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2012 IL App (4th) 111125-U

Filed 8/20/12

NO. 4-11-1125

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of E. PEARL FISHER,)	Appeal from
Deceased,)	Circuit Court of
BRENDA FAY FISHER,)	Champaign County
Petitioner-Appellant,)	No. 06P252
v.)	
REBECCA ROSE FISHER,)	Honorable
Respondent-Appellee.)	Brian L. McPheters,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices McCullough and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's grant of summary judgment in respondent's favor, concluding that (1) the Dead-Man's Act applied to the petitioner's tortious-interference-with-an-inheritance-expectancy claim; (2) no genuine issues of material fact existed with regard to petitioner's will contest and expectancy claim; and (3) even if respondent was in a fiduciary relationship with the decedent, that fact, without more, was insufficient to preclude the trial court's grant of summary judgment.

¶ 2 In September 2006, E. Pearl Fisher died, leaving a will that named respondent, Rebecca Rose Fisher, Pearl's daughter, the executrix of her estate. Rebecca later filed a petition for probate of will and for letters testamentary. In March 2007, petitioner, Brenda Fay Fisher, and two of her siblings filed a joint contest of admission of will to probate, alleging, in pertinent part, that over a period of time, Rebecca, their sister, engaged in various acts that "wrongfully induced" Pearl to change her will to make Rebecca the sole beneficiary of Pearl's estate.

(Brenda's siblings later withdrew from the joint complaint.)

¶ 3 In January 2011, Brenda also filed a separate "amended complaint for count II tortious interference with an inheritance expectancy," claiming that Rebecca's "duress or undue influence" caused Pearl to change her will, which deprived Brenda of certain farm property and money she was expecting to inherit from Pearl's estate.

¶ 4 In February 2011, Rebecca filed a motion for summary judgment. Following an April 2011 hearing, the trial court entered a written order granting summary judgment in Rebecca's favor on both Brenda's claims. In particular, the court found that no genuine issue of material fact existed because the evidence Brenda presented to support her claims consisted primarily of statements Pearl made to her, which were barred by the Dead-Man's Act (735 ILCS 5/8-201 (West 2010)).

¶ 5 Brenda appeals, arguing that the trial court erred by granting summary judgment in Rebecca's favor. We disagree and affirm.

¶ 6 I. BACKGROUND

¶ 7 A. The Pertinent Events That Prompted Brenda's Claims

¶ 8 During Pearl's marriage to James D. Fisher, she gave birth to six children who have since reached adulthood. At the time of James' death in June 1994, his will stated, in pertinent part, that Pearl was to receive several hundred acres of farmland "for and during the terms of her natural life, with the remainder therein after her death to my children." Included in James' real estate holdings was an 80-acre parcel of farmland (hereinafter, the Argo farm), which was improved with a house where Brenda has resided since 1982. From November 1995 through October 2004, Pearl purchased the vested remaining interest in the farmland James bequeathed to

four of her children (those four adults are not a party to this appeal). Brenda declined to sell her vested interest to Pearl.

¶ 9 In February 1997, Pearl executed a will (1997 will) in which she named Brenda the executrix of her estate. Pearl's 1997 will also bequeathed either real estate, personal property, or both to each of her children. In particular, Pearl (1) bequeathed to Brenda the Argo farm, the remaining funds from a bank account, and certain personal property, and (2) bequeathed to Rebecca the remaining farmland (over 300 acres) and certain personal property.

¶ 10 On October 21, 2002, Pearl contacted attorney Nolan C. Craver, Jr., seeking to (1) terminate a farm lease with Chris Wilson and (2) revoke the power of attorney Pearl had previously granted to Brenda. Craver explained that Pearl was not satisfied with Wilson's performance or Brenda's attitude. Two days later, Craver personally delivered the appropriate paperwork to Pearl's home and obtained her signatures. While there, Pearl informed Craver that she had recently opened a joint bank account with Rebecca and that she required Nolan's assistance in changing the terms of her 1997 will. Craver asked Rebecca—who had lived in Pearl's home her entire life—to leave the room so that he could discuss Pearl's request with her privately. Thereafter, Craver informed Pearl that he would assist her provided that Pearl knew the nature and extent of her estate and that she was not under any undue influence or stress.

