

Order filed September 15, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

<i>In re</i> ESTATE OF LEONA C. MAZANY)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
DESIREE A. FUSCO,)	Will County, Illinois.
)	
Petitioner-Appellant,)	Appeal No. 3-15-0796
)	Circuit No. 12-P-0291
v.)	
)	
JENEE L. POLACZEK,)	Honorable
)	James Jeffery Allen,
Respondent-Appellee.)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the trial court's order granting summary judgment where there was no genuine issue of material fact and the moving party was, therefore, entitled to a judgment as a matter of law.

¶ 2 The petitioner, Desiree Fusco, filed a petition to set aside the trust documents and last will and testament of her mother, Leona C. Mazany, which left Leona's entire estate to Desiree's sister, the respondent, Jenee L. Polaczek. Jenee filed a motion for summary judgment. The trial court granted Jenee's motion for summary judgment, and Desiree appealed. On appeal, Desiree argues the trial court erred in granted Jenee's motion for summary judgment because there was a

genuine issue of material fact regarding: (1) the authenticity of Leona's signatures (2) the claim of undue influence, and (3) the claim that Leona lacked testamentary capacity. We affirm.

¶ 3

FACTS

¶ 4

Leona Mazany and her husband had five children—Desiree Fusco, Allan Mazany, Theresa White, Janice Mazany, and Jenee Polaczek. On March 3, 2009, while Leona's husband was still alive, documents creating "The Leona C. Mazany Living Trust" (the Leona Trust) were prepared by attorney Kevin Barry but were not executed. The unexecuted "Leona Trust" documents indicated that Leona was a widow and that the trust was to be administered for Leona's primary benefit and with the entire balance of the trust at the time of Leona's death to be given to Desiree. The trust documents specifically indicated, for reasons best known to Leona, nothing was being left to the other four children. The trust documents also named Desiree as the successor trustee if Leona ceased to act as trustee.

¶ 5

In his deposition in this case, attorney Barry testified that he prepared the Leona C. Mazany trust dated March 3, 2009, and that the reason Leona indicated she was leaving Desiree the entire estate was because Leona believed that Desiree "will do the right thing" by the other children. Barry also testified that Leona had "harsh words" when discussing her son, Allan, and indicated that he would not get anything that she and her husband "built up." Barry testified that "mentally [Leona] was very strong" during the times he met with her throughout the period of March 3, 2009, to December 3, 2009.

¶ 6

On March 20, 2009, Leona's husband executed a will leaving his entire estate to Leona and providing that his estate would be passed on to Desiree if Leona did not survive him. In a verified petition subsequently filed in this case, Desiree verified that Leona and Leona's husband (the father of Leona's children) had given Desiree "specific verbal instructions that it was their

intention to have all of their children share equally in their estate” and they had charged Desiree with carrying out those intentions. In his will, Leona’s husband indicated that he “deliberately” did not make provisions for his other children—Allan, Janice, Theresa, or Jenee—for reasons personal to him. About two weeks later, on April 6, 2009, Leona’s husband passed away and his entire estate was left to Leona.

¶ 7 Nine days after her husband’s death, on April 15, 2009, Leona executed the previously prepared documents creating the Leona Trust. Within four months, on August 27, 2009, Leona executed a first amendment to the Leona Trust, which was prepared by attorney Ronald Campbell, to provide that upon Leona’s death, 50% of the value of the trust was to be given to Desiree if Desiree was living (otherwise, Desiree’s 50% of the trust was to be given, *per stirpes*, to Desiree’s then living descendants) and the other 50% of the trust was to be given to Jenee if Jenee was living (otherwise, Jenee’s 50% of the trust was to be given, *per stirpes*, to Jenee’s then living descendants). Leona also named Jenee as successor trustee, Desiree as the first default trustee, and Fifth Third Bank as the second default trustee.

¶ 8 On June 24, 2010, Leona executed a second amendment to certain provisions of the Leona Trust documents and executed a new will, both of which were prepared by attorney Ronald Campbell, providing that the entire trust estate was to be given to Jenee upon Leona’s death if Jenee was living (otherwise the trust estate was to be given *per stirpes* to Jenee’s then living descendants). Jenee remained named as Leona’s successor trustee.

¶ 9 In his deposition in this case, attorney Campbell testified that he prepared the first and second amendments to the Leona Trust. Campbell described Leona as a person who could state her thoughts and position firmly and without hesitation. Campbell believed that Leona changed the successor trustee from Desiree to Jenee because Desiree was more controlling than Jenee.

