004

¶ 54 Petitioner argues the trial court erred in excluding evidence based on events occurring after May 4, 2004, the date the codicil was signed. Petitioner maintains her theory of the case shows Hu, Courtney, and Michael engaged in a process of keeping petitioner and J.L. separated. Petitioner argues evidence after this date shows the conduct continued until J.L.'s death and supports her claim of undue influence. Petitioner points to offers of proof in which multiple witnesses testified regarding events where Hu, Courtney, and Michael acted to prevent petitioner from seeing J.L. despite multiple attempts by petitioner from May 2004 through February 2007, and where Courtney, Michael, and Hu allowed short visits of approximately 15 to 20 minutes. Petitioner further alleges evidence after May 2004 was relevant to understanding the progression of Alzheimer's and to explain how J.L. became more withdrawn and alienated over time.

¶ 55 Petitioner urges this court to review this issue *de novo*, stating a decision of the trial court to admit evidence based on a question of law is reviewed *de novo*.

¶ 56 The trial court excluded post-May 2004 evidence when it granted respondents' motion *in limine.* Motions *in limine* are pretrial motions seeking an order to exclude

inadmissible evidence and bar questions regarding such evidence. *Schuler v. Mid-Central Cardiology*, 313 Ill. App. 3d 326, 333, 729 N.E.2d 536, 543 (2000). These orders remain subject to reconsideration during trial. *Id.* at 334, 729 N.E.2d at 543. The trial court has broad discretion to grant or deny a motion *in limine*. *Id.* This court will not reverse an order of the court allowing or excluding evidence unless there was an abuse of that discretion. *Lambert v. Coonrod*, 2012 IL App (4th) 110518, ¶ 18, 966 N.E.2d 583. This is a high threshold; an abuse of discretion on an evidentiary ruling will be found only if no reasonable person would take the view of the trial court. *In re Leona W.*, 228 Ill. 2d 439, 460, 888 N.E.2d 72, 83 (2008).

¶ 57 Contrary to petitioner's contention, this issue does not present a question of law. The trial court granted the motion *in limine* on the ground evidence on occurrences after May 4, 2004, was irrelevant and unduly prejudicial. Such findings fall within the trial court's discretion regarding the admissibility of evidence (*In re Marriage of Bates*, 212 Ill. 2d 489, 522, 819 N.E.2d 714, 732 (2004), *Lucht v. Stage 2, Inc.*, 239 Ill. App. 3d 679, 694, 606 N.E.2d 750, 760 (1992)). *De novo* review is inappropriate.

¶ 58 Because we cannot find no reasonable person would take the view of the trial court, we find no abuse of discretion. Petitioner pursued two theories at trial: lack of testamentary capacity and undue influence. Both theories center on the circumstances and events at or near the time the will is executed. To set aside a will for lack of testamentary capacity, a petitioner must establish the absence of one of the following three elements: the testator had "the ability to know and understand the natural objects of one's bounty, the nature and extent of one's property, and to make a disposition of property according to some plan formed in the mind." *Manning v. Mock*, 119 Ill. App. 3d 788, 804, 457 N.E.2d 447, 456 (1983). "To be relevant,

evidence of a lack of testamentary capacity must relate to a time at or near the execution of the will." *Kuster v. Schaumburg*, 276 Ill. App. 3d 220, 227, 658 N.E.2d 462, 467 (1995). To set aside a will for undue influence, there must be factual allegations of undue influence at the time the testamentary documents were executed. *In re Estate of Osborn*, 128 Ill. App. 3d 453, 455, 470 N.E.2d 1114, 1117 (1984); see also *In re Estate of Mooney*, 117 Ill. App. 3d 993, 999, 453 N.E.2d 1158, 1162 (1983).

¶ 59 The last testamentary document directly affecting petitioner was signed in May 2002. Events that occurred two years later, in May 2004, and beyond bear no relevance to whether J.L. lacked testamentary capacity at that time or whether he was unduly influenced in May 2002. Even if testimony of efforts to continue to keep J.L. and petitioner apart established a pattern beyond May 2004, reversal would not be warranted as the record does not indicate substantial prejudice. See *Leona W.*, 228 Ill. 2d at 460, 888 N.E.2d at 83. The jury and the trial court heard testimony supporting petitioner's theory Hu, Courtney, and Michael hindered her visits with J.L. We fail to see how additional evidence of the same behavior extending beyond 2004, as J.L.'s condition continued to deteriorate, would have led the jury to a different conclusion regarding events in 2001 and 2002.

¶ 60 Petitioner's case, *Mooney*, is distinguishable and thus unconvincing. The evidence sought to be admitted in *Mooney* was evidence of "*past* occurrences" occurring "many years" before the will's execution. (Emphasis added.) *Mooney*, 117 Ill. App. 3d at 999-1000, 453 N.E.2d at 1162-63.

