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NO. 4-17-0279

FILED
February 8, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

STEPHEN PHILLIPS and SUSAN OTTERY, Plaintiffs-Appellants, v. JANE RHOTON, Individually; JANE RHOTON, as Executrix of the Estate of Mary L. Bowers; JANE RHOTON, as Successor Trustee of the Mary L. Bowers Trust Agreement dated January 17, 2011; and JANE RHOTON, as Trustee of the Mary L. Bowers Special Needs Trust Agreement dated January 17, 2011; and SHARON RHOTON, Defendants (JANE RHOTON, Individually; JANE RHOTON, as Executrix of the Estate of Mary L. Bowers; JANE RHOTON, as Successor Trustee of the Mary L. Bowers Trust Agreement dated January 17, 2011; and JANE RHOTON, as Trustee of the Mary L. Bowers Special Needs Trust Agreement dated January 17, 2011, Defendant-Appellant).	)	Appeal from Circuit Court of Champaign County No. 13L56 Honorable Michael Q. Jones, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Harris and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant Jane Rhoton's motion for summary judgment because she is not clearly entitled to judgment as a matter of law based on the pleadings, depositions, and affidavits in this case.

¶ 2 On October 26, 2016, the trial court awarded summary judgment to defendants Jane Rhoton and Sharon Rhoton on counts I and II of plaintiffs' second-amended 10-count complaint. On November 23, 2016, plaintiffs filed a motion to reconsider. On February 2, 2017,

the court denied the motion to reconsider. On March 2, 2017, the court entered a Supreme Court Rule 304(a) finding (Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016)) with regard to its summary judgment ruling. Plaintiffs, Steven Phillips, Susan Ottery, and Anne Bonnett, filed this appeal, arguing the court erred in granting Jane's motion for summary judgment. Plaintiffs have not appealed the court's ruling with regard to Sharon. We reverse the court's summary judgment ruling for Jane on counts I and II of the second-amended complaint and remand this case for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On July 14, 2014, plaintiffs filed their second-amended complaint in this case against defendants (1) Jane Rhoton, both individually and in her roles as executrix of the estate of Mary L. Bowers, successor trustee of the Mary L. Bowers trust agreement dated January 17, 2011, and trustee of the Mary L. Bowers special needs trust agreement dated January 17, 2011; and (2) Sharon Rhoton, who is Jane's mother-in-law. As previously noted, Sharon is not a party to this appeal.

¶ 5 According to the complaint, decedents, Edward Bowers and Mary Bowers, died on January 30, 2011, and September 1, 2012, respectively. They had four children—Anne, Susan, Jane (now known as Jane Rhoton), and Phillip Bowers. Phillip died before Edward and Mary. Stephen Phillips is Anne's son and Edward and Mary's grandson.

¶ 6 Edward and Mary owned a home and 80 acres of land in Philo, Illinois. Edward and Mary also owned land in Arkansas. Before retiring from farming, Edward farmed approximately 600 acres, including his own 80 acres. The complaint alleged grandson Stephen assisted Edward with the farming operation for more than 20 years. Defendants admitted Stephen assisted Edward from time to time. Plaintiffs stated they maintained loving and caring

relationships with Edward and Mary during their lives.

¶ 7 Count I of the second-amended complaint presented an undue influence claim and count II alleged tortious interference with testamentary expectancy based on the same undue influence. According to the complaint, before the estate plan in question in this case, which was executed in January 2011 (2011 Estate Plan), Edward and Mary had a series of different estate plans. Edward and Mary executed an estate plan in December 1995, which would have distributed their property equally between their children. On information and belief, plaintiffs alleged Edward and Mary executed a revised estate plan in May 2000, which provided the Illinois property would be split equally between Stephen, Susan, Anne, and Jane. Under that plan, Jane would have also received her parents' property in Arkansas.

¶ 8 Around 2000, Edward's health began to decline. In September 2004, Edward and Mary named Sharon as their agent under a durable power of attorney and a healthcare power of attorney. That same month, Edward and Mary executed a revised estate plan (2004 Estate Plan), which again provided their property would be divided more or less equally between Stephen, Susan, Anne, and Jane.

