2016 IL App (4th) 160185-U

NO. 4-16-0185

FILED
December 13, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of CLYDE R. KNOWLES, Deceased,	)	Appeal from
JANET A. EDWARDS and LINDA S. MORGAN,	)	Circuit Court of
Petitioners-Appellants,	)	Clark County
v.	)	No. 08P75
JOHN W. KNOWLES and JAMES C. KNOWLES,	)	
Respondents-Appellees.	)	Honorable
	)	Brien J. O'Brien,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) By failing, at the pertinent point in a witness's testimony, to tender a remedial instruction, petitioners have forfeited the issue of whether such an instruction should have been given.

(2) By failing to make a reasoned argument supported by the citation of relevant authority, petitioners have forfeited the issue of whether the trial court erred by excluding evidence that a witness had been barred for 11 years from practicing law.

(3) The jury's verdict in respondents' favor is not against the manifest weight of the evidence.

¶ 2 Clyde R. Knowles, whom we will call "the testator," died on December 25, 2008, and the question in this case is which document should be recognized as his last will and testament.

¶ 3 The final testamentary instrument he executed was a codicil, dated July 12, 2007, in which he reinstated a will dated September 30, 2001, and revoked all other wills. His two

daughters, however—petitioners, Janet A. Edwards and Linda S. Morgan—filed a petition to (1) invalidate the codicil on the ground that it was the product of undue influence by the testator's two sons, respondents, John W. Knowles and James C. Knowles; and (2) declare an instrument that the testator executed on July 10, 2007, two days before the codicil, to be his actual last will and testament. The jury was unconvinced by the theory of undue influence and returned a verdict in respondents' favor. Petitioners appeal. (James C. Knowles, named as executor in the will of September 30, 2001, has filed an appellee's brief, but John W. Knowles has not done so.)

¶ 4 Petitioners make three arguments in their appeal.

¶ 5 First, they argue the trial court committed clear error by refusing to reinstruct the jury during the testimony of Frank J. Weber. Actually, we are unable to see any such refusal in the record before us. Rather, petitioners failed to tender an instruction at the particular time when they elicited the testimony by Weber to which the instruction would have been pertinent, even though, in a sidebar conference, the attorneys seemingly had agreed that the instruction issue would be revisited if and when Weber's testimony actually called for the instruction. Because petitioners did not tender this instruction at the pertinent point in Weber's testimony, we conclude that this issue is forfeited.

¶ 6 Second, petitioners argue the trial court abused its discretion by excluding evidence that a witness, John Kessler, Sr., had been disbarred for 11 years. In their opening brief, petitioners fail to make a reasoned argument or to cite any authority in support of this argument. Consequently, James C. Knowles is correct that this issue is forfeited.

¶ 7 Third, petitioners argue that the jury's verdict is against the manifest weight of the evidence. We disagree. Given the trial evidence, a reasonable jury could return a verdict in respondents' favor.

¶ 8 Therefore, we affirm the trial court's judgment.

¶ 9 I. BACKGROUND

¶ 10 A. The Will of September 30, 2001

¶ 11 1. *The Testimony of Omer Shawler*

¶ 12 Omer Shawler testified substantially as follows. He had been practicing law in Marshall, Illinois, since 1950. In in the spring of 2001, he began talking with the testator about making an estate plan. The testator had inherited a lot of farmland from his father, and Shawler was concerned that if the testator predeceased his wife, Virginia Knowles, the federal government would get half his estate in taxes. On Shawler's advice, the testator eliminated this risk by putting the farmland in a form of joint tenancy with Virginia Knowles. At the same time, Shawler drafted wills for them both, "pursuant to the instructions and meetings with [the testator] and Virginia [Knowles;] they were there by themselves always." The testator and his wife signed these wills on September 30, 2001, in the kitchen of their residence, and Shawler and his wife, also named Virginia, signed the wills as witnesses. Shawler identified defendant's exhibit No. 8 as the will he had drafted for the testator and which the testator signed on September 30, 2001.

¶ 13 Also, Shawler identified "Defendant's Exhibit [No.] 9" as Virginia Knowles's will. It was dated 2006 rather than September 30, 2001, and he explained why:

> "It's identical to the will that she signed in 2001 because her will—[the testator] took them and evidently it had been misplaced and couldn't be found. So she said, ['']I want to make the same disposition we planned all along.['']
>
> She was out in a nursing home. Her mind was quite alert. We took the will out there, and I explained to her what we did, that it was exactly the same thing

only dated later. My secretary, Peggy English, witnessed it at that time, during that time in her presence and our presence. She acknowledged that as her will and she signed that, to confirm what she had done previously. She was afraid the will had been lost.

Q. All right. Did you prepare that will, No. [9]?

A. I did. It was exactly like the will we prepared originally that was—his will and her will were virtually identical."

¶ 14 Virginia Knowles died in June 2007.

¶ 15 2. *The Testimony of Jean Spittler*

¶ 16 Jean Spittler testified she was related to the testator by marriage—her husband was a brother of Virginia Knowles—and that from 1952 until her husband passed away, in 1998, they and the Knowles (that is, the testator and his wife, Virginia Knowles) played cards together, went on vacations together, and ate out together. Also, the Knowles came at least once or twice a month to the Spittlers' restaurant in Chrisman, Illinois. Respondents' attorney, Gregory C. Ray, asked Spittler:

"Q. Now, were there occasions during the time frame from the '50s to the '90s when you had conversations where [the testator] or Virginia [Knowles] or both of them spoke of their intent or interest in what they would have in a will?

A. Well, I never did know what they willed, but [the testator] always said he wanted the farm ground kept together and to go to the boys.

Q. Was this something you heard once?

A. Quite often.

Q. Would you say you've heard it ten times?

A. Oh sure.

Q. A hundred times?

A. Well, I don't know how many but several.

Q. Okay. Was this something that you heard consistently throughout, from the '50s to the '90s, or did it change?

A. No, it didn't change. He just wanted the ground to stay together."

¶ 17 B. Revocations and Reinstatements, Back and Forth

¶ 18 On June 21, 2007, the testator signed a document drafted for him by an attorney in Robinson, Illinois, Frank J. Weber, in which he revoked his will of September 30, 2001.

¶ 19 On June 22, 2007, he signed a will drafted for him by Frank J. Weber.

¶ 20 On July 3, 2007, he signed an affidavit drafted for him by another attorney, in Terre Haute, Indiana, John Kessler, Sr., in which he revoked the will of June 22, 2007, and reinstated the will of September 30, 2001.

¶ 21 On July 5, 2007, in a bank in Marshall, Illinois, he signed an affidavit that again revoked the will of June 22, 2007, and reinstated the will of September 30, 2001.

¶ 22 On July 10, 2007, he signed a will drafted by Frank J. Weber that was in all respects identical to the will of June 22, 2007 (except for the date). This will revoked the will of September 30, 2001.