Campbell was not able to recall the specific reason Leona had for wanting to remove Desiree from receiving anything under the second amendment, other than Leona was “displeased with Desiree.” Campbell testified that he had questioned Leona, at length, without Jenee in the room. Campbell also testified that he and his secretaries witnessed Leona sign the second amendment to the trust and her will that was dated June 24, 2010. He also notarized the second amendment to the trust. Campbell said that he did not observe any indication that Jenee was controlling or attempting to control Leona.

¶ 10 On June 16, 2011, Leona met with attorney Michelle Morrone for the preparation of a new estate plan. Marrone testified in her deposition that instead of having the original trust with various amending documents prepared by different attorneys, Leona wanted one trust document. Leona had explained to Marrone that her husband passed away, she did not like how most of her children treated her husband while he was sick, and she did not like the way they treated her at her husband’s funeral or afterwards when she was still grieving. Leona told Marrone that Janice, Allan, Theresa, and Desiree never really helped her around the house, did not help her when her husband was sick, and did not call to see how she was doing. Leona indicated that Allan did not help at all with his father, barely visited his father, and asked what he was going to get when his dad died right before his father’s death. After Leona told Allan that he would not get anything until she passed away, Allan did not really have any further contact with her. Leona told Marrone stories of Desiree’s irresponsibility. Leona indicated that Desiree tried to con Leona into giving her large sums of money, but Leona had caught Desiree in lies. Leona explained that Desiree did not ask for money on a regular basis. Desiree would not come out and ask for money but, instead, had some kind of story for why Leona should give her money. Leona told Morrone that Theresa and Janice were financially irresponsible and she was always giving them

money. Leona indicated that Janice usually did not have a job and asked for money on a regular basis. Leona told Marrone that she would be tormented by Janice until Leona gave in to Janice's financial requests because Janice would keep calling and coming over until she got the money. Leona indicated that after her husband's death, Theresa and Janice tried to fraudulently obtain \$14,000 from her husband's accounts. Leona told Marrone that the constant requests for money completely stressed her out. Leona also indicated that she believed that her older four children were jealous of her youngest child, Jenee. Leona said that Jenee always helped her and her husband and would call to ask how they were doing. Leona never mentioned that Jenee had borrowed money or asked for money.

¶ 11 Marrone also testified that when Leona returned to her office to sign the newly prepared trust documents and will on June 27, 2011, Leona knew what she was reading in reviewing the documents. On June 27, 2011, Leona executed the first restatement to the Leona Trust, which was prepared by Morrone. The first restatement to the Leona Trust amended the Leona Trust "in its entirety" by deleting all of its articles and inserting a restatement of trust to be known as "The Leona C. Mazany Restatement of Trust" (the first restatement of the Leona Trust). The first restatement of the Leona Trust provided that the entire remainder of the Leona Trust property was to be given to Jenee *per stirpes* upon Leona's death, nothing was being left to Desiree, Allan, Theresa, and Janice, and any person who unsuccessfully contested the validity of Leona's trust was disinherited. The first restatement of the Leona Trust also named Jenee as successor trustee and, if Jenee was unable or unwilling to act as trustee, then Karen Grzeda, was to be named successor trustee. Marrone testified that the two witnesses that signed the first restatement of the Leona Trust were Diane Kelly and James Morrone, both of whom worked in Marrone's law office. Marrone also signed the document.

¶ 12 Morrone testified that in December of 2011, she received a call from Jenee wanting to know how to keep Leona’s family away from Leona because Leona had been hospitalized due to stress from the family and Leona’s doctor wanted to keep the family members from causing stress to her from associating with her. Subsequently, Leona also called Morrone and indicated that she wanted to buy a house and did not want anyone to be able to find her. Morrone recommended that Leona execute another restatement of the trust, with the trust identified by just numbers, so that if anyone did a search on the chain of title for Leona’s new property Leona’s name would not be revealed. Also, at the direction of Leona, Marrone prepared another restatement of trust—“the Restatement of Trust Known as Trust 73345”—which did not deviate in any material way from the prior trust restatement.