¶ 9 In 2007, Jane gave birth to a child and began living with Edward and Mary at their home. Plaintiffs alleged Jane came to reside with her parents "to receive assistance, financial and otherwise, with raising her child." Edward's and Mary's health continued to decline, and they became dependent on Jane and Sharon. According to plaintiffs, Jane controlled their access to Edward and Mary. Jane screened all phone calls to the residence, discouraged visitors by removing furniture from the house, monitored her parents' conversations with other people, and exerted influence over their financial and agricultural affairs. Jane convinced her parents Stephen had been a financial burden and owed them a significant amount of money.

While Stephen had borrowed money from Edward and Mary, plaintiffs alleged Jane convinced Edward and Mary that Stephen's debt was much larger than it truly was.

¶ 10 In May 2009, Edward and Mary executed another estate plan (2009 Estate Plan). This estate plan called for the Illinois property to be divided between Stephen, Susan, and Jane. Jane again was to receive the Arkansas property.

¶ 11 Around January 2010, Edward fell outside while getting the mail. Edward was outside for a while until Stephen was called to carry him inside. Edward had to recover at a nursing home. According to the complaint, while Edward was at the nursing home, Jane and Sharon were present for all visits Edward received from third parties and monitored their conversations. However, in her deposition, Jane testified she only visited Edward a couple of times while he was in the nursing home. Plaintiffs alleged Edward never fully recovered from his fall before he died in January 2011. In her deposition testimony, Jane agreed Edward never fully recovered physically from the fall. However, she testified nothing was ever wrong with her father mentally.

¶ 12 In her deposition, Jane testified she and her parents had a conversation sometime around April 2010 about Stephen and the farm ground. No one else was present for the conversation with her parents. Jane testified her parents were not happy with Stephen. Jane testified her parents and Stephen had agreed Stephen would get 20 acres of their ground on completion of farming for them until their death. However, her parents said Stephen had not fulfilled his obligations under the agreement.

¶ 13 Jane also had a conversation in April or May 2010 with her parents about whether Anne and Susan were going to get any of their parents' farm ground. Jane said her parents were not happy with Anne and Susan and did not plan on allowing them to inherit any property

because they had taken financial records from Edward and Mary's house, including their then current will, checkbook stubs, documents, and other papers. Jane testified Mary was at the home when Anne and Susan did this in late February or early March 2010. Edward was still in the nursing home.

¶ 14 Jane testified her parents were upset with Stephen for a few reasons. They believed he had a key to their lock box at a local bank and tried to access the lock box. They were also upset because he was not making payments on a loan they made to him. Her parents had also given Stephen additional money to pay off his debts. She had no independent knowledge of how much money Stephen owed her parents or whether he had stopped making payments. Jane also testified her parents were upset with Stephen because he would cuss at them on the telephone and did not take care of the farm equipment. Edward also had to pay other farmers to harvest his crops when Stephen was unable to do it.

¶ 15 According to Jane, Edward and Mary also had issues with Anne and Susan. Anne pressured Edward and Mary to take out a loan for Stephen's benefit. Further, Mary became upset with Susan because Susan was accusing Jane of using Edward and Mary. In addition, Anne and Susan tried to convince Mary to go to an assisted living center, leave Edward in the nursing home, and allow Stephen to move into the house. Edward and Mary were also upset because Susan and Anne persuaded Mary to allow Anne's daughter, Katy Bayer, to do their taxes. This resulted in Edward and Mary filing for an extension because Katy was not able to do their taxes.

¶ 16 According to plaintiffs' complaint, around the fall of 2010, Jane and Sharon encouraged Edward and Mary to execute another estate plan. Jane and Sharon contacted a different law firm—Thomas, Mamer & Haughey—and requested it prepare a new estate plan for Edward and Mary. Jane drove Edward and Mary to the law office to discuss the new estate plan,

was present for all meetings, and discussed changes that needed to be made to the new estate plan.

