Circuit Court for Harford County
Case No. C-12-CV-22-000243

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1402

September Term, 2023

THE ESTATE OF LOUISE JACKMAN, *et al*.

v.

ALISON WARNER, *et al*.

Wells, C.J.
Albright,
Hotten, Michele D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: June 23, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

The appeal is about whether an attorney-in-fact acted contrary to the Power of Attorney ("POA") under which she was appointed. About a year before she died, Louise Jackman executed a POA appointing her daughter, Appellee Alison Warner, to be her attorney-in-fact. In this capacity, and shortly after being appointed, Ms. Warner executed life estate deeds[1] pertaining to four real properties Ms. Jackman owned. Ms. Warner did so in conformance with Ms. Jackman's wishes regarding the properties. After Ms. Jackman died, Appellant Ryan Burbey (Ms. Jackman's son, Ms. Warner's brother, and the personal representative of Ms. Jackman's Estate) sued Ms. Warner in the Circuit Court for Harford County. Mr. Burbey and the Estate claimed that Ms. Warner had acted improperly in executing the deeds, largely because the deeds (and the resulting conveyances) reduced what was available for distribution to Mr. Burbey under Ms. Jackman's will. The circuit court granted summary judgment to Ms. Warner. Mr. Burbey and the Estate (collectively, "Mr. Burbey") then noted this appeal.

Mr. Burbey presents four questions[2] for our review, which we condense and rephrase as follows:

[1] These deeds granted Ms. Jackman a life estate in her properties—reserving to her the right to possess, control, and convey each property and its future interests during her lifetime—with the remainder fee simple interest granted to others (the defendants). These types of deeds are a common estate planning tool. *See Grimes v. Gouldmann*, 232 Md. App. 230, 233 n.3 (2017) ("It allows the remaindermen to become the full owners of the property immediately upon the death of the life tenant, thereby saving the time and expense of the probate process.").

[2] Mr. Burbey presented the questions in his brief as follows:

1. Whether the circuit court erred in granting summary judgment in favor of all defendants because a reasonable inference could be drawn that Ms. Warner exercised undue influence over Ms. Jackman?
2. Whether the circuit court erred in granting summary judgment to all defendants because Louise Jackman's statements to Gina Shaffer were hearsay not subject to the state of mind exception?
3. Whether the circuit court erred in interpreting the POA to preclude conveyances of remainder interests in land?

For the reasons below, we answer "no" to all of these questions and affirm.

BACKGROUND[3]

Ms. Jackman died on January 8, 2022. She was survived by her adult children, Mr. Burbey and Ms. Warner. Over forty-three years before her death, in 1978, Ms. Jackman executed a will. Per her will, Ms. Jackman's assets were to be divided equally between Mr. Burbey and Ms. Warner. Her assets included four parcels of real property (the

1. Whether the trial court erred in admitting Louise Jackman's statements to Gina Shaffer as hearsay subject to the state of mind exception?
2. Whether the trial court erred in granting summary judgment in favor of all Appellees after finding as a matter of law that the Appellants' failed to provide any evidence from which a reasonable inference could be drawn that Ms. Warner exercised undue influence over Ms. Jackman?
3. Whether the grant of a remainder interest in land is tantamount to gift by will leaving the burden of proof with the Appellants or is it an *inter vivos* gift thus shifting the burden of proof to the Appellee?

[3] These facts come from the circuit court's Memorandum Opinion and Order, as supported by the documents in the record. None of these facts are disputed on appeal.

"properties"): 1701 Mountain Road, Joppa, Maryland 21085 ("Mountain Road"); 224 Bynum Ridge Road, Forest Hill, Maryland 21050 ("Bynum Ridge Road"); 128 Post Road, Aberdeen, Maryland 21001 ("Post Road"); and 206 Octoraro Road, Conowingo, Maryland 21918 ("Octoraro Road"). At the time of her death, Ms. Jackman also owned an investment account valued at approximately $600,000.

Twice before Ms. Jackman died, Mr. Burbey filed (and then voluntarily dismissed) petitions to be appointed Ms. Jackman's guardian. Mr. Burbey filed the first such petition in late 2019, a little more than two years before Ms. Jackman's death. Mr. Burbey voluntarily dismissed that petition in August 2020. Less than a year before Ms. Jackman's death, in early 2021, Mr. Burbey filed another petition for guardianship over Ms. Jackman. He voluntarily dismissed that petition on March 9, 2022 (after Ms. Jackman's death). Mr. Burbey did not attach physicians' certificates to either petition.[4]

About four months after the dismissal of Mr. Burbey's first guardianship petition, on December 22, 2020, Ms. Jackman met with Gina Shaffer, Esq., in Ms. Jackman's home, for the purpose of reviewing Ms. Jackman's estate planning and preparing an updated[5] POA. With Ms. Warner and Arvil Burbey (who is Ms. Jackman's grandson and Mr. Burbey's son) present, Ms. Jackman and Ms. Shaffer discussed estate planning—including a POA—Ms. Jackman's real properties, and the use of life estate deeds to

[4] *See* Md. Code Ann., Est. & Trusts § 13-705(c)(2); Md. Rule 10-202 (generally requiring two medical certificates to support a petition for guardianship of a person).

[5] Ms. Shaffer confirmed a prior POA existed at the time of the meeting but did not recall the details of the prior POA, including its designation of an agent.

transfer the properties. Ms. Jackman detailed her estrangement from Mr. Burbey, her impression of Mr. Burbey as financially irresponsible, and her displeasure with his guardianship filing.