¶ 11 On October 25, 2002, Craver arrived at Pearl's home as Rebecca was leaving. Craver described the events that followed:

"At [Pearl's] residence were Mrs. Sara [Routh-]Ingram[,] her husband[,] and Lydia Beebe[. Sara] and Lydia *** had known [Pearl] for a number of years, and had visited with her frequently.

I asked [Pearl] to review the Last Will and Testament that I prepared, which she did, and then I asked her if she understood that it left everything to Rebecca, and that she had [five] other children, and [Pearl] acknowledged that she was aware of that, and that is what she wanted. I then asked [Pearl] if she knew the nature and extent of her estate, and if she realized that she owned several hundred acres of farmland, and she said, "yes", and that she wanted everything to go to Rebecca. I then asked [Pearl] if she wanted [Sara] and [Lydia] to sign her Last Will and Testament as witnesses, and she said, "yes[.]" [Pearl] then signed her Last Will and Testament and [Sara] and [Lydia] signed as witnesses. [Sara] then left the property, and I, at [Pearl's] request, had prepared a Power of Attorney from [Pearl] to Rebecca, which [Pearl] signed and I notarized and [Lydia] signed as a witness. I then left the premises, and believe that is the last time I saw [Pearl], although I talked to her on numerous occasions ***."

¶ 12 In her affidavit, Sara confirmed Nolan's account of the events surrounding the signing of Pearl's will (2002 will), adding that Pearl often told her she (1) appreciated that Rebecca decided to reside with her, (2) was proud of Rebecca, and (3) was disturbed by the money, land, and vehicles that Brenda, as well as her other children, demanded of her. Sara "never observed Pearl conduct herself in a manner that suggested she was being manipulated, influenced, or otherwise directed by [Rebecca]." Sara added that "[r]ather than direct [Pearl's]

actions," she observed that Rebecca "was compliant with [Pearl's] wishes."

¶ 13 Lydia's affidavit also confirmed Nolan's account of the events surrounding the signing of Pearl's will, adding, as follows:

"At the time that I observed Pearl sign her Will, I believe that Pearl *** was of sound mind and body, knew who her children were, knew that she owned real estate and other assets, understood the effect of the provisions contained in her Will, and was not under any observable mental impediment that would have prevented her from exercising her free will."

¶ 14 Ron Eltzerth, a close friend of both James and Pearl for approximately 20 years, stated that Pearl was "very well-qualified as a decision maker, for financial matters." With regard to the joint bank account Pearl shared with Rebecca, Ron commented as follows: "I can assure all inquirers [Pearl] was a strong[-]minded individual, with a sense of determination to succeed in financial matters. She was certainly not an individual to be intimidated or coerced into any action in which she was not completely comfortable in doing." Ron noted that although Pearl's health declined significantly in the last year of her life, Rebecca provided Pearl "excellent care and assistance." Ron observed that Pearl's other children "provided little, if any, assistance to Pearl, particularly during the last years of Pearl's life." Ron recounted that James and Pearl were proud of Rebecca.

¶ 15 B. Brenda's Claims

¶ 16 Following Pearl's death in September 2006, Rebecca filed a petition for probate of will and for letters testamentary. In March 2007, Brenda, along with two of her siblings, filed a

joint contest of admission of will to probate, alleging, in pertinent part, that over a period of time, Rebecca engaged in various acts that "wrongfully induced" Pearl to change her will to make Rebecca the sole beneficiary of her estate. (In July 2009, the two siblings withdrew from the joint complaint.)

¶ 17 In January 2011, Brenda also filed a separate "amended complaint for count II tortious interference with an inheritance expectancy," claiming that Rebecca's "duress or undue influence" caused Pearl to change her will, which deprived Brenda of certain farm property and money she was expecting to inherit from Pearl's estate. (The record shows that Brenda received another parcel of farmland that satisfied her vested remaining interest bequeathed to her by James; neither Brenda's vested interest nor the parcel of land in satisfaction of that interest are at issue in this appeal.)