¶ 17 Plaintiffs alleged "[d]ue to the dependence, trust, and confidence Edward and Mary reposed in Jane, a fiduciary relationship existed between Jane and Edward and Mary." Further, plaintiffs claimed the estate plan at issue in this case was "prepared, procured and executed in circumstances wherein both Jane and Sharon were instrumental or participated in its preparation." In addition, plaintiffs alleged Jane destroyed Edward's and Mary's free will and the 2011 Estate Plan reflects Jane's wishes, not Edward's and Mary's.

¶ 18 In her deposition, Jane testified she contacted attorney Lott Thomas to set up the initial meeting for the new estate plan. She knew her parents wanted to make adjustments to their estate plan. She also testified she knew her parents wanted to leave Stephen, Anne, and Susan out of their estate. Sharon was not involved in scheduling the meeting or the estate planning process. Jane contacted attorney Thomas because he had helped her parents on a prior matter. She testified she drove her parents to and was present for part of the initial conference between her parents and Thomas. She was present when her parents described the changes they wanted to their estate including disinheriting Stephen, Anne, and Susan. She did not remember whether she was still in the meeting when her parents told attorney Thomas why they wanted to disinherit Stephen, Anne, and Susan.

¶ 19 Jane also testified in her deposition that attorney Thomas drafted some documents and mailed them to her parents' home. She did not remember reviewing the documents or calling Thomas about the documents. However, she stated she would have done so if her parents asked her to call. She also testified she was at attorney Thomas's office when the new estate documents were signed. She drove her parents to Thomas's office for them to sign the new estate plan

documents.

¶ 20 Jane testified her parents trusted and had confidence in her. However, she denied her parents relied on her to prepare the 2011 Estate plan.

¶ 21 On or about January 17, 2011, Edward and Mary executed the final estate plan. Jane was present when her parents executed these documents. Under this plan, Jane would receive the entire estate, and Susan, Anne, and Stephen would receive nothing.

¶ 22 Attorney Lott Thomas testified at a deposition he met with Edward on September 2, 2010, for estate planning purposes. Mary was not present for the meeting, but Jane was. Jane did not participate in the meeting other than stating it was her intent to take care of her parents as long as they were living at home. However, Thomas explained to Edward, regardless of Jane's intentions, things might occur keeping her from being able to do this. Edward was adamant he wanted all his property to go to Jane. Edward gave two reasons for this. He and Mary had done other things for Anne and Susan, primarily helping them purchase property in Missouri. He and Mary had also paid off approximately $200,000 of Stephen's debt.

¶ 23 Attorney Thomas met with both Edward and Mary on September 27, 2010. He said Jane was present for at least part of the meeting. He did not think Mary had finalized her thoughts regarding leaving all the property to Jane. It was at this meeting Thomas learned Stephen was supposed to be making payments back to Edward and Mary but had stopped doing so and stopped communicating with them.

¶ 24 After this meeting, Thomas began considering how to execute Edward and Mary's wish to leave the 80 acres to Jane. In a letter dated November 2, 2010, Thomas communicated how he intended to draft the estate documents. The letter stated he would not begin drafting the documents until Edward and Mary approved his plan. Jane called to say her

parents found the plan acceptable. Thomas then began drafting the documents, which he sent to Edward and Mary in late November. Jane called Thomas's office and said her parents accepted the documents as drafted.

¶ 25 Edward and Mary came to his office on January 17, 2011, and signed the documents. Pursuant to his normal practice, before Edward and Mary signed anything, Thomas went over each document, explaining the documents, answering any questions Edward and Mary had, and making sure nothing needed to be changed. They acknowledged it was still their wish to leave the 80 acres to Jane.

¶ 26 Attorney Thomas testified Edward and Mary appeared alert, responsive, and appeared to understand what they were doing. He believed they were both of sound mind, had the requisite ability to sign the legal documents, and understood they were leaving nothing to Anne, Susan, and Stephen.