¶ 61 C. The Exclusion of Testimony from the Guardianship Proceedings

¶ 62 Petitioner argues the trial court improperly excluded relevant testimony on the

issues of mental capacity and undue influence from the trial transcripts and depositions of the guardianship proceedings. Petitioner maintains it is unfair respondents were allowed to call Drs. Johnson and Froman, who examined J.L. as part of the guardianship proceedings, while petitioner was unable to present testimony from witnesses whose testimony was available only in the transcripts and depositions. Petitioner emphasizes J.L.'s videotaped deposition from August 2001 and his November 2001 trial testimony show J.L.'s "extreme" hearing problems, as well as his vision problems and his decreased knowledge of personal history and current events, as well as delusions and paranoia.

¶ 63 Petitioner, however, cites no authority and develops no legal argument other than, "[t]his is unfair," when alleging evidence should not have been excluded. Petitioner's only legal support is the argument the trial court improperly excluded the videotaped deposition of J.L. Petitioner has therefore forfeited her argument that the other evidence from the guardianship proceedings was improperly excluded by failing to cite relevant authority. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived ***."); *Campbell v. Wagner*, 303 Ill. App. 3d 609, 613, 708 N.E.2d 539, 543 (1999) (stating "the appellate court is not a depository into which the burden of research may be dumped and failure to cite legal authority in the argument section of a party's brief waives the issue for review"). While petitioner, in response to respondents' arguments in their appellee brief, provides legal authority and argument, her argument is too late. Ill. S. Ct. Rule 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 64 Regarding the August 2001 videotaped deposition of J.L., petitioner argues on appeal the video should have been entered as demonstrative evidence. Petitioner cites one case,

Cisarik v. Palos Community Hospital, 144 Ill. 2d 339, 579 N.E.2d 873 (1991), in support.

¶ 65 Petitioner's argument is flawed. First, the record does not show this argument was raised before the trial court. At trial, petitioner argued for the admission of the evidence from the guardianship proceedings for witnesses who were unavailable because of their deaths, and the trial court excluded the evidence under Illinois Supreme Court Rule 212 (eff. Jan. 1, 2011), finding "the interest of the defense is sufficiently different that the defendant respondent did not have the opportunity to adequately examine the witnesses on the actual issue *** presented here." Petitioner did not seek its admission as demonstrative evidence. The argument is forfeited. See *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 355, 701 N.E.2d 493, 499 (1998) ("Questions not raised in the trial court cannot be argued for the first time on appeal.").

¶ 66 Second, the videotape goes beyond demonstrative evidence. According to the *Cisarik* court, "[d]emonstrative evidence has no probative value in itself." *Cisarik*, 144 Ill. 2d at 341, 579 N.E.2d at 874. In *Cisarik*, the parents of a brain-damaged child sought admission of a " 'Day in the Life Movie' " to show the jury the full extent of the child's disabilities. *Id.* The movie had no probative value on the key issue of that case, whether respondents were liable for causing the injury. *Id.* This is a different scenario. While the videotape in *Cisarik* is "demonstrative" and has no probative value, the videotaped deposition of J.L. has probative value. The issue to be resolved at trial was J.L.'s testamentary capacity and, arguably, the videotaped deposition would have some impact on that question. It was not demonstrative.

¶ 67 D. The Denial of Petitioner's Motion for a Directed Verdict

¶ 68 Petitioner next argues the trial court should have granted her motion for a directed

verdict. Petitioner cites Illinois Pattern Jury Instruction, Civil, No. 200.03 (2011) as establishing, when a plaintiff proves the following elements, a presumption of undue influence arises: (1) a fiduciary relationship existed between the decedent and the beneficiary, (2) the decedent reposed trust and confidence in the beneficiary, (3) the beneficiary prepared or caused the preparation of the purported will, and (4) the beneficiary received a substantial benefit under the document. Petitioner argues the evidence proved these elements, giving rise to the presumption and entitling her to a directed verdict.

¶ 69 We disagree. Petitioner asserts the evidence establishes each of the elements. Petitioner argues Hu and J.L. shared a fiduciary relationship, with Hu in the dominant role. Petitioner emphasizes testimony showing the two were constantly together and Hu drove J.L. to all of his appointments. Petitioner argues J.L. reposed trust and confidence in Hu, and Hu received a substantial benefit under the will. To establish the third element, petitioner contends Hu drove J.L. to his appointments with his attorney Keller, and Keller's actions in drafting the will, coupled with the fact Hu drove J.L. to the appointment, should be imputed on Hu.

¶ 70 As above, petitioner relies on one sentence in *Hoover* to show Keller's act in drafting the will and trust should be imputed to Hu: "[t]he influence may be that of a beneficiary or that of a third person which will be imputed to the beneficiary." *Hoover*, 155 Ill. 2d at 412, 615 N.E.2d at 740. This argument is legally and factually insufficient. Petitioner has provided no legal authority to show the prerequisites of "imputing" influence onto a beneficiary, particularly in the absence of any relationship between the beneficiary and the influencer. Petitioner also has provided no factual scenario showing the influence should be imputed to Hu. Hu was not involved in the meetings. No evidence shows Keller received any benefit, financial

or otherwise, in Hu's receiving the gift. The evidence shows, instead, Keller was an attorney who prepared the documents for J.L.