¶ 18 In her affidavit, Brenda contended, in pertinent part, that in 1982, she rented the home located on the Argo farm from its owners. In 1987, James and Pearl purchased the 80-acre Argo farm, including the home, and Brenda continued to live on that property. Brenda stated that from February 1997 through October 2002, Pearl never told her that she was not receiving the Argo farm, despite speaking with her "several times per week." Based on her "regular interactions with [Pearl] after the execution of the 1997 will," Brenda asserted that "it was obvious Rebecca exerted control and dominion over her."

¶ 19 In support of her assertions, Brenda claimed that Rebecca (1) "vehemently" objected when her siblings attempted to visit Pearl, (2) threatened that she would prevent Brenda from visiting Pearl if Brenda made negative comments about Rebecca to Pearl, (3) installed caller identification on Pearl's home phone to "monitor" her calls, and (4) refused to deliver

Pearl's mail to the post office if it contained charitable donations from Pearl. Brenda also asserted that Pearl told her that Rebecca had made the following statements: (1) Brenda and her other siblings only visited with Pearl because they wanted money; (2) to fulfill James' intent, the separate farm tracts should be bequeathed to Rebecca so that they can be "held together;" and (3) Pearl had to change her 1997 will because it was invalid.

¶ 20 Chris, Pearl's former farm tenant, stated that in September 2002, he attempted to contact Pearl by phone regarding the 2003 planting season. Rebecca answered and informed Chris that the acreage that he could farm next season would be reduced. When Chris reminded Rebecca that his agreement was with Pearl, Rebecca stated that she had assumed management of the farmland. Chris told Rebecca that farming a reduced acreage would be financially unsustainable for him. In November 2002, Chris relinquished possession of the farmland.

¶ 21 C. Rebecca's Motion for Summary Judgment and
the Trial Court's Determination

¶ 22 In February 2011, Rebecca filed a motion for summary judgment. Following an April 2011 hearing, the trial court entered a written order granting summary judgment in Rebecca's favor on both of Brenda's claims. In particular, the court found that no genuine issue of material fact existed because the evidence Brenda presented to support her claims consisted primarily of statements Pearl made to her, which were barred by the Act.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Brenda argues that the trial court erred by granting summary judgment in Rebecca's favor. Specifically, Brenda contends that (1) because she sued Rebecca for tortious

interference with an inheritance expectancy as an individual instead of in her capacity as the executrix of Pearl's estate, Rebecca was not entitled to the protections of the Act; (2) genuine issues of material fact existed to preclude the court's grant of summary judgment with regard to her will contest and expectancy claim; and (3) the presumption of impropriety attached to Rebecca by virtue of her fiduciary relationship with Pearl creates a genuine issue of material fact sufficient to preclude the court's grant of summary judgment. We address Brenda's contentions in turn.

¶ 26 A. Summary Judgment and the Standard of Review

¶ 27 "Summary judgment is only proper where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, reveal no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law." *Farmers Automobile Insurance Ass'n v. Burton*, 2012 IL App (4th) 110289, ¶ 14, 967 N.E.2d 329. The appropriateness of a grant of summary judgment concerns the movant's right, which must be clear and free from doubt. *Burton*, 2012 IL App (4th) 110289, ¶ 13, 967 N.E.2d 329. We review *de novo* the trial court's grant of a motion for summary judgment. *Continental Casualty Co. v. Howard Hoffman and Associates*, 2011 IL App (1st) 100957, ¶ 27, 955 N.E.2d 151.

¶ 28 B. The Pertinent Portions of the Act and the Rationale for Its Enactment

¶ 29 Section 8-201 of the Act provides, in part, as follows:

"In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the

action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability." 735 ILCS 5/8-201 (West 2010).

The Act also provides the following definitions:

" 'Representative' means any executor, administrator, heir or legatee of a deceased person and any guardian or trustee of any such heir or legatee, or a guardian or guardian ad litem for a person under legal disability." 735 ILCS 5/8-201 (West 2010).