¶ 23 On July 12, 2007, James C. Knowles gave the testator a ride to Kessler's office in Terre Haute, where the testator signed another affidavit, which revoked "the Will prepared for [him] by attorney Frank Weber during the week of July 9, 2007, and any other Wills Made for

[him] by said attorney Frank Weber." This affidavit had the effect of reinstating the will of September 30, 2001.

¶ 24 C. The Testimony of Frank J. Weber

¶ 25 Frank J. Weber testified he had been an attorney for 45 years, had an office in Robinson, and in May 2007 a client referred the testator to him.

¶ 26 Petitioners' attorney, Frederick E. Roth, asked Weber: "When you met with [the testator] the first time, what did he describe as far as why he was there to see you?" Ray made a hearsay objection, which the trial court sustained. Roth asked Weber if Clyde R. Knowles had talked with him during their meeting in May 2007. He answered yes. Roth asked: "Do you remember what the conversation was about?" Again Ray made a hearsay objection, and again the court sustained the objection.

¶ 27 At Roth's request, the trial court then held a sidebar conference, outside the hearing of the jury. The court asked Roth: "[A]re you arguing that there is some exception to the hearsay rule that applies, or are you arguing that this is not a hearsay issue at all?" Roth responded that, in a will contest, an attorney was permitted to "talk about his former client, the testator, with regard to what went on," specifically, "about their meetings, their conversations[,] and the basis for their opinion as to whether or not their client knew what he was doing with regard to drafting up a will."

¶ 28 Ray pointed out that, actually, this exception to which Roth referred was an exception to the attorney-client privilege, not an exception to the hearsay rule. Ray agreed there was an applicable exception to the hearsay rule, the common-law exception for the declarer's then-existing state of mind, but as Ray had explained in a previously filed trial brief, that

exception did not extend to a declaration of having done a past act. See *In re Estate of Holmgren*, 237 Ill. App. 3d 839, 843 (1992). Therefore, in his trial brief, Ray had requested a limiting instruction: "You may not consider the testimony as proof of the facts stated but only for the limited purpose of proving the declarant's state of mind." Ray told the court: "I think the law is clear that the state of mind exception requires a limiting instruction if asked for it."

¶ 29 Perceiving that this evidentiary question might require in-depth discussion, the trial court excused the jury and Weber for a recess. After the jury and Weber left the courtroom, the court asked Roth what was the hearsay exception he intended to rely on. This time, Roth invoked the hearsay exception for "declarant unavailability" under Illinois Rule of Evidence 804 (eff. Jan. 1, 2011). The court did not see how that rule was applicable, and looking through some books on evidence that the court had at the bench, the court was unable to find "an exception that applie[d] *** when someone who [was] deceased and [had gone] to their attorney and [told] them certain things, that by virtue of that alone, [fell] within an exception to the hearsay rule." The court asked Roth if he could cite any case law. He answered: "Not at the moment, Your Honor, no."

¶ 30 Therefore, the trial court concluded: "I think potentially it comes in under the state of mind exception, but if that's how it comes in, it does require the court to give a limiting instruction as Mr. Ray has suggested." Accordingly, the court gave Roth the options of presenting Weber's hearsay testimony under the common-law exception for the declarant's state of mind—excluding declarations of having done a past act—or, alternatively, not presenting it at all. After conferring with his clients, Roth chose the common-law state-of-mind exception that Ray had identified.

¶ 31 Weber and the jury then returned to the courtroom. The trial court said:

"THE COURT: As I understand it, Mr. Roth, at this time you're offering this testimony under the state of mind exception to the hearsay rule, is that correct?

MR. ROTH: That's correct.

THE COURT: In that event, the objection is overruled.

MR. RAY: If the Court please, Your Honor, I would ask that a limiting instruction, as we've discussed, be presented to the jury at this time as to how they should interpret this.

THE COURT: Yes, sir, thank you, Mr. Ray. I'm admitting this evidence under an exception to the hearsay rule. You may not consider the testimony of [*sic*] proof of the facts stated but only for the limited purpose of proving the declarant Mr. Knowles' state of mind. That would apply to any description by Mr. Weber of what Mr. Knowles told him."

¶ 32 Subject to that limiting instruction, Roth resumed his direct examination of Weber. Weber testified that when the testator first came to him in his office in Robinson, the topic of discussion was a petition the testator's two sons had filed to obtain guardianship over him. He wanted Weber to represent him in the guardianship proceeding and to oppose the proposed guardianship. Weber did so, and as far as he knew, no guardianship ever was awarded. (James C. Knowles likewise testified that the guardianship case remained pending until the testator's death.)

¶ 33 A couple of weeks later, the testator returned to Weber's office and told him that one of his sons, John W. Knowles, had hit him. At his request, Weber obtained an order of protection against that son.

¶ 34 Another legal action that Weber filed on behalf of the testator was an action for an accounting. The testator had explained to him that he was in a farming operation with his sons and that he was dissatisfied with the information they had been giving him about shared income and expenses.

¶ 35 At some point, when consulting Weber on these legal matters, the testator brought in his will dated September 30, 2001, and told Weber he wanted it revised so as to better "equalize" the gifts of property among his sons and daughters. To make sure no asset was overlooked, the testator took Weber on a tour of his estate. With Weber driving the pickup truck (the testator, because of his age-related infirmities, had been told not to drive), they looked at his fields, livestock, and machinery. Afterward, Weber wrote a new will for him, which revoked the will dated September 30, 2001. The testator signed this new will on June 22, 2007. (His wife, Virginia Knowles, already had passed away.)

¶ 36 Roth asked Weber:

> "Q. How did it come about to print out, sign on July 10, [2007,] a second version of the will?
>
> A. Okay, when [the testator] came to my office on that date, he indicated to me that his son, James, had sent him to—
>
> MR. RAY: Let me object to something that's happened, Your Honor."

The trial court sustained the objection. The court explained in a sidebar conference, outside the hearing of the jury: "[T]he *Holmgren* case stands for the proposition that the state of mind exception to the hearsay does not apply to past events so if he's going to testify about [the testator's] telling him of a past event, it doesn't fall within the exception. I'm going to sustain the objection."

¶ 37 Roth then stated he wanted to make an offer of proof. The trial court asked him:

"THE COURT: Okay. Do you want to do that through his testimony or through your own representation?

MR. ROTH: I can do it through representation. He will testify that [the testator] told him that his son Jim sent him to see John Kessler.

MR. RAY: I think you're talking a little loud.

MR. ROTH: Went to see John Kessler in Terre Haute and signed some type of document. He did not have a copy of the document to share. He didn't know what the document was, however, he thought it might in some way impact the June 22[, 2007,] will, and as a result, they decided to print out, date[,] and sign a new will identical to the June 22, 2007[,] will."

After hearing that offer of proof, the court said: "I think that is a description of the past event, and therefore, I don't believe it falls within the exception so I'm going to sustain the objection."

¶ 38 The direct examination continued. Frank J. Weber testified that sometime after June 10, 2007, the testator telephoned him and, without any apparent rancor, simply told him "he did not need an attorney." Therefore, Weber obtained judicial permission to withdraw from the order-of-protection case and from the still-pending guardianship and accounting cases.