At the time of the meeting, Ms. Jackman had been diagnosed with mild dementia. Ms. Warner told Ms. Shaffer as much just before Ms. Shaffer's estate planning meeting with Ms. Jackman. Knowing this, Ms. Shaffer felt assured after speaking with Ms. Jackman that Ms. Jackman understood the nature of the meeting. Ms. Shaffer was convinced Ms. Jackman also understood the nature of the documents and decisions discussed at the meeting, including the POA and life estate deeds.

At the end of the meeting, Ms. Jackman signed the POA, with Ms. Shaffer and another attorney as witnesses. The POA named Ms. Warner as Ms. Jackman's attorney-in-fact. After the meeting, Ms. Shaffer's firm prepared life estate deeds for Ms. Jackman's properties,[6] per Ms. Jackman's instructions.

On February 10, 2021, Ms. Warner signed the life estate deeds as attorney-in-fact for Ms. Jackman. The life estate deed for Mountain Road transferred the property from

[6] Even though the circuit court's Memorandum Opinion and Order pertained to three (not four) life estate deeds and the summary judgment record included three life estate deeds, the court's ultimate decision included all four. The day before the court filed its Memorandum Opinion and Order, Mr. Burbey identified the fourth life estate deed (for the Octoraro Road property) in his Second Amended Complaint. After concluding that the Second Amended Complaint raised no additional legal issues, the circuit court issued a Supplemental Order indicating that its Memorandum Opinion and Order applied to (and dismissed) the Second Amended Complaint. The circuit court did so even though the fourth life estate deed was not added to the summary judgment record, a decision that Mr. Burbey does not here challenge. For clarity, we refer here to "four life estate deeds."

Ms. Jackman as sole owner to Ms. Jackman for life and the remainder to Mr. Burbey. The life estate deed for Bynum Ridge Road transferred the property from Ms. Jackman as sole owner to Ms. Jackman for life and the remainder to Ms. Warner and Ms. Warner's son. The life estate deed for Post Road transferred the property from Ms. Jackman, as sole owner, to Ms. Jackman for life and the remainder to Ms. Warner and Arvil Burbey. The life estate deed for Octoraro Road transferred the property from Ms. Jackman as sole owner to Ms. Jackman for life and the remainder to Ms. Warner.[7]

Mr. Burbey's Amended Complaint

Mr. Burbey, individually and in his capacity as personal representative[8] of Ms. Jackman's Estate, filed an amended complaint in which he requested that a constructive trust be imposed on the real property affected by the life estate deeds. The complaint included claims against Ms. Warner[9] for breach of a confidential relationship and for intentional interference with an inheritance. Claiming $750,000.00 in damages, Mr.

[7] Mr. Burbey described the Octoraro Road life estate deed thusly in the facts alleged in his second amended complaint, though he did not enter a copy of the deed into evidence. Ms. Warner does not challenge this representation.

[8] On February 10, 2022, Mr. Burbey opened the Estate of Louise Jackman and, on February 15, 2022, was appointed the personal representative.

[9] Mr. Burbey amended his complaint, per court order that certain non-parties were necessary to the action, to add Ms. Jackman's grandsons—Arvil Burbey, Caleb Warner, and Nick Warner—as interested parties. There are no specific allegations against any of these individuals; they are merely listed as interested parties in the caption of the second amended complaint. Appellees note, on appeal and in their motion for summary judgment below, that Caleb Warner and Nick Warner had not been served, but the motion and its granting applied to all claims against all parties and interested parties.

Burbey alleged that Ms. Jackman was incompetent and dependent on Ms. Warner and challenged the propriety of the life estate deeds signed by Ms. Warner as Ms. Jackman's agent. According to the pleadings, Ms. Warner's "conduct is inconsistent with the testamentary wishes of Ms. Jackman[,]" and her "actions served only one purpose, which was to ensure that Plaintiff, Ryan Burbey, did not receive his share of Ms. Jackman's estate." Mr. Burbey did not allege that Ms. Warner had exercised undue influence over Ms. Jackman.

Ms. Warner's Motion for Summary Judgment

Ms. Warner[10] moved for summary judgment on all counts alleged by Mr. Burbey. In her motion, Ms. Warner argued that Mr. Burbey failed to plead any facts to support that Ms. Warner breached the duties required of her by the POA. Additionally, Ms. Warner argued that the Maryland General and Limited Power of Attorney Act protects her from any liability to Mr. Burbey. Ms. Warner supported her motion with the POA appointing Ms. Warner as Ms. Jackman's agent, and the life estate deeds at issue. She also attached an affidavit from Ms. Shaffer, which detailed Ms. Shaffer's meeting and discussion with Ms. Jackman. According to Ms. Warner, the executed POA and the life estate deeds confirmed that Ms. Warner was acting within her appointed authority in

[10] Though the circuit court, in its Memorandum Opinion and Order, identifies the motion for summary judgment as one filed by all defendants (Ms. Warner, Arvil Burbey, Caleb Warner, and Nick Warner), the motion itself identifies only Ms. Warner and Arvil Burbey as its movants. Caleb Warner and Nick Warner did not apparently join in or file any pleadings below. We will refer to Ms. Warner and Arvil collectively as "Ms. Warner."

signing the deeds. The affidavit detailed what Ms. Jackman told Ms. Shaffer about what Ms. Jackman wanted with respect to the four properties. Ms. Jackman wanted the four real properties to be distributed via life estate deeds that superseded her previous estate plan. According to Ms. Shaffer, Ms. Jackman "was clear" about what she wanted and why.[11] Based on these documents, Ms. Warner argued that there were no disputes of material fact, and Ms. Warner was entitled to statutory protection from Mr. Burbey's claims as a matter of law.