¶ 30 "The purposes of the Act are to protect decedents' estates from fraudulent claims and to equalize the position of the parties in regard to the giving of testimony." *Gunn v. Sobucki*, 216 Ill. 2d 602, 609, 837 N.E.2d 865, 869 (2005). The Act bars only that evidence which the decedent could have refuted. *Id.* The question in every case is whether the testimony proffered by the party witness will benefit him as against the party protected by the Act. A disqualifying interest under the Act must be a legal interest that is direct, certain, and immediate, so that the party will gain or lose as a result of the suit. *Herron v. Underwood*, 152 Ill. App. 3d 144, 153, 503 N.E.2d 1111, 1118 (1987).

¶ 31 C. Brenda's Claim That the Act Was Not Applicable to Her Tortious Interference With an Inheritance Expectancy Suit

¶ 32 Brenda contends that because she sued Rebecca for tortious interference with an inheritance expectancy as an individual instead of in her capacity as the executrix of Pearl's estate, Rebecca was not entitled to the protections of the Act. We disagree.

¶ 33 In support of her contention, Brenda cites *Kernott v. Behnke*, 311 Ill. App. 389, 393-98, 36 N.E.2d 575, 577-79 (1941), for the proposition that a defendant who is sued as an individual is not entitled to invoke the protections of the Act on the grounds that the defendant claims the property as executrix of the estate. However, *Kernott* is distinguishable.

¶ 34 In *Kernott*, 311 Ill. App. at 390-94, 36 N.E.2d at 576-77, the petitioner brought a replevin suit against the respondent, alleging ownership of 25 shares of company stock that the petitioner claimed she received from the decedent, her mother, as an *inter vivos* gift. The petitioner initially sued the respondent as an individual and as the executrix of her mother's estate, but later proceeded on an individual basis only, asserting the stock was not a part of her mother's estate. *Kernott*, 311 Ill. App. at 394-95, 36 N.E.2d at 577. Refuting the petitioner's assertion of an *inter vivos* gift, the respondent claimed ownership of the stock solely as the executrix of the decedent's estate. *Kernott*, 311 Ill. App. at 392, 36 N.E.2d at 576. During a bench trial, the petitioner sought to introduce evidence concerning the circumstances surrounding the *inter vivos* gift, which the trial court denied. *Kernott*, 311 Ill. App. at 393, 36 N.E.2d at 577. After determining that the suit against the respondent in her capacity as executrix was properly dismissed, the appellate court held that the petitioner's evidence concerning the circumstances of the *inter vivos* gift was improperly excluded by the court. *Kernott*, 311 Ill. App. at 398, 36 N.E.2d at 579. Here, the issue before us does not concern an *inter vivos* gift but, instead, Brenda's claim that Rebecca tortiously interfered with her inheritance expectancy as reflected in Pearl's 1997 will. Therefore, *Kernott* does not offer Brenda any support.

¶ 35 In *Coleman v. Heidke*, 291 Ill. App. 3d 670, 673, 684 N.E.2d 163, 166 (1997), the appellate court, citing *Smith v. Haran*, 273 Ill. App. 3d 866, 652 N.E.2d 1167 (1995), wrote the

following regarding the applicability of the Act:

"[B]ased on the clear language of the statute, the Dead Man's Act is not restricted to probate actions filed on behalf of an estate or decedent. It applies to any action in which the representative of the deceased person sues or defends. As such, it pertains not only to actions where a representative sues to protect the interests of an estate, but also to actions brought by heirs and legatees to protect their status and rights as heirs and legatees."

¶ 36 Although Brenda asserts that Rebecca is not a representative of Pearl's estate for purposes of her tort claim, the clear intent of both her will contest and tort claim is to protect her rights to certain property and money as an heir to Pearl's estate pursuant to Pearl's 1997 will. In other words, because Brenda's respective claims concern solely the apportionment of Pearl's estate—of which Rebecca represents as executrix—the provisions of the Act apply, regardless of how Brenda endeavors to couch her claims. See *Kamberos v. Magnuson*, 156 Ill. App. 3d 800, 804, 510 N.E.2d 112, 114 (1987) ("In determining whether the [Act] applies, it is important to ascertain whether the action is brought or defended by a person in the capacity of personal representative, heir, legatee or devisee, or whether it involves or tends to impair the estate of a decedent"). We, therefore, reject Brenda's contention that Rebecca—as executrix of Pearl's estate—was not entitled to the protections of the Act.