¶ 39 Roth asked Weber:

"Q. *** Did you do any other will work for him after July 10[, 2007]?

A. No.

Q. When you were providing legal services to [the testator] with respect to his wills, did you have discussions about those wills with his daughters, Janet and Linda?

A. No, I did not."

¶ 40 (Petitioners, in their testimony, likewise denied ever talking with the testator about his will or estate plan, and they also denied ever talking with Frank J. Weber about such matters.)

¶ 41 The testator died on December 25, 2008. Upon hearing of his death, Weber sent the will of July 10, 2007, to the circuit clerk of Clark County.

¶ 42 That was the first day of the jury trial, August 24, 2015. The next day, before the jury was called into the courtroom, Roth argued to the trial court, for the first time, that the hearsay exception in Illinois Rule of Evidence 803(3)(A) (eff. Apr. 26, 2012) applied to the proposed testimony by Weber that Roth had described in his offer of proof the day before. That rule provides as follows:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:
>
> (A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will ***." Ill. R. Evid. 803(3)(A) (eff. Apr. 26, 2012).

Roth announced his intention to recall Weber to the stand and, pursuant to that rule, "to complete his testimony on matters where he was barred from testifying."

¶ 43 Now that Roth pointed out Rule of Evidence 803(3)(A), the trial court agreed with his interpretation of it—but the court noted it had already given a limiting instruction. The court said:

> "THE COURT: *** Now, I understand that I gave the limiting instruction.
>
> ***
>
> *** Well, after looking at this now, I think that testimony does relate to the revocation of a will when he went to Mr. Kessler, there was a revocation document prepared. So I think it falls within this exception now. I think Mr. Weber could be permitted to testify about that subject.
>
> Now, that's going to require me to und[o] this limiting instruction, or not. I guess we need to talk about that too. I guess, is that what you're asking, Mr. Roth, that I now und[o] this limiting instruction that was given?
>
> * * *
>
> MR. ROTH: Well, yes, ***."

¶ 44 The trial court asked Ray what his thoughts were. Ray responded:

> "MR. RAY: Well, I don't know that you can answer the point until you know what the witness is going to say. The exception that the Court is focusing on is extremely narrow. It doesn't encompass any conversation about any topic that happens to be in the same conversation that may have taken place that addresses this very narrow exception, so I don't know how you can und[o] or—

I think the limiting instruction that you have is appropriate until the Court hears testimony that you can, on the proponent's motion, ask that the Court advise the jury that they may consider this as evidence of the fact stated by the—according to the testimony of the witness.

THE COURT: All right. Well, I'm going to allow you, if you can arrange it, to recall Mr. Weber to testify as to that limited issue. We're not going to rehash the entire—You were allowed to ask him the questions about his conversations with Mr. Knowles and that testimony was admitted under the state of mind exception with the limiting instruction given. I recognize that. You're now wanting to put him back on the stand to testify about, why did you prepare the subsequent will?

MR. ROTH: Correct.

***

MR. RAY: Now, Judge, I know what Mr. Weber is going to say because he's going to rely on his notes and his notes say that the deceased said, ['']Jim sent me to Mr. Kessler,['] or language to that effect.

I don't believe that relates to the execution of the will. It is an event that precedes it. He either revoked the will or executed the will. That's all the exception relates to. *** I will be very strenuously objecting to the witness testifying that Jim sent him, that is hearsay.

THE COURT: Well, I don't know what he's going to say.

MR. ROTH: We'll see what he says.

THE COURT: Okay."

¶ 45 When Roth recalled Weber to the stand, he asked him if he remembered having a meeting with the testator on July 10, 2007. Weber answered yes. Roth asked him:

"Q. And what did he say to you with regard to his will?

A. He told me that since he had made, we had done the will on June 22, [2007,] that his son, Jim Knowles had sent him to Attorney John Kessler in Terre Haute, Indiana, to sign a new will that Jim had prepared for him or had Mr. Kessler prepare for him.

MR. RAY: Objection, Your Honor, I believe what we heard is hearsay. I believe we've heard hearsay on hearsay, and particularly, the last phrase about who prepared what. I do not believe that falls within the exception of the rule that we've been talking about.

Move to strike and ask the jury be told to disregard the last part of the comment regarding who prepared the will.

THE COURT: The objection is overruled, the answer will stand.

Q. (Mr. Roth) After you were told this by [the testator], what did you and he decide to do?

A. I told him—he had indicated to me that the will he had prepared or that I had prepared for him, that he signed on June 22, [2007,] he wanted that to— or the terms of that will to be his will. So I suggested to him that he could re-sign that will, you know, the last will, and it provided in that, of course, it would have revoked any prior will. So with that, he asked that I—that he re-sign the will.

Q. So did you reprint the same will and re-sign it?

A. I did, yes.

MR. ROTH: No further questions."

¶ 46 D. The Testimony of Terry Stephen

¶ 47 Terry Stephen testified he lived in Marshall. He was a construction contractor doing business under the name of TG Stephen Enterprise, and he first got to know the testator and Virginia Knowles by doing work for them in their house and on their farm. He became good friends with the testator, who frequently stopped by the shop.

¶ 48 In approximately the summer of 2007, Stephen was working in the back of the shop when his secretary summoned him, telling him that two men wanted to talk with him outside, in the front area. Stephen went outside, and it was the testator (to whom he referred as "Clyde Jr.") and Joe McHammond, who had driven him there. The conversation initially had to do with something else, but then it came around to the topic of the testator's will. Stephen testified:

"A. He was upset and thought that the boys were going to be mad at him for what he had done, and he was basically remorseful and was airing this out to me and basically said that he did something that he shouldn't have done. I didn't know—No mention of a will at this point.

Q. What was [the testator's] demeanor in terms of his behavior and characteristics?

A. He was upset, maybe nervous.

Q. Agitated?

A. To some degree. And I hadn't seen [the testator] for a while and so, you know, you know, just normal Clyde but, you know, you could tell that he was aging, you know.

* * *

Q. (Mr. Ray) Mr. Stephen, at some point did the subject of a will come up in this conversation?

A. Yes.

Q. Was it immediately following that part of the conversation you've just described for us?

A. Yes.

Q. Tell us about the conversation or statements [the testator] made to you about a will.

A. I asked him, What are you talking about? And he then told me that he had been taken down to Robinson and—

MR. ROTH: Objection, Your Honor, this is hearsay, it's regarding a past event.

THE COURT: Overruled. I think it falls within the exception set forth in 803(3)(a). You can continue, sir.

A. And he said he changed the will and he had regrets that he had done that and didn't know what to do. He indicated that the girls talked him into doing that, and he explained this was over—because he was mad at the boys because they took his driving privileges away and he was upset at that point which he had done this. ***

* * *

Q. (Mr. Ray) Did that conclude [the testator's] comments to you with reference to the trip to Robinson with respect to a will?

A. He kept going over and over, he just didn't say it once, he said it several times, that he made a big mistake and he was afraid the boys were going to be mad at him and he didn't know what to do."