Mr. Burbey opposed the motion, arguing (1) that Ms. Shaffer's affidavit contained inadmissible hearsay, (2) that there are material facts to support the inference that Ms. Jackman intended to divide her assets equally between Ms. Warner and Mr. Burbey, (3) that Ms. Shaffer directed Ms. Warner, in executing the deeds, to violate Maryland law and the terms of the POA, and (4) that the existence of a confidential relationship is a question of fact to be decided by a jury. Mr. Burbey supported his opposition with a copy of the letter of administration appointing him personal representative of Ms. Jackman's Estate, Ms. Jackman's 1978 will, and the POA. He argued that these documents "clearly evidence that Ms. Jackman's intended her assets be divided equally between Mr. Burbey

[11] Ms. Jackman first wanted Mr. Burbey not to get "one penny" and to leave him out of her estate planning altogether. Ms. Jackman told Ms. Shaffer that Mr. Burbey was "basically estranged" from the family, that she was angry at him for attempting to get guardianship over her, and that he was financially irresponsible. Ms. Warner asked Ms. Jackman to transfer one property to Mr. Burbey so as "to avoid a fight with [him] if he were left out." Ms. Warner told Ms. Jackman which of the four properties Mr. Burbey preferred. The remainder interest in the Mountain Road property was deeded to Mr. Burbey.

and the Defendant *and* that assets only be gifted for the purpose of receiving public benefits." He also supplied the life estate deeds[12] as proof that Ms. Warner's signature on the deeds violated the POA's prohibition against making gifts of Ms. Jackman's assets. Finally, Mr. Burbey attached his own affidavit stating that Ms. Jackman "was living in complete squalor" as recently as 2019, Ms. Warner refused to cooperate in Mr. Burbey's attempts to help Ms. Jackman, and Ms. Jackman "never indicated to [Mr. Burbey] a desire to disinherit [him]."

After hearing Ms. Warner's summary judgment motion, the circuit court permitted the parties to supplement their papers with excerpts from the depositions of Ms. Shaffer and Mr. Burbey and additional argument. Mr. Burbey argued that Ms. Warner's summary judgment motion was entirely dependent on Ms. Shaffer's testimony,[13] which was inadmissible hearsay as to Ms. Jackman's intent. He added that Ms. Shaffer's testimony also showed that Ms. Jackman did not direct or desire that the life estate deeds to be executed.[14] Ms. Warner argued that Ms. Shaffer's deposition testimony only strengthened Ms. Warner's summary judgment motion by adding more details to what was in Ms.

[12] As above, Mr. Burbey supplied the life estate deeds for three of the four properties Ms. Jackman owned.

[13] The parties appear to use "affidavit" and "testimony" interchangeably in their arguments regarding Ms. Shaffer's statements. Mr. Burbey argues both contain inadmissible hearsay and Ms. Warner disagrees. We will refer to Ms. Shaffer's affidavit and her deposition collectively as "testimony" unless the context requires otherwise.

[14] We summarize the contents of Mr. Burbey's supplemental papers first because he filed them before Ms. Warner filed hers.

Shaffer's affidavit. Ms. Warner reiterated that Ms. Shaffer's testimony was admissible hearsay as to Ms. Jackman's state of mind, no facts reasonably allowed for the inference that Ms. Jackman intended to divide her assets equally, and Ms. Warner did not violate the terms of the POA by making a gift. Regarding Mr. Burbey's deposition, Ms. Warner pointed out that it illustrated his estrangement from Ms. Jackman and his lack of knowledge as to her POA or updated estate plan. Claiming that the existence of a confidential relationship was not a question of fact requiring a jury, Ms. Warner concluded that summary judgment should be entered on all counts.

Subsequently, the circuit court granted Ms. Warner summary judgment on Mr. Burbey's claims. The court relied on Ms. Shaffer's statements, in her deposition and affidavit, which the court found admissible under *Edery v. Edery*, 193 Md. App. 215 (2010), as hearsay statements under the state of mind exception.

The court found that the POA signed by Ms. Jackman created a confidential relationship between Ms. Warner and Ms. Jackman. The court acknowledged that the question of whether a confidential relationship exists is ordinarily a question of fact, as Mr. Burbey argued in his opposition, but concluded that in this case, the existence of a confidential relationship between Ms. Jackman and Ms. Warner is "a matter of law and not a factual question to be decided by a jury."

According to the court, there was "simply no evidence of a breach of a confidential relationship." The court was not convinced by Mr. Burbey's argument that the life estate deeds were *inter vivos* gifts that were made in violation of the POA's

prohibition against any gifts other than those made for public benefits. First, the court disagreed that the POA only allowed Ms. Warner to make gifts of Ms. Jackman's assets in order to qualify Ms. Jackman for public benefits, calling this reading of the POA's language "inaccurate." Further, the court determined that the life estate deeds were not *inter vivos* gifts. Ultimately, the court concluded that "there is no material dispute of facts that would suggest that Ms. Warner was not acting pursuant to the [POA]." Regardless of whether there was a confidential relationship, the court concluded that Ms. Warner was immune from Mr. Burbey's claims under Sections 17-113(c) and (d) of the Estates and Trusts ("ET") Article.

As to Mr. Burbey's claim for intentional interference with an expected inheritance, the court found Mr. Burbey had provided no evidence of undue influence. The circuit court therefore entered judgment for the defendants on Mr. Burbey's claims,[15] and this timely appeal followed.

STANDARD OF REVIEW

We review the granting of summary judgment de novo. *John B. Parsons Home, LLC, v. John B. Parsons Found.*, 217 Md. App. 39, 53 (2014). We affirm summary judgment if the prevailing party is entitled to judgment as a matter of law without any

[15] The circuit court's Memorandum Opinion and Order also discussed why Mr. Burbey could not succeed on his claim for conversion (which Mr. Burbey excluded in his amended complaint).