¶ 37 D. Brenda's Claim That Genuine Issues of Material Fact Existed To Preclude Summary Judgment With Regard to Her Will Contest

¶ 38 Brenda next contends that genuine issues of material fact existed to preclude the

trial court's grant of summary judgment with regard to her will contest. We disagree.

¶ 39 As previously noted, in March 2007, Brenda filed a joint contest of admission of will to probate, alleging, in pertinent part, that over a period of time, Rebecca engaged in various acts that "wrongfully induced" Pearl to change her will to make Rebecca the sole beneficiary of Pearl's estate. In *DeHart v. DeHart*, 2012 IL App (3d) 090773, ¶ 2, 2012 WL 736910, *4, the appellate court, noting the law regarding undue influence was well settled, provided the following:

"Undue influence sufficient to invalidate a will is that influence which prevents the testator from exercising his own free will in the disposition of his estate or which deprives the testator of free agency and renders the will more that of another than his own. The influence may be exerted at any time, but must be directly connected with the execution of the will and operate at the time the will is made. [Citation.] The *prima facie* elements of undue influence are: (1) a fiduciary relationship between the testator and a substantial and comparatively disproportionate beneficiary under the will; (2) a testator in a dependent situation in which the substantial and disproportionate beneficiaries are in dominant roles; (3) a testator who reposed trust and confidence in such beneficiaries; and (4) a will prepared or procured and executed in circumstances wherein such beneficiaries were instrumental or participated. [Citation.] Furthermore, the pleading of undue influence

must contain a specific recital of the manner in which the free will of the testator was impaired at the time the instrument was executed. The mere conclusion that the testator was influenced by the dominant nature of the disproportionate beneficiary is insufficient." (Internal quotations omitted.)

¶ 40 In this case, Brenda does not contest that the Act applied to her will contest. Thus, Brenda was incompetent to testify about statements Pearl allegedly made to her. See Michael H. Graham, *Graham's Handbook of Illinois Evidence* § 601.10, at 400 (10th ed. 2010) ("The [Act] deals primarily with competency, not with the admissibility of evidence. Its effect is to render a witness incompetent as to certain matters[.]"). The remaining evidence in support of Brenda's will contest consists of the following: (1) Rebecca lived with Pearl since Rebecca's birth; (2) Rebecca exercised control over certain farmland prior to the execution of the 2002 will; (3) Rebecca "vehemently" objected when her siblings attempted to visit Pearl; (4) Rebecca threatened that she would prevent Brenda from visiting Pearl if Brenda made negative comments about Rebecca to Pearl; (5) Rebecca installed caller identification on Pearl's home phone to "monitor" her calls; and (6) Rebecca refused to deliver Pearl's mail to the post office if it contained charitable donations from Pearl.

¶ 41 We note, however, that this evidence fails to (1) show how Rebecca dominated Pearl or (2) allege with specificity the manner in which Pearl's free will was impaired at the time she executed her 2002 will. Indeed, we note further that the collective evidence presented by Rebecca in the form of affidavits and depositions from Nolan, Sara, Lydia, and Ron characterized Pearl as a strong-willed, independent, and assertive woman who affirmatively conveyed her

intent to change her will and was not vulnerable to manipulation by Rebecca but instead, enjoyed Rebecca's compliance and gracious care, especially in the final year of her life. Thus, although we consider the evidence presented in a light most favorable to Brenda, the absence of sufficient evidence to substantiate the second and fourth elements of Brenda's undue influence claim—that is, that Rebecca dominated Pearl and that she was instrumental in procuring Pearl's 2002 will—renders Brenda's will-contest claim fatally flawed in that Brenda has failed to allege sufficient facts that show that Rebecca wrongfully induced Pearl into changing her 1997 will.