¶ 49 E. The Testimony of Troy Weber

¶ 50 Troy Weber testified he lived in Terre Haute and that he was in sales and service at Coldwell Company, an industrial supply company that catered to the agricultural industry. He first got to know the testator about 20 years before he passed away. The testator would come into the shop to buy supplies, and they became friendly. Troy Weber would characterize their relationship as a friendship. He saw the testator every week.

¶ 51 One day in 2007, in the late spring or early summer, after Troy Weber got off work and was on his way home, he received a telephone call from the testator. He was calling from the house of a family friend named Mary Jo, and he wanted Troy Weber "to take him to an attorney by the name of Mr. Kessler in Terre Haute." Troy Weber testified:

"A. He told me the girls took him to change the will and he wanted a ride to Mr. Kessler's to get it fixed.

* * *

Q. And did you know if he was driving himself or able to drive himself at the time this call came in?

A. He was not.

Q. All right. And tell us then how did that conversation continue and conclude.

A. I told him I would call him back, but I was losing signal, which I wasn't. He was at the time of his life where if things were ignored or fuzzy he would, at times, go onto something else, and I was hoping he would forget about it.

Q. Did you hear from him again on that subject?

A. No."

¶ 52 F. The Testimony of James C. Knowles Regarding the Testator's Going to Kessler

¶ 53 James C. Knowles testified that in 2007 he became aware the testator had signed something that he, the testator, believed was perhaps a new will. Sitting at the kitchen table in his house, the testator showed the document to James C. Knowles and his wife. "He wanted somebody to read it to him"—the testator had poor eyesight and difficulty comprehending "large words." James C. Knowles's wife, named Kris, read the document aloud—legal descriptions and all—and it was indeed a will. The testator "was not happy with what was being said." James C. Knowles testified:

"A. He was agitated and upset and he actually asked me to help him, and I said, [']Dad, I can't help you. You go to do something on your own.['] I said, [']I can't help you with this.[']

Q. Was there any conversation or discussion at that time about any individual named John Kessler?

A. Yes.

Q. What was that?

A. He mentioned John, about John Kessler, they was old friends and said that he wants to go see him. ***

* * *

Q. Did you have any conversation at that time with your father or anytime as to what he should do with regard to his property through a will or any other document?

A. I said, you know, there was no conversation really at all, I just told him, [‘]You go to do what you want to do,[’] and that’s what he did.

Q. Was there anything said by your wife to your dad that time other than reading the will?

A. No.

* * *

Q. All right. After the conversation you’ve already told us about, you had another conversation with your dad about wills or something to do with wills, is that correct?

A. Yes.

Q. When did that happen? If you can’t give us the exact date, at least tell us approximately when and who was present and where it happened.

A. Four to eight days after that.

Q. Where was that?

A. In his kitchen?

Q. How did that conversation come about?

A. He struck the conversation.

Q. By struck, you mean he started it?

A. Yes, he started it.

Q. Anybody else present?

A. No, just me and him.

Q. What was the conversation?

A. The exact words, he said that, [']The girls did it to me again.[']

Q. And did he say anything else?

A. He was pretty upset, very little comments or anything, but you know, he wanted, he wanted me to take him to Kessler's office.

Q. Tell us about the conversation.

A. Well, he wanted me to take him to Kessler's office, and I said, [']Dad, I shouldn't do that.['] We talked a little bit about that and he insisted on me to take him. We went to Terre Haute.

Q. During that conversation still at your dad's house, did you ask him or suggest to him or tell him anything about what he should or shouldn't do about the terms or provisions of a will or whether any particular will should be preferred over any other?

A. No.

Q. Did you ever tell him anything he should do about a will?

A. No."

¶ 54 James C. Knowles testified he drove the testator to Kessler's office, in Terre Haute. He followed the testator into the building. After telling the receptionist he was here for his

appointment, the testator went into Kessler's office. James C. Knowles sat in the reception area. About an hour and 15 minutes later, the testator emerged from Kessler's office. They went back out and got in the pickup truck, and the testator threw an envelope onto the dash. Upon their return to the testator's house to begin the day's farm work, the testator put the envelope in a hutch in the kitchen, where it remained until the testator's death.

¶ 55 G. The Testimony of Jamie L. Simpson

¶ 56 Jamie L. Simpson testified she was a legal secretary at Kessler and Kessler, in Terre Haute, and that on July 3 and 12, 2007, the testator visited Kessler's office. On July 3, 2007, she greeted the testator at the door, and he told her he was there to see John Kessler, Sr. (who had since passed away—she believed in 2008; his son still practiced at the firm). The testator went into Kessler's office, that is, into the office of John Kessler, Sr. After a while Kessler emerged from his office, bringing out a tape containing his dictation, and she typed the document, now labeled "Defendant's Exhibit [No.] 13," and took it into the office. After the testator finished reviewing the document, Kessler called her back into his office to have the testator sign the document in her presence so that she could notarize his signature. Another person, to whom Simpson referred as "Mary Lista," also signed it.

¶ 57 Pretty much the same thing happened on July 12, 2007. The testator went into Kessler's office. Simpson did not recall that anyone went in with him on this occasion. Kessler and the testator had a conversation. Kessler brought out a dictation tape. She prepared a document, now labeled as "Defendant's Exhibit [No.] 14," and took it into Kessler's office, and Kessler gave it to the testator for his review and signature. He signed it, and she notarized it. She did not recall that anyone else was in the room.

¶ 58 Those two exhibits are in the record. "Defendant's Exhibit [No.] 13" is an affidavit dated July 3, 2007, and it bears the signatures of the testator as the affiant, Simpson as notary public, and "John A. Kesler" and "Mary Jo Licata" as witnesses. The affidavit reads as follows:

> "I, Clyde R. Knowles, being first duly sworn upon my oath, do hereby state that I do hereby revoke and annul the Will prepared for me by Attorney Frank Weber on June 22, 2007 and I declare said Will to be null and void and of no legal effect whatsoever. To finalize this matter I have destroyed the aforesaid Will in the presence of witnesses, to give final effect to my decision to revoke and annul it and declare it null and void."

¶ 59 "Defendant's Exhibit [No.] 14" is an affidavit dated July 12, 2007, and bearing the signatures of the testator as the affiant, Simpson as notary public, and "John A. Kesler" and Simpson as witnesses. The affidavit reads as follows:

> "I, Clyde R. Knowles, being first duly sworn upon my oath, do hereby state that I do hereby revoke and annual the Will prepared for me by Attorney Frank Weber during the week of July 9, 2007, and any and all other Wills made for me by said Attorney Frank Weber, and I declare said Will, and/or Wills, to be null and void and of no legal effect whatsoever. It would be my intention to destroy the original of said Will or Wills, but my said Attorney Frank Weber kept the original that I signed in his office and I do not have the same in my possession so that I can destroy it, which would be my intention as I write this affidavit.
>
> Further, I hereby state that it is my will and my intention that a former Last Will and Testament of mine, prepared by Attorney Omar Shawler of

Marshall, Illinois and signed and executed by me on September 30, 2001, to be my Last Will and Testament and I hereby make and declare the same to be my Last Will and Testament."