After summary judgment was granted on Mr. Burbey's claims, the parties jointly filed a stipulation of dismissal to dispense with Ms. Warner's counterclaims for defamation and invasion of privacy.

disputed material facts. *Prop. & Cas. Ins. Guar. Corp. v. Yanni*, 397 Md. 474, 480 (2007); *see also* Md. Rule 2-501(f) ("The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.").

We deem disputed facts "material" if the facts "will alter the outcome of the case, depending upon how the fact-finder resolves the dispute." *Injured Workers' Ins. Fund v. Orient Express Delivery Serv., Inc.*, 190 Md. App. 438, 451 (2010). We are "obliged to conduct an independent review of the record to determine if there is a dispute of material fact." *Id.* at 450–51. During our review, we do not try the case or decide the factual disputes; rather, we determine whether there is an issue of fact that is sufficiently material to be tried. *Castruccio v. Est. of Castruccio*, 456 Md. 1, 16, *reconsideration denied* (2017). A "mere submission of an affidavit, or other evidence in opposition to a motion for summary judgment," does not necessarily generate a triable issue of fact. *Utica Mut. Ins. Co. v. Miller*, 130 Md. App. 373, 391 (2000).

Upon determining that there are no genuine disputes of material fact, "we must determine whether summary judgment was correctly entered as a matter of law." *Yanni*, 397 Md. at 480. Though we resolve all reasonable inferences in favor of the non-moving party, "a mere scintilla of evidence in support of the non-moving party's claim is insufficient to avoid the grant of summary judgment." *Danielewicz v. Arnold*, 137 Md. App. 601, 612–13 (2001).

Whether evidence constitutes hearsay is an issue of law reviewed de novo. *Gordon v. State*, 431 Md. 527, 533 (2013). "In deciding whether a hearsay exception is applicable, we review the trial judge's ruling for legal error rather than for abuse of discretion; that is because hearsay is never admissible on the basis of the trial judge's exercise of discretion." *Thomas v. State*, 429 Md. 85, 98 (2012). Because "not all aspects of a hearsay ruling need be purely legal[,]" *Gordon*, 431 Md. at 536, "we review [a circuit court's decision to admit hearsay under an exception] for abuse of discretion or clear error if it involves factual or discretionary determinations." *Colkley v. State*, 251 Md. App. 243, 290 (2021). That said, this "two-dimensional approach" to hearsay rulings[16] flattens in the context of summary judgment. This is because a circuit court may not resolve any factual issues at the summary judgment level. *See Webb v. Joyce Real Est., Inc.*, 108 Md. App. 512, 521 (1996) ("[B]ecause the summary judgment procedure may be used only to determine whether there exists a factual dispute requiring a trial, the circuit court may not resolve any factual issues and the standard for appellate review is whether its decision was legally correct." (citation omitted)).

MR. BURBEY'S CONTENTIONS

Mr. Burbey argues that in granting summary judgment in favor of Ms. Warner, the circuit court ignored evidence from which a jury could conclude that Ms. Warner exercised undue influence over Ms. Jackman. Specifically, Mr. Burbey contends that it was Ms. Warner, not Ms. Jackman, who contacted Ms. Shaffer and requested the drafting

[16] *Gordon*, 431 Md. at 538.

of a POA for Ms. Jackman; that Ms. Jackman had memory issues; that Mr. Burbey had interactions with Ms. Jackman in 2019 that caused him concern for her wellbeing; that Mr. Burbey believed Ms. Jackman needed to be evaluated; that Mr. Burbey sought guardianships in 2019 and 2021; and that Ms. Warner refused to, and was court-ordered to, cooperate in getting physicians' certificates during the 2021 guardianship petition. From these facts, Mr. Burbey argues, "one could surely draw an inference of undue influence."

Mr. Burbey also argues that the court erred in concluding that Ms. Shaffer's testimony was admissible hearsay under the state of mind exception. According to Mr. Burbey, the circuit court misapplied *Edery* because, unlike the facts of that case, Ms. Shaffer's testimony did not constitute "the only means" the court possessed to determine Ms. Jackman's intentions— the court also had the 1978 will to use for that purpose. Mr. Burbey points to *Figgins v. Cochrane*, 403 Md. 392 (2008), to support his argument that "statements made to a lawyer, by a decedent, used to explain the actions of a third party are hearsay and not subject to the state of mind exception." Mr. Burbey contends that, under *Figgins,* it was error for the circuit court to rely on Ms. Shaffer's testimony about Ms. Jackman's statements to grant summary judgment.

Mr. Burbey also argues that the life estate deeds were *inter vivos* gifts, rather than testamentary gifts, because Ms. Warner transferred remainder interests for no consideration. This was a violation of the POA, Mr. Burbey contends, because Ms. Jackman's POA prohibits the agent from making gifts of Ms. Jackman's assets unless

necessary for receiving public benefits. If the life estate deeds constitute gifts, then Ms. Warner, in signing the deeds and not applying for public benefits on behalf of Ms. Jackman, transgressed her authority under the POA, and is not protected from liability by ET § 17-113.

Treating the life estate deeds as testamentary transfers, rather than *inter vivos* gifts, is a mistake, Mr. Burbey contends, because doing so means that the burden for proving whether the consideration for the deeds was adequate will not shift back to the agent. As a consequence, Mr. Burbey concludes, the agent will never be held accountable for their conduct:

> If this Court adopts the Appellees' theory that a grant of a remainder interest is the same as a will, then agents will be permitted to convey property to a life estate, reserve the remainder and avoid all accountability for their conduct – a result that the law should not permit.