¶ 13 On December 19, 2011, Thomas Maher, an adult protective services caseworker with Will County Senior Services, responded to a report regarding the possible abuse of Leona, which Jenee acknowledges she had filed. During his discovery deposition, Maher testified that the alleged abusers were identified as Desiree, Theresa, Janice, and Allan. Maher had several in-person meetings with Leona, the first of which took place on December 22, 2011, with only Leona present. Leona did not appear confused, and she did not need help with activities of daily living. Leona indicated that the stress from the abuse caused her to “pass out.” Leona indicated that she had given the four alleged abusers money for “numerous things” and they had not helped care for her. Leona indicated that Desiree, Theresa, Janice, and Allan would not help her unless they were paid and she was concerned they knew her new location. Leona clarified that Allan did not really do anything to her because he was not really involved with the family.

¶ 14 In their next meeting on January 3, 2012, at a senior care facility where Leona had been admitted, the facility’s personnel informed Maher that Leona had a restricted visitors list and that

Leona should remain in some type of care environment because of her family causing her too much stress. Leona was breathing heavy, not very talkative, and she appeared to not be in good health. Leona denied being pressured by Jenee to allege abuse and indicated the abuse report was made because of concern for Leona's health and wellbeing.

¶ 15 On January 10, 2012, Maher visited Leona in a different facility where she had a restriction in place for no visitors. Maher was required to have a social worker take him to Leona. Leona looked and felt better. Leona reiterated her allegations of abuse and indicated that the alleged abusers (Desiree, Theresa, Janice, and Allan) never seemed to care that much for her. Maher testified that Leona appeared to be able to direct him in regard to the course of the abuse investigation. He described Leona as being "lucid" and "feisty." He testified, "she knew what was going on, and she had her own view of what to do [and] of what she was going to do for herself." Leona confirmed to Maher that Jenee was not making her do anything and that the abuse was reported because the stress from the alleged abusers was not good for her health. Leona became upset when telling Maher that the alleged abusers did not care that much about her husband until around the time of his death, which Leona believed was because they were only concerned over the money they believed they would get when he died.

¶ 16 Maher testified in his deposition that he was able to substantiate the allegations of emotional abuse inflicted on Leona by Desiree, Theresa, and Janice. His reports noted the alleged abusers stalked Leona, she showed a fear of them, and upon medical advice she was moved where the abusers did not know her location. In his report, Maher had indicated that Leona completely understood the abuse problem and the actions needed to address the problem. Maher was not able to substantiate the allegations of financial exploitation as having happened, or as not having happened, because there was no documentation.

¶ 17 On January 11, 2012, Jeneé attempted to obtain an emergency order of protection for Leona against Desiree and Janice, but she was unsuccessful in doing so because the petition was not legally sufficient. Shortly thereafter, Jeneé contacted attorney Daniel Rippy to obtain orders of protection, with Jeneé indicating that her siblings were harassing Leona and Leona wanted the orders of protection against them. Rippy testified that Jeneé brought Leona to meet with him, but he met with Leona alone by sending Jeneé out of the room. Jeneé signed the retention agreement and paid him on behalf of Leona, acting as Leona’s power of attorney for property. Rippy described Leona as a “very sharp lady.” Leona indicated she wanted an order of protection against Desiree and Janice because they were harassing her by constantly asking for money and, realizing she was close to the end of her life, Leona wanted to be left alone to die in peace. Rippy testified, “[h]er general feeling was that just the constant tension between her and the daughters was shortening her life, and that’s why she wanted to be left alone.” Leona was “very specific” about being under doctor’s order to avoid stress. Leona cried when she discussed her poor relationship with Desiree and Janice. Leona did not have any complaints about Jeneé. Rippy never had the feeling that Leona did not know what she was doing or that she did not understand what was going on around her. He never had the sense that Leona was less than fully competent or the sense that he had to check with anyone else as to whether Leona had the capacity to make decisions in her own best interests.

¶ 18 On January 13, 2012, Leona executed another will and another restatement of the Leona trust—“the Restatement of Trust Known as Trust 73345” (Trust 73345)—which had been prepared by attorney Morrone. Trust 73345 left all of Leona’s assets and remaining trust property at the time of Leona’s death to Jeneé and specifically indicated that Leona was disinheriting her four other children. Morrone testified that the only change between the two

restatements of Leona's trust was a change to the title. Morrone testified that she went to Leona's nursing home to have Leona execute the documents creating Trust 73345 and the new will that Morrone had prepared. At the nursing home, Leona told Morrone that her daughters had been coming to her house and to the hospital to talk to her about money. Leona indicated they were berating her about money to the point that they were making her sick. Leona indicated that she was seeking an order of protection against her daughters, Janice and Desiree. Although Leona knew the doctors said that she needed to eliminate the exposure to stress caused by her children berating her for money, Leona still questioned whether she was being a bad mother by seeking the orders of protection.