¶ 60 Other than those two occasions, July 3 and 12, 2007, when the testator came in and she typed those two affidavits for his signature, Simpson remembered one other occasion when the testator came to Kessler's office. It could have been before those dates or after—she could not recall. Ray asked her:

"Q. And is there anything that stands out in your mind? Do you have a memory of anything in particular occurring on the other date?

A. The date that I recall, [the testator] was somewhat upset. Mr. Kessler and he, you know, chatted, trying to get [the testator] calmed down. As to why he was upset, I don't recall why. I just remember that he had been upset that day.

Q. Do you recall anybody else being present either within the building or near the building at that time?

A. I do not recall, no.

Q. How did that occurrence so-to-speak end?

A. To my recollection, when [the testator] left he—our building sets up kind of high, and he basically ran down the stairs and out the door, out the door across the stairs and across the street."

¶ 61 H. The Testimony of Mary Jo Licotta

¶ 62 Mary Jo Licotta (as her name is spelled in the transcript) testified she was a neighbor and friend of the testator, whom she had known all her life (she was 85). They were

like brother and sister. Although they really were not brother and sister, he told people she was his sister. After the testator no longer was able to drive, she drove him places, wherever he wanted to go.

¶ 63 In 2007, he asked her to drive him to the law office of Frank J. Weber, in Robinson, to pick up his will. She testified: "Well, all the way down there and all the way back, he kept saying[,] [']I don't, I don't want that will. I don't want that will.['] " He never explained to her why he did not want that will.

¶ 64 A lot of times, at his request, she took him to Terre Haute: he wanted to go to Sam's Club several times, and he twice wanted to go to Troy Weber's place of business, and he wanted to eat at his favorite restaurant. On two occasions, she drove him to Kessler's office.

¶ 65 Ray asked her:

> "Q. Okay. Do you recall the first occasion you went to Mr. Kessler's office with [the testator]—or at least you drove him there?
>
> A. Well, he wanted me to go in with him that time. He went to sign a paper to void whatever, a will or something.
>
> Q. Can you put a date on that visit?
>
> A. I think that was July 3 because the next day we went over specifically to Sam's to buy fireworks ***. ***
>
> * * *
>
> Q. *** Let me show you what has been marked as Defendant's Exhibit No. 13. Do you recognize that document?
>
> A. Yes.
>
> Q. What is that?

A. It's to revoke or void the will that we had picked up in Robinson.

Q. Is that your signature on the document?

A. Yes, it is.

Q. And did you sign that at Mr. Kessler's office?

A. Yes.

* * *

Q. You were in [John Kessler, Sr.'s,] office together with [the testator], correct?

A. Yes.

Q. Do you recall the conversation?

A. Well, a lot of it was just about what was happening in Marshall, and [Kessler] was kind of catching up with what was happening there. They talked about the crops and that.

* * *

Q. Was there a point in the conversation when [the testator] told [Kessler] or spoke to [Kessler] about why he had made the trip over?

A. I don't think anything was said about why. I just, I don't remember. I really don't.

Q. If you know, how did that document I showed you a moment ago get prepared? Was that prepared at Mr. Kessler's office?

A. I assumed at the time that the girl typed it up and brought it in and handed it to [Kessler].

Q. Were you in John Kessler's office throughout the entire visit or were you not in there part of the time?

A. No, I was in there the whole time.

Q. You don't specifically recall any part of the conversation relating to the document?

A. They didn't talk about it a whole lot.

Q. They talked about it some, but mainly about other stuff, is that what you're saying?

A. Yes.

Q. Do you recall Mr. Kessler dictating into a piece of equipment, tape-recorder-type-of-thing that document?

A. No.

Q. Were you mainly sitting off to the side just kind of being there or were you participating actively?

A. I didn't participate because I didn't know who [*sic*] they were talking about.

Q. Okay.

A. Most of the time."

¶ 66 Licotta took the testator to Kessler's office on another occasion. She could not remember the date. It was nice weather out and she sat in the car and waited while the testator went into the building and returned 5 or 10 minutes later.

¶ 67 I. The Testimony of James C. Knowles Regarding the Testator's Visit to a Psychiatrist,

His Admission to the Psychiatric Unit of a Hospital,
and His Return Home

¶ 68 James C. Knowles testified that on July 17, 2007, the testator telephoned him and told him he had an appointment with a psychiatrist in Terre Haute, John Winston D. Gonzalez, and that he needed a ride there. He was "agitated" because that morning, his daughter Janet A. Edwards had refused to take him there. As James C. Knowles and the testator were on their way to Terre Haute, James C. Knowles telephoned Janet A. Edwards and asked her where, exactly, in Terre Haute Gonzalez's office was. He testified: "In that conversation she told me that, she told me, [']That dirty old man knew where he was going and she was done with him.['] "

¶ 69 As it turned out, the testator himself was able to give directions to Gonzalez's office. It was right next to Regional Hospital. When they reached an intersection near Gonzalez's office, the testator attempted to jump out of the vehicle. James C. Knowles grabbed him, preventing him from doing so, and was able to hold onto him long enough to pull into the parking lot of Regional Hospital, where he let go of him. The testator got out of the vehicle and went into Gonzalez's office. James C. Knowles followed him in. The testator, visibly agitated, was taken back to Gonzalez's office right away.

¶ 70 After 30 to 40 minutes, Gonzalez came to the door and invited James C. Knowles to come into his office, where they had a conversation. James C. Knowles then telephoned his brother, John W. Knowles, and his brother's wife, Ruthann Knowles, asking them to come and help get the testator home. Gonzalez wanted him back home and in bed, in his own environment. John and Ruthann Knowles came over. Ruthann Knowles went in and talked with the testator while James and John Knowles waited in the hallway. The testator was ready to ride home with Ruthann Knowles. So, the two of them left Gonzalez's office, and James and John Knowles followed in another vehicle. The testator and Ruthann Knowles ended up at a truck-stop

restaurant, and James and John Knowles went to a Rally's restaurant across the street, to keep an eye on them and make sure everything was all right.

¶ 71 After a while, Ruthann Knowles and the testator came out of the restaurant, got into the vehicle and left. James and John Knowles followed them. They next ended up in Kessler's parking lot, and the testator and Ruthann Knowles went inside together. Soon the testator came out of Kessler's law building. James C. Knowles testified:

> "A. [The testator] came out, he was upset, and I approached the stairway up there where he was at. ***
>
> * * *
>
> A. *** I started talking to him. He walked over the intersection of that street and luckily he got across the street just fine, *** walked across to the sheriff's department and wanted to go to the hospital.
>
> *** They talked to him for a little bit and next thing I know they was taking him to the hospital."

¶ 72 He was admitted to the psychiatric unit of Regional Hospital, where he received medication. He remained there four days.

¶ 73 In late July 2007, after the testator returned home from his hospitalization, James C. Knowles and his wife, Kristina Knowles, helped take care of him, making sure he had food.