¶ 71 The basis of petitioner's claim fails. Petitioner has not established the trial court erred in denying her motion for a directed verdict.

¶ 72 E. The Denial of the Motion for Judgment *N.O.V.*

¶ 73 Petitioner next argues the trial court erred in denying her motion for judgment *n.o.v.* on the issue of lack of testamentary capacity. Petitioner contends the facts show J.L.'s Alzheimer's disease started before 1999, as evidenced by J.L.'s confusion, lack of understanding, and fighting with loved ones. Petitioner argues "[t]he very idea that this man would do this to his only child, who there is no doubt he had almost worshiped, defies reality and is an indication of the ravaging disease from which he suffered." Petitioner further argues the excluded transcripts and videotape of J.L. show all the evidence, "when viewed in its aspect most favorable to the Petitioner, so overwhelmingly favors her that no contrary verdict based on that evidence could ever stand."

¶ 74 Petitioner initially properly states the question to be asked when deciding a judgment *n.o.v.* but improperly states the question in her analysis. A motion for judgment *n.o.v.* should be granted in cases in which all the evidence, when viewed in the aspect most favorable to the opponent, so overwhelmingly favors the movant no contrary verdict on that evidence could ever stand. *Snelson v. Kamm*, 204 Ill. 2d 1, 42, 787 N.E.2d 796, 819 (2003). This is a question of law, which we review *de novo*. *Id.*

¶ 75 The test here, then, is whether the evidence, when viewed in the aspect most favorable to respondents, so overwhelmingly favors petitioner no contrary verdict on that

evidence could stand. Viewing the evidence in the aspect most favorable to respondents, we find the evidence supports the verdicts of the jury and the trial court. There is testimony from Keller and expert witnesses supporting the conclusion J.L., at the time he signed his 2001 testamentary documents and the 2002 Amendment, possessed "the ability to know and understand the natural objects of [his] bounty, the nature and extent of [his] property, and to make a disposition of property according to some plan formed in [his] mind." *Manning*, 119 Ill. App. 3d at 804, 457 N.E.2d at 456. We recognize there is both expert and lay testimony to the contrary. But the task is to consider the evidence in the light most favorable to respondents. In doing so, we cannot find the evidence so overwhelmingly favors petitioner no contrary verdict could stand.

¶ 76 F. The Denial of the Motion for a Mistrial

¶ 77 Petitioner last argues the trial court erred in denying her motion for a mistrial. Petitioner points to her testimony when defense counsel asked a question insinuating she sued the lawyers who represented her during the guardianship proceedings. Petitioner contends the question was prejudicial and inflammatory as it was part of a theme to disparage her and show she had to be evicted from J.L.'s property.

¶ 78 A trial court has broad discretion in determining the propriety of declaring a mistrial. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 534, 736 N.E.2d 1074, 1091 (2000). When the alleged error did not prejudice the complainant or otherwise impair the complainant's right to a fair trial, a mistrial should not be declared. *Id.* at 534-35, 736 N.E.2d at 1091. This court will reverse a trial court's denial of a motion for a mistrial only when there is a clear abuse of discretion, such as when the decision is arbitrary, fanciful, or unreasonable. *Lovell v. Sarah Bush Lincoln Health Center*, 397 Ill. App. 3d 890, 899, 931 N.E.2d 246, 253 (2010).

¶ 79 During the cross-examination of petitioner, the following questioning occurred:

"Q. And, in fact, three days after this letter you sued your father?

A. I did not sue my father. I filed a guardian petition because he needed help.

Q. That's not my question. You filed an action against your father?

[Petitioner's Counsel]: Asked and answered, [your] Honor.

THE COURT: Sustained.

[Defense counsel]: Did you sue these lawyers?

A. No.

[Petitioner's Counsel]: Objection, move to strike. Motion for mistrial. Prejudicial, inflammatory.

THE COURT: I'll sustain the objection. I will strike it. Argumentative at the least.

[Petitioner's Counsel]: Thank you, Your Honor.

THE COURT: I'm going to deny your motion for a mistrial."

¶ 80 The trial court did not abuse its discretion. The record establishes petitioner was not unduly prejudiced by the above question. As respondents emphasize, the question was one question in petitioner's lengthy testimony over multiple hours during a nearly three-week-long trial. In her testimony, petitioner had earlier testified, without objection, she had sued the firm of

Husch & Eppenberger, which represented her during the guardianship proceedings, after those proceedings concluded. The jury was thus already aware of this fact due to admitted testimony. We are unconvinced this one question so prejudiced petitioner a mistrial is warranted.

¶ 81 We also note petitioner has cited no case in which a similar fact pattern resulted in the reversal of an order denying a mistrial on appeal.

¶ 82 III. CONCLUSION

¶ 83 We affirm the trial court's judgment.

¶ 84 Affirmed.