DISCUSSION

Appearing in Title 17 of the Estates and Trusts Article, the Maryland General and Limited Power of Attorney Act (the "Act") outlines the duties of an agent acting under a power of attorney as well as the protections they receive for their actions. When an agent acts as authorized by the power of attorney and in accordance with what they know their principal reasonably expects, among other requirements, an agent is not liable to beneficiaries of the principal's estate plan for failure to preserve their principal's estate plan. Subsections (a) and (b) of Section 17-113 outline the agent's duties. These subsections provide:

(a) Notwithstanding provisions in the power of attorney, an agent that has

accepted appointment shall:

(1) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest;

(2) Act with care, competence, and diligence for the best interest of the principal; and

(3) Act only within the scope of authority granted in the power of attorney.

(b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(1) Act loyally for the principal's benefit;

(2) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(4) Cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(5) Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(i) The value and nature of the principal's property;

(ii) The principal's foreseeable obligations and need for maintenance;

(iii) The extent to which the principal's liability for taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes, can be minimized; and

(iv) The principal's eligibility for a benefit, a program, or assistance under a statute or regulation.

ET § 17-113.

Subsections (c) and (d) spell out the circumstances under which the agent is protected for her actions:

(c) An agent that acts as provided in this section is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits

> from an act taken by the agent or has an individual or conflicting interest in relation to the property or affairs of the principal.

ET § 17-113.

The Act also provides mechanisms by which the court may review the conduct of an agent suspected of misusing or abusing their authority under a power of attorney. On the filing of a petition, Section 17-103(a) permits a court to "construe a power of attorney or review the agent's conduct, and grant appropriate relief." *Matter of Jacobson*, 256 Md. App. 369, 398–99 (2022) (discussing the legislative purpose of the Act). Such a petition may be filed by the principal, the principal's family members, would-be beneficiaries of the principal's estate, and other enumerated individuals or entities in the principal's circle.[17]

"Freestanding" claims that an agent has exercised undue influence, *i.e.*, claims that are not tethered to the execution of the power of attorney itself, can get little traction in the face of Section 17-103. For example, a competent principal can have a petition to review the conduct of their agent dismissed. ET § 17-103(b) ("On motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney."). Undue influence claims that are based on nothing more than bald, conclusory

[17] Similarly, Section 17-102 allows certain individuals and entities, including the personal representative of a deceased principal's estate, to request that an agent disclose receipts, disbursements, or transactions conducted by the agent on the principal's behalf, ET § 17-102(b)(1), and to petition a court to order compliance if need be. ET § 17-102(b)(2).

allegations are dismissed for failure to state a claim. *See, e.g.*, *Matter of Jacobson*, 256 Md. App. at 404. And, even if a petitioner can state a claim, the agent will not be liable for her conduct if she satisfies the requirements of Sections 17-113(c) or (d).

To the extent that Mr. Burbey argues that evidence of Ms. Warner's undue influence rendered summary judgment inappropriate, Mr. Burbey's argument fails. Disputed facts (or inferences) preclude summary judgment only if those facts or inferences "will alter the outcome of the case, depending upon how the fact-finder resolves the disputes." *Injured Workers' Ins.*, 190 Md. App. at 451; *see also* Md. Rule 2-501(b) ("A response to a motion for summary judgment . . . shall (1) identify with particularity each *material fact* as to which it is contended that there is a genuine dispute . . . ." (emphasis added)). Mr. Burbey's facts, even if proven, were not material to determining whether Ms. Warner was entitled to liability protection under Sections 17-113(c) and (d). As the circuit court explained, there was no dispute about Ms. Warner's entitlement to this protection:

> Further, [the] Court finds that Ms. Jackman's statements show that Ms. Warner did act pursuant to her [POA] for Ms. Jackman and followed her wishes in conveying [her] properties through life estate deeds. Lastly, regardless of whether a confidential relationship existed, S[ubs]ections 17-113(c) & (d) of the Maryland Power of Attorney Act immunize[] Warner against these claims brought by Plaintiff Burbey.
>
> . . .
>
> Under Section 17-113 (c), [Ms.] Warner is not liable to Mr. Burbey for following the wishes of Ms. Jackman, despite the fact that these wishes contradicted her desires in the 1978 Will. Under Section 17-113 (d), [Ms.] Warner is not liable merely because she benefitted from an action that she undertook as an Agent pursuant to the [POA] for Ms. Jackman.

Thus, even if Mr. Burbey had suspected that Ms. Jackman needed a guardian, or that Ms. Warner failed to assist in that effort by securing physicians' certificates, that evidence is not material to determining whether Ms. Warner was entitled to the liability protection of Sections 17-113(c) or (d). At oral argument, Mr. Burbey conceded that the POA is valid.[18] In his opposition to Ms. Warner's summary judgment motion, and looking to the time period after Ms. Jackman signed the POA and before Ms. Warner signed the life estate deeds, Mr. Burbey did not allege anything in Ms. Warner's conduct or otherwise that would have invalidated the life estate deeds. In other words, although Mr. Burbey put forward facts in his opposition to summary judgment, his facts were not enough to preclude summary judgment in favor of Ms. Warner.

Mr. Burbey next argues that the circuit court's conclusion that Ms. Warner "followed [Ms. Jackman's] wishes in conveying [her] properties through life estate deeds" was error because it was based on inadmissible hearsay not covered by a hearsay exception. Returning to Mr. Burbey's argument on this point, he points to Ms. Shaffer's testimony and argues that it is inadmissible under *Figgins v. Cochrane*, 403 Md. 392 (2008), because "statements made to a lawyer, by a decedent, used to explain the actions of a third party are hearsay and not subject to the state of mind exception." Accordingly, argues Mr. Burbey, because Ms. Shaffer's testimony is inadmissible, it was error to rely on it in concluding that Ms. Warner was protected from Mr. Burbey's claims.