¶ 74 Petitioners testified that during this period, James C. Knowles forbade them to visit with the testator unless the visits were supervised. James C. Knowles denied this. He testified that he implored them to help with their father but that no such help was forthcoming.

¶ 75 J. The Testimony of Ruthann Knowles

¶ 76 Ruthann Knowles testified that as she and the testator left the reception area of Gonzalez's office, the testator appeared agitated. Roth asked her if he had mentioned to her why he was upset. She answered:

> "A. He was still very upset at Janet.
>
> Q. What did he say, if you recall?
>
> A. That she had gotten angry with him and would not take him to the doctor's office."

¶ 77 When getting back into the vehicle after they had lunch at the restaurant, the testator told Ruthann Knowles that he wanted to go to Kessler's office and "pay a bill." After the testator paid Kessler, they began having a conversation about "days long gone, many years ago." The testator then became upset with Kessler, smacking the desk and raising his voice, saying that attorneys were "untrustworthy." The testator cursed Frank J. Weber. Ruthann Knowles told the testator to stop yelling because it was unseemly, whereupon he became angry and hit her on the arm. The testator became more turbulent and said he wanted to "be put away." He then ran out of Kessler and Kessler and into the street, and Ruthann Knowles and James C. Knowles ran after him (while John W. Knowles stayed in the car; it is unclear if the order of protection was still in force). They followed him to the police station, and the police took him to Regional Hospital.

¶ 78 K. The Testimony of John Winston D. Gonzalez

¶ 79 Gonzalez opined that, on this occasion, July 17, 2007, the testator was experiencing paranoia and delusion, side effects of the Alzheimer's dementia he had diagnosed on October 24, 2006 (he had seen him in several appointments since then). He testified in his evidence deposition, which was read to the jury:

"I spoke with him [on July 17, 2007], and he was very anxious and told me that his children just literally want to get his property away from him.

According to him, his lawyer was sad because he did not really know the reason why this case was dropped. He thought that they were all against him. And the two daughter[s] who had been supportive of him, they are now almost on the same boat as his two sons. *** He's fearful of what his children are going to do to him."

¶ 80 He admitted the testator to Regional Hospital for four days, for observation and adjustment of medications.

¶ 81 II. ANALYSIS

¶ 82 A. The Omission of a "Re-Instruction"

¶ 83 Petitioners argue the trial court made a clear error by "refusing to re-instruct the jury" that the limiting instruction the court gave on the first day of trial was inapplicable to Weber's testimony. In addressing this argument, we should first place the responsibility where it belongs: when respondents made a hearsay objection to Weber's testimony, it was petitioners' responsibility to invoke the applicable hearsay exception. See *Salcik v. Tassone*, 236 Ill. App. 3d 548, 555 (1992). During the first day of the trial, respondents made their hearsay objection, and in response, petitioners invoked the testamentary exception to the attorney-client privilege (*Eizenga v. Unity Christian School of Fulton*, 2016 IL App (3d) 150519, ¶ 24), even though no one had raised the attorney-client privilege. They also invoked Illinois Rule of Evidence 804 (eff. Jan. 1, 2011), which was inapplicable, as the court correctly concluded. They did not, at that time, invoke Illinois Rule of Evidence 803(3)(A) (eff. Apr. 26, 2012). Therefore, they are in no

position to complain that, on the first day of trial, the court gave a limiting instruction pursuant to *Holmgren*, 237 Ill. App. 3d at 843, as respondents had requested the court to do. See *Salcik*, 236 Ill. App. 3d at 555. Respondents were the only parties citing relevant authority at that time. So, let us be clear: by failing, during the first day of the trial, to identify the correct hearsay exception (Rule of Evidence 803(3)(A)), it was petitioners who erred, not the trial court.

¶ 84 On the second day of trial, in response to petitioners' belated invocation of Rule of Evidence 803(3)(A), the trial court allowed them to recall Weber to the stand. Petitioners complain, however, that the court forbade them to "rehash" Weber's entire testimony. His entire testimony, however—everything he said on the stand during the first day of trial—would not have fit within the terms of Rule of Evidence 803(3)(A). The hearsay exception applied only to a statement by the testator of his then-existing memory or belief relating to the execution, revocation, identification, or terms of his will. See Ill. R. Evid. 803(3)(A) (eff. Apr. 26, 2012). Again, the rule provides as follows:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:
>
> (A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will ***." Ill. R. Evid. 803(3)(A) (eff. Apr. 26, 2012).

¶ 85 Given the limitations of the quoted rule, it would have made no sense to have Frank J. Weber repeat his entire testimony from the day before—for example, that the testator wanted Weber to represent him in the guardianship proceeding or to petition for an order of protection on his behalf; such testimony would not have related to the execution, revocation, identification, or terms of a will. See Ill. R. Evid. 803(3)(A) (eff. Apr. 26, 2012). "The admission of evidence is left to the discretion of the trial court, and the trial court may, in its discretion, exclude cumulative evidence." *Hubbard v. Sherman Hospital*, 292 Ill. App. 3d 148, 155 (1997). Having Weber repeat everything he said the day before would have been cumulative and pointless. As the parties agreed on the second day of the trial, before the jury was brought into the courtroom, the only expected testimony by Weber that fit within Rule of Evidence 803(3)(A) would be his testimony as to the testator's stated reason for wanting him to prepare a will on July 10, 2007, that was identical to the will he had signed on June 22, 2007: because his son James C. Knowles had sent him to Kessler, in Terre Haute, to sign a will that James C. Knowles had directed Kessler to prepare.

¶ 86 Even though the trial court allowed petitioners to present that testimony by Weber during the second day of the jury trial, petitioners complain that the court erroneously "*refused* to advise the jurors of the *error* and re-instruct them" that "the statements of memory or belief by [testator] to attorney Frank Weber [were] admissible evidence 'to prove fact[s] remembered or believed.' " (Emphases added) (quoting Ill. R. Evid. 803(3)(A) (eff. Apr. 26, 2012)). Our response is twofold.

¶ 87 First, as we already have said, it was *petitioners* who erred by failing to invoke Rule of Evidence 803(3)(A) in the first place. "When a party offers evidence, it must also offer all possible theories under which the evidence may be admissible since it is not the trial court's

duty to sort out such theories; the trial court's duty extends only to ruling upon the arguments presented." *Salcik*, 236 Ill. App. 3d at 555.

¶ 88 Second, petitioners fail to cite the page of the record in which the court "*refused* to re-instruct" the jury as opposed to simply *omitting* to re-instruct the jury. (Emphasis added.) (For that matter, in their brief, petitioners make many representations without supporting citations to the record. In both the statement of facts and the argument of a brief, each representation of fact must be followed by a citation to the relevant page of the record. See Ill. S. Ct. R. 341(h)(6)(7) (eff. Jan. 1, 2016).) In our review of the transcript of August 25, 2015, we did not come upon any such refusal.