¶ 19 Marrone testified that Leona had recognized Marrone right away when Marrone walked into Leona's room. Leona also recognized Carmen (Jenee's friend) when Carmen had arrived to be a witness to Leona signing the testamentary documents. Morrone never had the sense that Leona was operating under anyone's undue influence. Morrone testified that she witnessed Leona sign the testamentary documents. He indicated that Leona "knew what she was reading" and was "lucid." Morrone notarized the living trust documents regarding Trust 73345.

¶ 20 On January 27, 2012, Rippey appeared in court with Leona and was granted leave to file amended petitions for plenary orders of protection against Desiree and Janice. The petition against Janice indicated that Leona was a 77-year-old woman suffering from multiple health issues and under the care of a physician, who had been consistently and constantly harassed by Janice in the last several months in that Janice repeatedly telephoned Leona to request money. The petition for the order of protection against Janice further indicated that Janice had falsely held herself out as the executor of the estate of Leona's late husband and fraudulently removed \$18,000 from his estate. The petition also indicated that due to the constant and severe stress

caused by the harassing contact, Leona's health had further declined and Leona was fearful that further contact with Janice would harm her due to her medical condition. Leona also alleged that Janice had caused physical harm to Leona on past occasions.

¶ 21 The allegations in the petition for an order of protection against Desiree were similar to the petition against Janice in regard to Leona's physical condition and the repeated phone calls requesting money. The petition against Desiree further alleged that, on multiple occasions, Leona told Desiree not to contact her because it caused Leona tremendous stress, but on December 21, 2012, Desiree appeared uninvited at Leona's nursing home and police were called. The petition against Desiree also indicated that Desiree had blocked Leona from getting her personal effects from within her Oak Lawn home. The petition for an order of protection also indicated that in the past, when Leona was in Desiree's care and Leona needed medical treatment, Desiree did not help Leona or take her for medical treatment and Leona did not receive care until two days later when her other daughter helped her. The matter was continued twice because Leona was hospitalized and could not be present at those hearings. Prior to the continued hearings, Rippey confirmed with Leona that she wished to go forward on the orders of protection.

¶ 22 On February 6, 2012, Leona's Trust purchased a home for \$250,000 in Shorewood, Illinois. Maher testified in his deposition that Leona had told him she purchased the home so she could live closer to Jenae, who was caring for Leona. Marrone testified in her deposition that Leona indicated she was buying a home in Shorewood to be closer to Jenae and her grandkids. Leona also told Marrone that she was keeping her other house in Oak Lawn for the time being because it was not the right time to sell due to current market conditions.

¶ 23 On February 20, 2012, Leona wrote a note to the judge presiding over her petitions for the orders of protection. In the note, Leona apologized for not being able to appear in court that day and explained, “I am still in the hospital trying to get better.” Leona requested that the judge “[p]lease grant [her] the order of protection so [she] can live a little longer.” On March 20, 2012, Leona’s petitions for the orders of protections were dismissed due to Leona’s inability to appear in court. The judge noted Leona was in a nursing home and could control who could visit her.

¶ 24 On March 29, 2012, Leona died. On May 9, 2012, the trial court entered an order admitting to probate Leona’s will dated January 13, 2012, and issued letters of office as the executor of Leona’s estate to Jenee.

¶ 25 On August 31, 2012, Desiree and Allan filed a verified petition contesting Leona’s will and trust documents.¹ Desiree alleged in the verified petition: (1) Jenee had exercised undue influence over Leona to such an extent as to deprive Leona of her free will when she executed any and all testamentary documents from August 27, 2009, through January 13, 2012; and (2) Leona lacked the testamentary capacity to execute those testamentary documents because of a combination of prescription drugs Leona was taking and the undue influence from Jenee. Desiree requested that the trial court enter an order setting aside the two restatements of the Leona Trust, setting aside both amendments that Leona had made to the original Leona Trust, declaring Leona’s last will and testament invalid and void, and finding Leona died intestate.