¶ 27 Based on his normal practice, Thomas testified he would have conferred with Edward and Mary by themselves at some time during the course of his meetings with them. He always talked to his clients alone about their testamentary wishes to make sure they were not being influenced by anyone else. If he ever sensed a client was being unduly influenced, he would not allow the client to sign any papers. He saw no evidence of any undue influence when speaking with Edward and Mary. Nothing in Edward's and Mary's reasoning to leave the property to Jane raised any "red flags" in his mind.

¶ 28 Thomas testified Edward and Mary were relying on Jane to find documents, take care of financial records, and other similar tasks. He testified it was fair to say Edward and Mary trusted Jane.

¶ 29 On September 9, 2016, Jane filed a motion for summary judgment on counts I and

II of plaintiffs' second amended complaint. According to the memorandum in support of the motion:

> "In the more than three years since this suit was initiated, Plaintiffs have conducted discovery on an intermittent basis. The depositions of Jane, Sharon, Jane's husband (Jerry Rhoton), and probate attorney Lott Thomas have all been taken. But in those three years, and in all of the depositions that have been taken, Plaintiffs have yet to proffer any evidence that undue influence was exerted by Jane with respect to the 2011 Estate Plan. In fact, the undisputed evidence demonstrates the opposite. Edward and Mary executed the 2011 Estate Plan of their own free determination and for their own reasons."

¶ 30 In October 2016, plaintiffs responded to defendants' motion for summary judgment. Plaintiffs noted the deposition testimony of Jane and Attorney Thomas "clearly indicates that Defendants had extensive involvement in the procurement of the 2011 Estate Plan." Plaintiffs also argued "the alleged 'motivations' for the 2011 Estate Plan are based on misrepresentations, concealment of facts, or distortions of reality." As a result, according to plaintiffs, this case cannot be decided by summary judgment. Citing *DeHart v. DeHart*, 2013 IL 114137, ¶ 29, 986 N.E.2d 85, plaintiffs argued a decision whether a presumption of undue influence has been established is a fact specific inquiry that should be determined by the trier of fact after all testimony has been presented and credibility determinations can be made. Plaintiffs point out defendants only argued plaintiffs could not present evidence defendants were instrumental or participated in procuring or executing the 2011 Estate Plan. However, according to plaintiffs, the record showed Jane was very involved with the new estate plan and was sufficient to establish the estate plan resulted from her undue influence.

¶ 31 On October 26, 2016, the trial court held a hearing on Jane's motion for summary judgment. The court stated the primary issue was whether Edward and Mary had reasons to execute the estate plan giving all their property to Jane independent of any undue influence from Jane and Sharon. According to the court:

> "Counts I and II are both grounded in the idea of undue influence. We know there are reasons articulated by Ed and Mary as to why they changed their estate plan. The Plaintiff to succeed is essentially, at the risk of oversimplifying, going to have to show some day that Jane and/or Sharon overbore their will, and that can be done in more ways than one. It can be done by threat of physical violence and it can be done by subtle subterfuge, but in the fullness of time, Plaintiffs would have to show that Jane and/or Sharon exerted undue influence on Ed and Mary so as to overcome their will. And again I have to stay out of the trap of coming to my own conclusions as to facts ***. It would be inappropriate for me to come to any decisions on disputed factual issues. But we also have to remember and keep our eye on what the ultimate issue here is. It is not what is true in these various suggestions of the litany of reasons why Ed and Mary changed their estate plan. It is when Ed and Mary changed it, were they operating of their own free will, regardless of what the truth is? Now the basic argument of Plaintiffs is these reasons they've got, they're all lies, and the reason that they're lies is we've got affidavits that say otherwise. You think you suggest they changed it because Ed and Mary were estranged from Susan and Anne? Not true; it's a lie. We say so under oath. You think it's a reason that they changed their estate plan because this loan to Stephen and dissatisfaction over that? Not true; read my affidavit. It is not

> case dispositive whether or not those things are true. The argument of the Plaintiffs is they're true—I'm sorry—they are untrue, and to the extent that Ed and Mary based their decision to change their estate plan, they did so because Jane and/or Sharon lied to them about all these untrue things. That's a great oversimplification. I don't mean to be putting words into any counsel's mouth, but that's essentially how I analyze the argument here. All the reasons they listed, they're all lies, and Ed and Mary, if in fact those are reasons of theirs, they formulated those reasons because they were planted by Jane and/or Sharon who were lying at the time for their own purposes. That's essentially what we have here."