¶ 42 E. Brenda's Claim That Genuine Issues of Material Fact Existed To Preclude Summary Judgment With Regard to Her Tort Suit

¶ 43 Brenda also contends that genuine issues of material fact existed to preclude the trial court's grant of summary judgment with regard to her expectancy claim. We disagree.

¶ 44 As previously noted, in January 2011, Brenda filed an "amended complaint for count II tortious interference with an inheritance expectancy," claiming that Rebecca's "duress or undue influence" caused Pearl to change her will, which deprived Brenda of certain farm property and money she was expecting to inherit from Pearl's estate.

¶ 45 To recover for tortious interference with an inheritance expectancy, a plaintiff must allege facts that support the following elements: (1) the existence of an expectancy; (2) the defendant's intentional interference therewith; (3) tortious conduct such as undue influence, fraud, or duress; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages. *DeHart*, 2012 IL App (3d) 090773, ¶ 31, 2012 WL 736910, *6.

¶ 46 In this case, Brenda contends that she has demonstrated that Rebecca intentionally

interfered with her expectancy through tortious conduct based on the following evidence: (1) Rebecca prevented Brenda and her siblings from visiting Pearl and (2) Pearl's statements that Rebecca suggested Pearl should change her will "so that all of Pearl's estate was left to [Rebecca]." However, for the reasons we have already stated, (1) Brenda's claims regarding what Pearl allegedly told her are barred from our consideration by the Act and (2) no evidence shows that Rebecca engaged in tortious conduct—intentionally or otherwise—that deprived Brenda of property and money from Pearl's estate. Simply put, the evidence shows that Pearl chose of her own free will to change the terms of her will so that all her possessions would be enjoyed by Rebecca. Because we conclude that Brenda has failed to present evidence to satisfy her claim that Rebecca intentionally engaged in tortious conduct meant to deprive her of a portion of Pearl's estate, we reject her argument that genuine issues of material fact exist to support her expectancy claim.

¶ 47

F. Brenda's Fiduciary Relationship Claim

¶ 48

Brenda also contends that the presumption of impropriety attached to Rebecca by virtue of her fiduciary relationship with Pearl creates a genuine issue of material fact sufficient to preclude the trial court's grant of summary judgment. We disagree.

¶ 49

The presumption of fraud or undue influence attaches where a fiduciary relationship between the parties exists and the fiduciary has benefitted by virtue of his fiduciary status. *In re Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088, 677 N.E.2d 1024, 1029 (1997). A fiduciary relationship may exist (1) as a matter of law from the relationship of the parties, such as an attorney-client relationship, or (2) based on the facts of a particular situation, such as a relationship where trust is reposed on one side and results in superiority and influence on the

other side. *In re Estate of Elias*, 408 Ill. App. 3d 301, 319, 946 N.E.2d 1015, 1032 (2011). One who holds a power of attorney is a fiduciary as a matter of law. *DeJarnette*, 286 Ill. App. 3d at 1088, 677 N.E.2d at 1029.

¶ 50 In this case, Brenda acknowledges that Rebecca did not receive Pearl's power of attorney until after the execution of her 2002 will but nonetheless claims that Rebecca was in a position of trust prior to the execution of that will. Even if we were to accept that Rebecca was in a fiduciary relationship prior to her 2002 will—which we do not—the evidence in this case does not show how Rebecca unduly benefitted by virtue of this fiduciary relationship. See *Zachary v. Mills*, 277 Ill. App. 3d 601, 608, 660 N.E.2d 1301, 1305-06 (1996) ("More than the mere existence of a fiduciary relationship must be shown to raise a presumption of undue influence in the making of a will ***."). As we have previously concluded, the pleadings, depositions, admissions, and affidavits on file in this case show that Pearl executed her 2002 will—which bequeathed her entire estate to Rebecca—of her own free will without any input from Rebecca. We, therefore, reject Brenda's claim.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we affirm the trial court's judgment.

¶ 53 Affirmed.