[18] At oral argument, Mr. Burbey's counsel stated, "We do not challenge the power of attorney."

To be sure, the circuit court cannot consider inadmissible evidence when determining whether to grant summary judgment. Md. Rule 2-501(c) ("An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth *such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." (emphasis added)); *Washington Mut. Bank v. Homan*, 186 Md. App. 372, 390 (2009) ("The moving party is always required to support his or her various contentions by placing before the court facts that would be admissible in evidence . . . ." (cleaned up)).

Hearsay is not admissible except if it is. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay is not admissible "[e]xcept as otherwise provided by [the Maryland Rules] or permitted by applicable constitutional provisions or statutes[.]" Md. Rule 5-802. We refer to this as "the hearsay rule." It has many "exceptions." *See* Md. Rules 5-802.1, 5-803, & 5-804. If hearsay evidence meets one of these "exceptions," it is not excluded by "the hearsay rule."

To the extent that Ms. Jackman told Ms. Shaffer what Ms. Jackman expected regarding her four properties, Ms. Jackman's statements (expressed by Ms. Shaffer) were admissible under the "state of mind" exception to the hearsay rule. *See* Md. Rule 5-803(b)(3). This exception allows into evidence statements of the out-of-court declarant's then-existing "state of mind" in order to prove "the declarant's then existing condition or

the declarant's future action." *Id.*[19]; *see also Edery*, 193 Md. App. at 237 (decedent's statements about where she wished to be buried, which decedent made to her children before she died, were admissible under the state of mind exception and relevant under Section 5-509(c) of the Maryland Health-General Article to determining whether the decedent had given "contrary directions" regarding the disposition of their body).

In *Edery*, we cited with approval Professor Lynn McClain's explanation for the state of mind exception:

> When the declarant's state of mind is relevant, ... the declarant's assertion as to his or her state of mind is admissible to prove that the declarant had that particular state of mind (emotion, feeling, etc.) and therefore also had it at the time relevant to the case. . . . Direct assertions by the declarant as to the declarant's state of mind are admissible under this hearsay exception. Statements that provide circumstantial evidence of the declarant's state of mind are not excluded by the hearsay rule either, but this is because they are nonhearsay, as they are not offered to prove the truth of the matter asserted.

Edery, 193 Md. App. at 234 (citing 6A Lynn McClain, *Maryland Evidence* § 803(3):1 at 198–99 (2001) (footnotes omitted)).

Here, Ms. Jackman's statements (as told to Ms. Shaffer) were admissible under the

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[19] This rule allows for certain hearsay statements regarding "Then Existing Mental, Emotional, or Physical Condition" to be admitted:

> 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), offered to prove the declarant's then existing condition or the declarant's future action, but not including 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.

Md. Rule 5-803(b)(3).

"state of mind" exception because, as the circuit court found, they "define[d] the expectations of Ms. Jackman." Ms. Shaffer affied that, as to the properties (and other estate planning), Ms. Jackman told Ms. Shaffer what she (Ms. Jackman) wanted and why:

> Ms. Jackman told me about the real properties that she owned and whom she wanted to get each such property. She told me that she did not want Ryan to get "one penny," and that she wanted to leave him out altogether in terms of her estate planning from getting any of the real property or other assets.
>
> . . . Ms. Jackman told me about what she called Ryan's "shenanigans." She explained that Ryan was basically estranged from the family. Ms. Jackman was also angry at Ryan for filing court proceedings in which he tried to become her guardian. Ms. Jackman said that Ryan was not fiscally responsible and that she did not want him in charge of her finances.
>
> . . . Ms. Jackman was clear at the meeting that she wanted Ms. Warner to get a piece of real property and each of her grandsons to get a real property, and she specified who was to get which property. Ms. Jackman also was clear that she wanted an adult on each deed to a grandchild because of their young age, and that should be Ms. Warner.

In short, Ms. Jackman's statements expressed what she wanted at the time (Ms. Jackman's then existing condition), and what Ms. Jackman wanted was relevant to determining whether Ms. Warner had "[a]ct[ed] in accordance with [Ms. Jackman's] reasonable expectations to the extent actually known by [Ms. Warner,]" as required by Section 17-113(a).

Figgins v. Cochrane, the case on which Mr. Burbey relies, is distinguishable because the out-of-court statement at issue there was not offered to prove the out-of-court's declarant's "then existing condition" as it was here. Nor was there any evidence about the out-of-court "declarant's future action." *See* Md. Rule 5-803(b)(3). In *Figgins*, the decedent's will conveyed his house to his son, but soon after the decedent fell into a coma, and just days before his death, his daughter and attorney-in-fact (Ms. Figgins)

transferred the house to herself for no consideration. *Figgins*, 403 Md. at 395. During trial, the decedent's attorney was questioned regarding a meeting with the decedent and Ms. Figgins a month before the decedent's death. *Id.* at 419. According to counsel's proffer, the attorney would testify to the decedent's statements that he (the decedent) wished to transfer his property directly to his daughter. *Id.* Sometime after that meeting, the attorney prepared a deed conveying the house to the daughter, but the deed was not executed until—five days after the decedent lapsed into a coma—the daughter "returned to [the attorney's] office, signed the deed, which conveyed the property to herself, purportedly under the Power of Attorney, and immediately drove to the Land Records Office to record it." *Id.* at 400 (footnote omitted).