¶ 32 The trial court then discussed whether a presumption of undue influence exists in this case. The court noted common sense provided Edward and Mary would need a ride to the attorney's office. The court also noted the choice to use attorney Lott Thomas to prepare the 2011 Estate Plan was not suspicious, considering his experience and reputation in estate planning. The trial court found plaintiffs presented inadequate evidence to raise a presumption of undue influence. The court found the most important evidence on this issue was attorney Thomas's deposition testimony regarding the 2011 Estate Plan. According to the court:

> "To the extent there is some faint suggestion because of the number of phone calls they made and how much time Jane sat in the waiting room versus how much time she may have sat in the office in the company of these elderly folks, that is more than rebutted by Mr. Thomas'[s] depiction of how this all came about."

The court pointed to Thomas's testimony regarding why Edward wanted to leave all his estate to Jane.

¶ 33 The trial court noted attorney Thomas testified Edward gave reasons why he and Mary wanted to leave all their property to Jane. Edward told Thomas he and Mary had done other things for Anne and Susan, primarily helping them buy property in Missouri. Edward also stated he had paid off $200,000 of Stephen's debt. Stephen was supposed to pay them back but quit making payments and communicating with them. As a result, Edward and Mary were short on cash, living off their social security payments of $2200 a month. All farm income went to paying mortgages on the farm property. The court then stated:

> "What this tells me is Mr. Thomas has under oath recounted what his clients were telling him—Ed and Mary were telling him were the reasons for engaging his services to change the estate plan. The question then becomes is there a genuine issue of material fact as to whether the reasons I have just read into the record, which according to Lott Thomas, were articulated not by Jane and Sharon but by Ed and Mary, is there a genuine issue of material fact that these reasons were possibly the product of undue influence by Jane and/or Sharon. That's the real issue. These other things, you know, the safe deposit box, for one, but some of the other eight reasons that Jane says Ed and Mary said, virtually all of those are factually disputed.
>
> But the real key here is the legal professional who's being asked to draft this document changing the estate plan, this is what the legal professional is saying his clients were asking him to do and why they were asking him to do it, and is there a genuine issue of material fact that Ed's stated reasons were because of his will being overborne by undue influence from Jane and/or Sharon? If I have framed the question properly, the answer to that is a resounding no. No,

> there isn't evidence that those particular reasons stated on Page 12 and Page 17 and 18 of Mr. Thomas'[s] deposition, there is no evidence that I think establishes a fact that, well, it may have been what Ed told Lott Thomas but he only told that because his will was overborne by Jane and/or Sharon. I find no evidence of that.
>
> Accordingly, I do not find a genuine issue of material fact whether or not Jane and/or Sharon exerted undue influence on the testators, Ed and Mary Bowers."

¶ 34 On November 23, 2016, plaintiffs filed a motion to reconsider the trial court's order granting defendants' motions for summary judgment on counts I and II of plaintiff's second amended complaint. On February 2, 2017, the court denied the motion to reconsider. On March 2, 2017, the court entered a finding pursuant to Illinois Supreme Court Rule 304(a), finding no just reason for delaying either enforcement or appeal of the trial court's order granting defendants' motion for summary judgment as to counts I and II and the court's denial of plaintiffs' motion to reconsider.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 Plaintiffs argue the trial court erred in granting defendant Jane Rhoton's motion for summary judgment on counts I and II of their second amended complaint. Both counts were based on undue influence allegedly exercised by Jane on Edward and Mary. Our supreme court has stated, "What constitutes undue influence cannot be defined by fixed words and will depend upon the circumstances of each case." *In re Estate of Hoover*, 155 Ill. 2d 402, 411, 615 N.E.2d 736, 740 (1993).

¶ 38 Our supreme court has made clear summary judgment is "a drastic means of

disposing of litigation." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007). A movant's right must be "clear and free from doubt" before summary judgment is appropriate. *Bagent*, 224 Ill. 2d at 163. "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 8 (2008).