¶ 26 Specific to the claim of undue influence, Desiree alleged that on or about April 15, 2009, Jenee began exercising control of Leona by isolating her from her other four children (namely Desiree), Jenee had verbally abused and intimidated Leona, and Jenee made “numerous

¹ Allan did not join in the appeal of the trial court’s grant of summary judgment. For simplicity, we reference Desiree as the petitioner for the remainder of the order.

misrepresentations” about Desiree to Leona in an attempt to convince Leona that Desiree did not have Leona’s best interest at heart, all of which allegedly led to Leona executing the first amendment to her trust. Desiree also alleged that after August 27, 2009, Jenee’s “campaign to isolate Leona *** from the rest of her children increased in intensity and severity to the point the other children were denied visitation with their mother.” Desiree claimed that Jenee sought the order of protection against her to further isolate Leona. Desiree alleged that Jenee’s influence over Leona was to such an extent and degree as to deprive Leona of her free will in executing the testamentary documents at issue, from August 27, 2009, through January 13, 2012, and that those testamentary documents were executed by Leona to fulfill the will and desire of Jenee rather than the free will and desire of Leona.

¶ 27 Specific to the claim of Leona’s lack of testamentary capacity, Desiree alleged that Jenee’s undue influence over Leona, as had been previously alleged in the petition, coupled with the “significant volume of medication/pain medication” that Leona had been “exposed to” from August 27, 2009, through January 13, 2012, impaired Leona’s mental capacity “to such an extent that she was incapable of making a just and proper distribution of her estate.”

¶ 28 After the parties had conducted discovery for some time, on April 15, 2015, Jenee filed a motion for summary judgment. On June 25, 2015, Desiree filed a response to Jenee’s motion for summary judgment, arguing, among other things, that: (1) Jenee could not prove Desiree could not establish a *prima facie* case for undue influence; (2) Jenee could not prove, as a matter of law, that the will at issue was actually executed by decedent; (3) Jenee could not prove, as a matter of law, that Leona had the testamentary capacity to execute the testamentary documents at issue; and (4) the case was not ripe for summary judgment because no physicians, nurses, or experts had testified to Leona’s mental health or mental capacity. Desiree also requested that the

trial court stay the hearing on Jeneé’s motion for summary judgment until a report by her handwriting experts was completed regarding the validity of Leona’s signature on the testamentary documents in question.

¶ 29 On August 27, 2015, the trial court heard the parties’ arguments on Jeneé’s motion for summary judgment and took the matter under advisement. The trial court also granted leave for Desiree to “file a report pertaining to authentication of handwriting.” Desiree submitted a report indicating that, in examiner’s opinion it, was “highly probable” that the signatures on the documents at issue were not written by Leona. Subsequently, the trial court granted Jeneé’s motion for summary judgment, finding no genuine issues of material fact and that Jeneé was entitled to a judgment as a matter of law. Desiree appealed.

¶ 30 ANALYSIS

¶ 31 On appeal, Desiree argues the trial court erred in granted Jeneé’s motion for summary judgment because there was a genuine issue of material fact regarding: (1) the authenticity of Leona’s signatures, (2) her claim of undue influence, and (3) her claim that Leona lacked the testamentary capacity to execute the testamentary documents at issue. In response, Jeneé argues Desiree failed to establish that an issue of material fact existed to prevent the entry of summary judgment. We affirm the trial court’s order granting Jeneé’s motion for summary judgment.

¶ 32 Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2014); *In re Estate of Harn*, 2012 IL App (3d) 110826, ¶ 25. If what is contained in the papers on file would constitute all of the evidence before a court and is insufficient to go to a jury but, instead, would require a court to direct a verdict, then

summary judgment should be entered. *Helpers-Beitz v. Degelman*, 406 Ill. App. 3d 264, 267 (2010).

¶ 33 A defendant who moves for summary judgment may meet the initial burden of production by either: (1) affirmatively disproving the plaintiff's case by introducing uncontroverted evidence entitling him or her, as the movant, to a judgment as a matter of law; or (2) by establishing that the plaintiff, as the nonmovant, lacks sufficient evidence to prove an essential element of the cause of action. *Id.* In either instance, once the movant has met its initial burden of production, the burden shifts to the nonmovant. *Id.* at 267-68. When the defendant meets the initial burden of production, the nonmovant cannot simply rest on its pleadings to raise genuine issues of material fact. *Id.* Although the nonmovant is not obligated to prove its case, the nonmovant must produce facts that would arguably entitle it to a favorable judgment. *Id.* Our review of a trial court's grant of summary judgment is under the *de novo* standard. *Id.*

¶ 34 I. Authenticity of Leona's Signatures

¶ 35 Desiree first argues that the record on appeal demonstrates a clear factual dispute regarding whether Leona's signatures were authentic. In support of her contention, Desiree points to the report by her handwriting expert indicating it was highly probable the signatures were not Leona's signatures.