Our Supreme Court (and this Court) affirmed the trial judge's exclusion of this evidence as inadmissible hearsay not within the state of mind exception. *Id.* at 422; *Figgins,*, 174 Md. App. at 42–43. The Supreme Court explained "[t]hat statements of the intention of one person cannot be used to prove the basis for another's conduct is well-grounded in our jurisprudence and that of our intermediate appellate court." *Figgins*, 403 Md. at 421. Along these lines, when the case was before us, we explained that

> In its forward-looking capacity, the Father's state of mind was never offered to prove or to interpret any future action by him. He fell into a coma and took no future action. Under Maryland law, his October 26, 2004 state of mind could not be used to prove or to explain the future action of someone else, either the appellant or the lawyer.
>
> The Father's intention on October 26, 2004, is immaterial because, whatever he may have intended to do, he never did it.

Figgins, 174 Md. App. at 42–43.

Here, unlike in *Figgins*, the declarant's out-of-court statement was not offered to prove the declarant's future action. Instead, Ms. Jackman's out-of-court statement was offered to prove what Ms. Jackman reasonably expected, i.e., her "then existing condition." What Ms. Jackman reasonably expected is a fact made relevant in and of itself by the Maryland General and Limited Power of Attorney Act, specifically Sections 17-113(a) and (c).[20] These subsections require an attorney-in-fact to "[a]ct in accordance with the principal's reasonable expectations" and protect an attorney-in-fact from liability when they do so, among other requirements. Under these subsections, evidence of Ms. Jackman's "reasonable expectations" (i.e., Ms. Jackman's "then existing condition") was admissible regardless of whether Ms. Jackman ever took any future action in furtherance of her reasonable expectations. Accordingly, we see no error in the circuit court's having predicated summary judgment in favor of Ms. Warner in part on Ms. Jackman's out-of-court statements, as expressed to Ms. Shaffer and recounted in Ms. Shaffer's testimony.[21]

[20] Maryland's General and Limited Power of Attorney Act was not the law when *Figgins* was decided. It was enacted two years later, in 2010, and became effective on October 1, 2010. We do not suggest that the Act was enacted in response to *Figgins*, however. Nor have we found anything in the Act's legislative history to suggest as much.

[21] Ms. Jackman's statements to Ms. Shaffer were also admissible as nonhearsay "operative facts." When an out-of-court statement is used to prove a vital component of a claim, charge, or defense—like notice or assumption of risk—that statement is nonhearsay. *See Banks v. State*, 92 Md. App. 422, 432 (1992). These types of statements are not hearsay because they are offered to prove not the truth of what is being said, but something else. *Id.* ("Since the law accords the making of such statements a certain legal effect, the sincerity and reliability of the declarant is of no consequence; the simple fact that such statements are made is relevant.").

Ms. Shaffer's testimony is not hearsay because it tended to show three operative

Mr. Burbey next argues that in determining whether there was a genuine dispute of fact regarding Ms. Jackman's wishes, the circuit court erred by failing to consider Ms. Jackman's 1978 will. In other words, the life estate deeds reduced what Mr. Burbey was to inherit as one-half beneficiary of Ms. Jackman's estate under the 1978 will. In support of this contention, he supplied a copy of Ms. Jackman's 1978 will and the life estate deeds.

But these facts, undisputed as they were, were not material to Ms. Warner's entitlement to protection from liability as Ms. Jackman's agent. Under Section 17-113(c), an agent is "not liable to any beneficiary of the principal's estate plan for failure to preserve the plan." ET § 17-113(c). Thus, even though the life estate deeds had the effect of not preserving Ms. Jackman's estate plan as stated in her 1978 will, that fact, because it was immaterial to defeating Ms. Warner's claim for liability protection, was not a basis to deny summary judgment. Md. Rule 2-501(b) (requiring that a response to a summary judgment motion "identify with particularity *each material fact* as to which it is contended that there is a genuine dispute" (emphasis added)).

Mr. Burbey next argues that Section 17-113(c) does not protect Ms. Warner from liability because signing the life estate deeds was contrary to the authority granted her by

facts under Section 17-113: (1) what Ms. Jackman's "reasonable expectations" were, an "operative fact" under Section 17-113(a) requiring that Ms. Warner act in accordance with Ms. Jackman's reasonable expectations; (2) whether Ms. Warner "actually knew" what Ms. Jackman's reasonable expectations were, another "operative fact" under Section 17-113(a); and (3) that Ms. Warner might not be liable to Mr. Burbey because she had acted "as provided in [Section 17-113,]" an "operative fact" under Section 17-113(c).

the POA. Specifically, Mr. Burbey contends that the POA's "Special Instructions" "expressly prohibit[] the agent from making any gifts unless doing so is necessary for pursuing public benefits" for Ms. Jackman. Mr. Burbey adds that the life estate deeds amount to *inter vivos* gifts that violate the "no gifts" provision of the POA.

Read plainly, the "gift" clause upon which Mr. Burbey relies does not have the effect Mr. Burney and the Estate suggest. The POA generally authorized Ms. Warner to "to do all acts that [Ms. Jackman] could do" including to "[e]xecute, acknowledge, seal, deliver, file, or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction[,]" and "[d]o lawful acts with respect to the subject and all property related to the subject." As for qualifying for public benefits, the POA's Special Instructions said, "I authorize my agent to make gifts of my assets in order to qualify me for public benefits."

Like the circuit court, we do not read the Special Instructions to prevent the giving of gifts except in order to qualify Ms. Jackman for public benefits. Instead, we agree that that language simply defines a time when the agent *could* make a gift, i.e., when it is necessary in order to qualify Ms. Jackman for public benefits. We do not read this clause to prevent gifting at other times, provided that gifting is a "lawful act" with respect to the gifted property, as the POA provides in its general instructions.