> "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Bagent*, 224 Ill. 2d 154, 162–63.

We give no deference to a trial court's summary judgment order and apply a *de novo* standard of review. *Williams*, 228 Ill. 2d at 417.

¶ 39 In ruling on defendant's motion, the trial court found inadequate evidence was presented to raise a presumption of undue influence. We note a presumption of undue influence is raised when a party contesting a will can establish:

> "(1) that a fiduciary relationship existed between the testator and a person who substantially benefits under the will; (2) that the primary beneficiaries were in a position to dominate and control the dependent testator; (3) that the testator reposed trust and confidence in such beneficiaries; and (4) that such beneficiaries were instrumental in or participated in the procurement or preparation of the will." *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1018, 679 N.E.2d 393, 404 (1997).

With regard to the presumption of undue influence, Jane only contested the fourth factor that no evidence existed showing Jane was instrumental or participated in procuring the will. This contention misrepresents the record.

¶ 40 When the record is viewed liberally in plaintiffs' favor, a question of fact exists regarding the role Jane played in procuring Edward and Mary's 2011 Estate Plan. Among other things, Jane communicated with attorney Thomas's office about the estate plan; she was present for meetings between Edward, Mary, and attorney Thomas where the estate plan was discussed, including plaintiffs' disinheritance; she drove Edward and Mary to appointments with attorney Thomas; and she acted as a go-between for Edward and Mary and attorney Thomas. These facts are not even in dispute.

¶ 41 While we do not say a presumption of undue influence exists based on the record in this case, the trial court's finding plaintiffs could not establish a presumption of undue influence was premature. When the record is construed liberally in favor of plaintiffs, this evidence could lead to a presumption of undue influence.

¶ 42 The trial court placed much emphasis on the deposition testimony of attorney Lott Thomas. The court stated:

> "But the real key here is the legal professional who's being asked to draft this document changing the estate plan, this is what the legal professional is saying his clients were asking him to do and why they were asking him to do it, and is there a genuine issue of material fact that Ed's stated reasons were because of his will being overborne by undue influence from Jane and/or Sharon? If I have framed the question properly, the answer to that is a resounding no. No, there isn't evidence that those particular reasons stated on Page 12 and Page 17

> and 18 of Mr. Thomas'[s] deposition, there is no evidence that I think establishes a fact that, well, it may have been what Ed told Lott Thomas but he only told that because his will was overborne by Jane and/or Sharon. I find no evidence of that.
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> Accordingly, I do not find a genuine issue of material fact whether or not Jane and/or Sharon exerted undue influence on the testators, Ed and Mary Bowers."

¶ 43 In a trial, attorney Thomas's testimony may rebut any presumption of undue influence, and it may be very persuasive to the trier of fact. Nonetheless, the fact finder is not precluded from drawing reasonable inferences from all the facts presented, which would include a possible inference of undue influence. *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 466, 448 N.E.2d 872, 878 (1983). Regardless of attorney Thomas's testimony Edward was adamant and vocal about leaving all his property to Jane, this does not make it a legal certainty Edward and Mary were not acting pursuant to Jane's undue influence.

¶ 44 Looking at the record in a light most favorable to the plaintiffs and without judging the credibility of any witnesses, questions of material fact remain whether Jane exercised undue influence on her parents to change their estate plan for her sole benefit. Our decision to reverse the trial court's summary judgment ruling should not be seen as any indication of this court's view of the strength of plaintiffs' case. We simply do not find Jane is clearly entitled to summary judgment based on the record in this case. We further note our decision should be narrowly construed as we have only addressed the trial court's ruling on the presumption question. We eschew analysis of plaintiff's "secret influences" argument and simply note the facts here are not remotely comparable to the evidence of the misrepresentations present in *Hoover* and alleged in *DeHart*, which the supreme court deemed could be considered as

circumstantial evidence of undue influence.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we reverse the trial court's order granting Jane summary judgment as to count I and II of plaintiffs' second amended complaint and remand for further proceedings.

¶ 47 Reversed and remanded.