¶ 36 When a timely will contest is initiated, the question is not whether the will was properly admitted, but whether the will should be declared invalid. *In re Estate of Alfaro*, 301 Ill. App. 3d 500, 503 (1998). A will contest provides the contestant a full opportunity, after admission, to investigate thoroughly the circumstances affecting instrument's validity. *Id.*

¶ 37 If the instrument contains an attestation clause that shows on its face all required legal formalities have been met and the signatures on the instrument are admittedly genuine, a *prima*

facie case has been made in favor of the due execution of the will. *Id.* at 504. However, when the evidence clearly shows the attestation clause does not speak the truth, then the attestation clause alone cannot establish a *prima facie* case of due execution. *Id.* A *prima facie* case of the validity of the will may be overcome by the positive testimony of the subscribing witnesses that one of the statutory requirements was not met. *Id.* “[T]he burden is on the contestant to provide sufficient proof to overcome the *prima facie* validity of the admitted will.” *Id.* at 503-504.

¶ 38 In this case, even though Desiree points to the handwriting expert’s report to support her contention that Leona’s signatures were not authentic, the report is insufficient to overcome the overwhelming evidence that the documents were, in fact, executed by Leona. Attorney Morrone testified that she drafted the documents, in accordance with Leona’s wishes, and was a witness to Leona’s signatures on the documents. Morrone also notarized both the first restatement of trust and second restatement (the trust known as 73345), which were both materially identical. Thus, the trial court did not err in concluding that Desiree had failed to provide sufficient evidence that Leona’s signatures on the documents at issue had been forged.

¶ 39 II. Undue Influence

¶ 40 Next, Desiree argues that the record on appeal contains sufficient evidence to support her claim of undue influence. In support of her argument, Desiree points to the evidence that she enjoyed a close relationship with her mother prior to Jenee’s intervention, her verified pleading allegations that Jenee made “misrepresentations” to Leona about her, and the evidence that Jenee had isolated Leona from her four other children.

¶ 41 Undue influence to invalidate a testamentary document “ ‘must be directly connected with the execution of will itself, must operate when the will is made, must be directed toward the procuring of the will in favor of a particular person, and be such as to destroy the freedom of the

testator's actions, thereby making the instrument more the result of the will and intent of another than that of the testator himself.' ” *In re Estate of Osborn*, 234 Ill. App. 3d 651, 660 (1992) (quoting *Hockersmith v. Cox*, 407 Ill. 321, 325-326 (1950)). Undue influence cannot be inferred from the will in defendant's favor because “ ‘a testator may distribute his estate as he pleases.’ ” *Osborn*, 234 Ill. App. 3d at 660 (quoting *Hockersmith*, 407 Ill. at 325-326. The pleading of undue influence must contain specific allegations of the manner in which the free will of the testator was impaired at the time the instrument was executed. *DeHart v. DeHart*, 2012 IL App (3d) 090773, ¶ 22. “The mere conclusion that the testator was influenced by the dominant nature of the disproportionate beneficiary is insufficient.” *Id.* (quoting *In re Estate of Julian*, 227 Ill. App. 3d 369, 376 (1991)).

¶ 42 In this case, Desiree claims that she has established a *prima facie* showing of undue influence given the evidence in the record. She points to her verified petition, wherein she alleged that Jenee made “numerous misrepresentations” to Leona about Desiree and, through these misrepresentations, convinced Leona that Desiree did not have Leona's best interests at heart. However, Desiree had not supported these conclusive claims. Rather, the evidence in the record shows that, just prior to her husband's death, during his funeral, and during her mourning her husband, Leona feelings toward her four older children changed in that she felt they did not authentically care for her or her husband and instead only cared for their parents' money. Based on Leona's feelings that her older four children did not authentically care for her, Leona changed her estate plan to make Jenee the sole beneficiary of her estate. Maher, Morrone, Rippy, and Campbell all testified to Leona clearly stating her reasons for intentionally disinheriting her older four children.