Even if the POA could be read in the restrictive way that Mr. Burbey suggests, i.e., to prevent gifts except for the purpose of qualifying Ms. Jackman for public benefits,

the life estate deeds[22] were not *inter vivos* gifts. With an *inter vivos* gift, nothing can be reserved by the owner in making the gift. Our Supreme Court described the features of an *inter vivos* gift in *Pomerantz v. Pomerantz*:

> It has been decided frequently by this court to make a gift inter vivos perfect and complete there must be an actual transfer of all right and dominion over it by the donor and acceptance by the donee, or by some competent person for him, and that the transfer of the gift should go into effect at once and completely. If the transfer is to be at a future time, it is only a promise without consideration and cannot be enforced either at law or in equity. The law will not recognize a gift where there is reserved to the donor, either expressly or as a result of circumstances, a power of revocation or dominion over the subject of the gift. There can be no locus poenitentiae, and there is a locus poenitentiae when the supposed donor may at any moment undo what he has done. The donor must have done everything which it was possible for him to do to complete and perfect the gift.

179 Md. 436, 439–40 (1941). This is not so for a testamentary gift. *Upman v. Clarke*, 359 Md. 32, 44 (2000) ("A testamentary gift is different. Obviously, persons can no longer enjoy property after their death; they suffer no loss from a testamentary gift.").

The life estate deeds at issue here are not *inter vivos* gifts because they "expressly reserv[ed]" to Ms. Jackman virtually complete control of the properties until her death. For the Mountain Road property, for example, the life estate deed provided as follows:

[22] "A deed with a life estate is often used in estate planning as a way to avoid probate. It allows the remaindermen to become the full owners of the property immediately upon the death of the life tenant, thereby saving the time and expense of the probate process." *Grimes*, 232 Md. App. at 233. The key characteristic of life estate deeds is the "virtually complete control" the owner retains during her lifetime. Danaya C. Wright & Stephanie L. Emrick, *Tearing Down the Wall: How Transfer-on-Death Real-Estate Deeds Challenge the Inter Vivos/Testamentary Divide*, 78 Md. L. Rev. 511, 519 (2019) ("Because no property interests vest in the beneficiary until the transferor's death, the transferor retains complete control to amend, modify, or revoke the beneficiary designation during the transferor's lifetime.").

> **THIS LIFE ESTATE DEED** is made on this 10th day of February, 2021 by **LOUISE L. JACKMAN**, a resident of the State of Maryland, Grantor, unto the same **LOUISE L. JACKMAN**, a resident of the State of Maryland, Grantee.
>
> **FOR NO CONSIDERATION** but love and affection between a mother and her son, the Grantor grants and conveys to **LOUISE L. JACKMAN**, for life, expressly reserving the power to sell, transfer, convey or mortgage the property, and upon her demise the remainder to her son, **RYAN DAVID BURBEY**, in fee simple, all that lot of ground situate and lying in the 3rd ELECTION DISTRICT of Harford County, State of Maryland, and described on Exhibit A, attached hereto and incorporated by reference herein.[23]

[23] The life estate deeds pertaining to the Bynum Ridge Road and Post Road properties both reserved the same powers to Ms. Jackman. The Bynum Ridge Road deed provided:

> **THIS LIFE ESTATE DEED** is made on this 10th day of February, 2021 by **LOUISE L. JACKMAN**, a resident of the State of Maryland, Grantor, unto the same **LOUISE L. JACKMAN**, a resident of the State of Maryland, Grantee.
>
> **FOR NO CONSIDERATION** but love and affection between a mother and her daughter and grandson, the Grantor grants and conveys to **LOUISE L. JACKMAN**, for life, expressly reserving the power to sell, transfer, convey or mortgage the property, and upon her demise the remainder to her daughter and grandson, **ALISON WARNER** and **NICHOLAS C. WARNER**, as joint tenants with the right of survivorship, and unto personal representatives, heirs and assigns of the survivor of them, in fee simple, all that lot of ground situate and lying in the 3rd ELECTION DISTRICT of Harford County, State of Maryland, ...

The Post Road deed provided:

> **THIS LIFE ESTATE DEED** is made on this 10th day of February, 2021 by **LOUISE L. JACKMAN**, a resident of the State of Maryland, Grantor, unto the same **LOUISE L. JACKMAN**, a resident of the State of Maryland, Grantee.
>
> **FOR NO CONSIDERATION** but love and affection between a mother and her daughter and grandson, the Grantor grants and conveys to **LOUISE L. JACKMAN**, for life, expressly reserving the power to sell, transfer, convey or mortgage the property, and upon her demise the remainder

By granting and conveying to herself, for her life, "the power to sell, transfer, convey or mortgage the property," Ms. Jackman maintained "a power of revocation or dominion over the subject of the gift." *See Pomerantz*, 179 Md. at 439–40. Because the life estate deeds did not effectuate *inter vivos* gifts, Ms. Warner, by executing the life estate deeds, did not transgress her authority under the POA (even if it prohibited the giving of gifts for purposes other than to qualify Ms. Jackman for public benefits).

Ultimately, we see no error in the circuit court's granting summary judgment to Ms. Warner. Below, Ms. Warner established her entitlement to protection from Mr. Burbey's claims as a matter of law. Although Mr. Burbey identified evidence to suggest that what Ms. Warner had done was improper, he did not dispute the basic facts that Ms. Warner had acted under a POA executed by Ms. Jackman, that that POA was valid, and that when Ms. Warner conveyed the life estates, she did so "in accordance with" what she actually knew to be Ms. Jackman's reasonable expectations. We affirm.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.

> to her daughter and grandson, **ALISON WARNER** and **ARVIL ELIJAH BURBEY**, as joint tenants with the right of survivorship, and unto personal representatives, heirs and assigns of the survivor of them, in fee simple, all that lot of ground situate and lying in the 2nd ELECTION DISTRICT of Harford County, State of Maryland, described as follows: . . . .

Though the Octoraro Road life estate deed is not in the record, we assume it reserved the same powers to Ms. Jackman.