¶ 89 Instead, it appears that the trial court asked Roth: "[I]s that what you're asking, Mr. Roth, that I now und[o] this limiting instruction that was given?" He answered yes. Then the court turned to Ray, asking him what were his "thoughts." Ray said that because Rule of Evidence 803(3)(A) did not "encompass any conversation about any topic," he thought the "limiting instruction [remained] appropriate until the Court hear[d] testimony that" came within the terms of that rule, at which time petitioners could "ask that the Court advise the jury that they [might] consider this as evidence of the fact stated *** according to the testimony of the witness"—and then Ray would again make a hearsay objection, to ensure the issue was preserved. That proposed procedure seems logical. Roth did not object to it. Rather, in response to the court's remark, "Well, I don't know what [Weber's] going to say," Roth said: "We'll see what he says." Thus, the understanding seemed to be that *when* Weber testified, over Ray's overruled hearsay objection, to a *particular thing* the testator had told him, namely, that James C. Knowles had sent him to Kessler's office to sign a document that James C. Knowles had had Kessler prepare, Roth would *then* request an instruction that the jury could consider *that*

testimony as offered for its truth. We do not see anywhere in the transcript where the court told Roth: "I decline to re-instruct the jury," or words to that effect. Roth just never did request and tender the remedial instruction at the pertinent time in Weber's testimony. See *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557 (2008) ("A party forfeits a right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction *and tenders an alternative, remedial instruction to the trial court*." (Emphasis added.)).

¶ 90 In a conference at the beginning of the second day of the trial, petitioners moved for a remedial instruction, but they did not specify how the instruction should be worded, and they did not follow through. They are analogous to a party who failed to obtain a ruling on a motion. Failing to obtain a ruling on the motion is not the same as receiving a denial. *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 432 (2007). If, before a witness testifies, a party moves that the trial court give a jury instruction pertaining to the witness's expected testimony and if, instead of denying the motion, the court intimates it will consider giving the instruction at a point in the witness's testimony when the limiting instruction would be apropos, and if later, when the party believes that point in the witness's testimony has been reached, the party fails to follow through by asking the court to then give the instruction, the motion for the instruction is procedurally forfeited. See *id.* at 433. If petitioners believed that, in addition to the overruling of the hearsay objection, the jury needed a remedial instruction, they should have requested the instruction at the pertinent time in Weber's testimony.

¶ 91 B. The Exclusion of Kessler's 11-Year Disbarment

¶ 92 Petitioners assert that the trial court abused its discretion by excluding evidence that the supreme courts of Indiana and Illinois had barred Kessler from practicing law for 11 years. In their opening brief, petitioners cite no authority and make no reasoned argument in support of this assertion. Therefore, as James C. Knowles correctly argues, the assertion is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are [forfeited] and shall not be raised in the reply brief ***."); *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010); *Roiser v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 568 (2006).

¶ 93 C. The Sufficiency of the Evidence

¶ 94 According to petitioners, respondents unduly influenced the testator to sign the codicil, dated July 12, 2007, in which he reinstated his will dated September 30, 2001, and revoked all other wills, including those made for him by Frank J. Weber. By returning a verdict in favor of respondents, the jury rejected this theory of undue influence. Petitioners argue the verdict is against the manifest weight of the evidence.

¶ 95 The only authority they cite in support of this argument is *Lake v. Seiffert*, 410 Ill. 444, 449 (1951), in which the supreme court said:

> "To repeat the rule again, briefly, the undue influence which will void a will must be directly connected with the execution of the instrument itself and must be operating when the will is made. [Citations.] The only evidence in this case which has the effect of bringing appellee's conduct within the rule is her presence in the attorney's office when the will was discussed, drawn and executed. Under similar facts in *Tidholm v. Tidholm*, 391 Ill. 19, 62 N.E.2d 473, it was held that the mere presence of a beneficiary did not constitute proof of undue

> influence, in the absence of any showing that she exerted any influence other than what her presence might produce, if any. Here appellee's presence is all that is proved. There is no showing that she caused or persuaded the testator to come to the attorney's office to make his will; that she ever discussed a will with the testator or his attorney, or that she directed or influenced the terms of the will. She maintained complete silence while the testator coherently discussed the extent of his estate, and expressed his will as to its disposition. We cannot say that appellee's conduct brings her within the rule of undue influence expressed above."

¶ 96 Under the heading of "Jury's Verdict Was Against the Manifest Weight of the Evidence," petitioners recount essentially the following items of evidence from the trial.

¶ 97 1. *The Testator Consulted With Frank Weber in Private, Outside the Presence of Petitioners*

¶ 98 Petitioners recount Frank J. Weber's testimony that "whenever he was discussing [the testator's] estate and a Will, the Petitioners, his daughters[,] Janet Edwards and Linda Morgan, were not present and at no time prior to [the testator's] death did he discuss the estate plan or Wills with them." Petitioners also recount their own testimony in which they denied ever discussing with the testator his estate plan and wills.

¶ 99 The reasoning appears to be that because petitioners were out of earshot while the testator actually was conferring with Frank J. Weber, and because they never discussed with the testator his estate plan and wills, the wills that he signed in Weber's office represented his own true, self-motivated, uninfluenced decision and hence the affidavits he signed in Kessler's office,

revoking those wills, did not represent his true, self-motivated, uninfluenced decision but must have been the result of undue influence by one or both of respondents.

¶ 100 But there is another side to the evidence. True, petitioners denied ever discussing with the testator his estate plan and wills, but the jury did not have to believe them. The jury could have believed, instead, Terry Stephen and Troy Weber, who testified that the testator, their friend, expressed to them his remorse and regret that he had allowed his daughters, petitioners, to talk him into changing his will. In other words, petitioners cannot establish that the verdict is against the manifest weight of the evidence by glossing over conflicts in the evidence and recounting only the evidence that favors them.

¶ 101 2. *The Care and Deliberation With Which the Testator and Frank J. Weber Crafted a New Will*

¶ 102 Frank J. Weber and the testator worked together for weeks on the new will, the will that he signed on June 22, 2007, and signed again on July 10, 2007. They toured the farmland together as he specified which fields should go to which children.

¶ 103 A jury could infer, however, that the testator, during those weeks, was under the influence of his own anger—anger at his sons for filing the guardianship proceeding and taking away his truck keys—and that when the anger faded, it was replaced with distress and remorse for going against the estate plan he and his late wife had carefully planned and agreed on in consultation with Shawler.

¶ 104 There was evidence that before she became incapacitated by illness, Virginia Knowles maintained the ledgers for the farm—she kept the books—and therefore one could infer that the testator not only trusted her implicitly as his wife but put great confidence in her. One

could infer that her word carried weight in the family: she was the one who told the testator and his sons to break it up when they got into altercations, and it was on her instructions that the sons took the truck keys from the testator. There also was evidence that he deeply mourned her death.