¶ 43 Although Desiree alleged in her verified petition that “based on knowledge and belief [Jenee] on numerous occasions verbally abused and intimidated [Leona], those allegations also were nothing more than mere vague conclusions. The evidence, in fact, showed emotional abuse toward Leona by Desiree and Jancie, not by Jenee. Similarly, Desiree’s contention that Jenee “began exercising control over her mother***by isolating her from her other children” was shown to be not true. Rather, the record shows that it was Leona who chose, at the urging of her medical providers, to isolate herself from her older four children, going as far as seeking an order of protection so she could “live a little longer.” Therefore, trial court did not err in granting summary judgment in favor of Jenee on the issue of undue influence.

¶ 44 III. Testamentary Capacity

¶ 45 Finally, Desiree argues that Leona lacked testamentary capacity when executing the testamentary instruments at issue. Specifically, Desire contends that the undue influence she alleged Jenee exerted over Leona, combined with the significant amount medication Leona was “exposed to,” impaired Leona’s mental capacity to such an extent that Leona was incapable of making a just and proper distribution of her estate.

¶ 46 Testamentary capacity requires that the testator has the sufficient mental ability to know and remember the natural objects of her bounty, comprehend the kind and character of property held, and make a disposition of that property in accordance with some plan formed in the testator’s mind. *Osborn*, 234 Ill. App. 3d at 658. In order to prevail on a claim of lack of testamentary capacity, a contestant needs to only establish that the executed instrument was the product of an unsound mind or memory. *DeHart*, 2013 IL 114137, ¶ 20. It is presumed every person is sane and of sound mind for the purpose of making a will until the contrary is proven, and the burden rests upon the party asserting a lack of testamentary capacity. *Shevlin v. Jackson*,

5 Ill. 2d 43, 47 (1955). To be relevant, the proof surrounding the testator's lack of testamentary capacity must pertain to or be contemporary with the time the will was made. *In re Estate of Harn*, 2012 IL App (3d) 110826, ¶ 26.

¶ 47 Here, Desiree claims that decedent was on numerous prescription drugs that inhibited her from having the requisite testamentary capacity when combined with Jenee's alleged undue influence over Leona. As discussed above, the allegation of undue influence were insufficient. Additionally, Desiree has provided no evidence of such "incapacitating" medications. She does not point to any specific medication or any known side effects of those medicines to support her argument on appeal. Moreover, her claim of Leona's lack of testamentary capacity was refuted by the testimony of Morrone, Campbell, Rippy, and Maher, who all indicated that Leona was of sound mind and memory when they interacted with her. Most notable, Marrone testified as to Leona's competency when Leona signed the most recent testamentary documents. Thus, the trial court did not err in granting summary judgment on this issue where Desiree failed to provide sufficient evidence regarding Leona's alleged lacked testamentary capacity.

¶ 48 Desiree also argues that the trial court's decision regarding Leona's testamentary capacity was premature because of the absence of any medical testimony regarding decedent's mental state at the time she executed the relevant testamentary documents. However, there is no indication in the record that Desiree sought leave procure additional discovery to defeat Jenee's motion for summary judgment.

¶ 49 Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013) provides the procedure to be followed where a party must seek additional discovery to avoid the entry of a summary judgment in the opposing parties' favor, providing that:

“If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be considered with the affidavits in passing upon the motion.” Ill. S. Ct. R. 191(b).

“Failure to comply with Rule 191(b) defeats an objection on appeal that insufficient time for discovery was allowed.” *Olive Portfolio Alpha, LLC v. 116 West Hubbard Street, LLC*, 2017 IL App (1st) 160357, ¶ 23 (quoting *Giannoble v. P&M Heating & Air Conditioning, Inc.*, 233 Ill. App. 3d 1051, 1064 (1992)).

¶ 50 Here, Desiree did not file a Rule 191(b) affidavit naming medical providers, showing why their affidavits could be procured, and indicating what she believed they would testify to if sworn regarding Leona’s mental capacity. Therefore, she cannot complain on appeal that discovery was insufficient. See *U.S. Bank, National Ass’n v. Avdic*, 2014 IL App (1st) 121759, ¶ 39 (parties who fail to file Rule 191(b) affidavits cannot complain that the discovery process was insufficient or limited). Thus, we reject petitioner’s argument that the trial court’s decision to grant summary judgment was premature due to incomplete discovery.

¶ 51

CONCLUSION

¶ 52

For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 53

Affirmed.