¶ 105 3. *A Desire To "Equalize" the Distributions of Farmland*

¶ 106 Frank J. Weber testified that, in devising a new will in June 2007, the testator wanted to "equalize" the distributions of farmland among his children. It does not follow, however, that the supposedly unequal distribution of farmland in the will of September 30, 2001 (as reinstated by the affidavits of July 3 and 12, 2007), was the product of undue influence. "Unequal disposition of property between children is not necessarily evidence of undue influence by one more favored in the disposition; nor an indication of less affection for those less favored." *In re Estate of Rothenberg*, 176 Ill. App. 3d 176, 183-84 (1988). There was evidence that the testator and his late wife had agreed to keep the farm together, even if it meant an unequal distribution of farmland.

¶ 107 4. *Frank J. Weber's Hearsay Testimony as to Why the Testator Went to Kessler's Office*

¶ 108 Petitioners point to Frank J. Weber's recollection of what the testator had told him: that on July 3, 2007, "his son, Jim Knowles[,] *** sent him to Attorney John Kessler in Terre Haute, Indiana, to sign a new will" (actually, an affidavit) "that Jim had prepared for him or had Mr. Kessler prepare for him" and which revoked the will Weber had previously prepared for him and which he had signed on June 22, 2007. "[P]roof of undue influence may be wholly inferential and circumstantial." *In re Estate of Hoover*, 155 Ill. 2d 402, 411-12 (1993). Petitioners wanted the jury to infer that just as James C. Knowles defeated the Weber-drafted

will of June 22, 2007, by sending the testator to Kessler and procuring his signature on the revoking affidavit of July 3, 2007, so did he defeat the Weber-drafted will of July 10, 2007, by taking him to Kessler and procuring his signature on the revoking affidavit of July 12, 2007.

¶ 109 That is one view a reasonable jury could take of the evidence. Alternatively, a reasonable jury could decide that by going to Kessler's office on July 12, 2007, and signing the second revoking affidavit, the testator was entirely self-motivated, even if he might not have been entirely self-motivated earlier, on July 3, 2007, if one believed Frank J. Weber's hearsay testimony: on July 12, 2007, regretting his departure from the estate plan he and his late wife had agreed on, the testator reacted against the influence his daughters had brought to bear on him by going to Kessler's office again and making things right with his late wife, choosing to keep faith with her. That likewise is a defensible view of the evidence.

¶ 110 The testimony of Terry Stephen and Troy Weber, neither of whom had any apparent reason to lie, would support that view of the evidence. Both of them testified that the testator had told them his daughters had taken him to Robinson and had talked him into changing his will and that he now regretted doing so. He even asked Troy Weber to give him a ride to Kessler's office to fix this mistake—or what he regarded as a mistake. Likewise, James C. Knowles testified that, sometime during the period of July 8 to 12, 2007, the testator was "pretty upset" and told him, " ['']The girls did it to me again.['] " and insisted that he take him to Kessler's office, in Terre Haute. James C. Knowles denied "ask[ing] him or suggest[ing] to him or tell[ing] him anything about what he should or shouldn't do about the terms or provisions of a will or whether any particular will should be preferred over any other." Because the regret the testator expressed to James C. Knowles (according to his testimony) was the same regret he expressed to Terry Stephen and Troy Weber (according to their testimony) apparently before

respondents even learned of the change in the will, a jury could reasonably believe that when the testator signed the revoking affidavit on July 12, 2007, he was self-motivated, not motivated by respondents. "A reviewing court will not set aside a verdict merely because the evidence is conflicting, nor can a reviewing court usurp the function of the jury by substituting its judgment for the jury's in passing on the credibility of the witnesses and the weight to be given their testimony." *Manning v. Mock*, 119 Ill. App. 3d 788, 806 (1983).

¶ 111 5. *Driving the Testator to Kessler's Office*

¶ 112 It is true that on July 12, 2007, one of the respondents, James C. Knowles, drove the testator to Kessler's office, where he signed the codicil (or revoking affidavit). The law is clear, however, that driving the testator to an attorney's office to sign a will is not, in itself, a procurement of the will and thus is not undue influence, even if the will benefits the driver. *Anthony v. Anthony*, 20 Ill. 2d 584, 586 (1960); *Zachary v. Mills*, 277 Ill. App. 3d 601, 609 (1996).

¶ 113 6. *Evidence That Kessler Already Had the Documentation Prepared When the Testator Arrived at His Office*

¶ 114 Petitioners point to Licotta's (or Licata's) testimony that during the testator's meeting with Kessler on July 3, 2007—a meeting in which she was present from start to finish—she did not recall Kessler's dictating any document and she did not recall much discussion of why the testator was there. Petitioners would have us infer, from this testimony, that James C. Knowles had arranged for the preparation of the revoking affidavit ahead of time, before the testator's arrival at Kessler's office.

¶ 115 Again, that is only part of the evidence. Other evidence points the other way. Simpson testified that Kessler brought a dictation tape out of his office after talking with the testator and that she used the dictation tape to type the revoking affidavit.

¶ 116 Besides, there also is the possibility that the testator himself had a telephone conversation with Kessler ahead of time, a telephone conversation similar to the one he had with Troy Weber, and that Kessler knew, before the testator's arrival, precisely what his objective was.

¶ 117 7. *The Testimony of the Psychiatrist, Gonzalez*

¶ 118 Petitioners say that on July 17, 2007, the testator "met with his psychiatrist, Dr. Gonzalez, in Terre Haute," who "testified how [the testator] was afraid of his sons."

¶ 119 Actually, the testator told Gonzalez he was "fearful of what his *children* [were] going to do to him," to quote Gonzalez's evidence deposition. (Emphasis added.) Petitioners, of course, are the testator's "children" just as much as respondents are. The testator also remarked that petitioners, his daughters, were "now almost on the same boat as his two sons."

¶ 120 On July 17, 2007, the testator was in the throes of what Gonzalez diagnosed as paranoia, and he was fearful not just of his sons but of his daughters, too. He feared that "his children just literally want[ed] to get his property away from him"—not after his death, but right away, while he was alive.

¶ 121 8. *Forbidding Petitioners To Have Unsupervised Visits With the Testator*

¶ 122 Petitioners say that after the testator's discharge from the psychiatric unit of Regional Hospital, they "were warned they could not have unsupervised visits with their father or the police would be called."

¶ 123 Again, that is only part of the evidence. The record contains other evidence that is to the opposite effect. Roth asked James C. Knowles:

> "Q. (Mr. Roth) You never told Janet on the front lawn of your father's house that she could not be with your father unsupervised, is that correct?
>
> A. No, I did not say that."

¶ 124 In short, the evidence is conflicting, and "a jury's verdict is not contrary to the manifest weight of the evidence when the evidence is conflicting and the jury resolved the conflict." *Templeton v. Chicago & North Western Transportation Co.,* 257 Ill. App. 3d 42, 54 (1993). We are unconvinced that the verdict is "unreasonable, arbitrary, and not based on the evidence" or that the "opposite conclusion is readily apparent" from the evidence. *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 179 (2008).

¶ 125 III. CONCLUSION

¶ 126 For the foregoing reasons, we affirm the trial court's judgment.

¶ 127 Affirmed.