2015 IL App (1st) 140874-U

FIFTH DIVISION
March 31, 2015

No. 1-14-0874 & 1-14-1530 (cons.)

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF HARRY LAWSON a/k/a HARRY LAWSON, JR., a/k/a HARRY HILL LAWSON, JR.	)	Appeal from the Circuit Court of Cook County
(JEAN LAWSON PETERSON, DORIS LAWSON WHALEY, STEVEN BOELKENS, GORDON BOELKENS and WESLEY BOELKENS, JR.,	)	
Petitioners-Appellants,	)	
v.	)	No. 12 P 6736
NICHOLAS G. GRAPSAS, as Administrator of the Estate of Harry Lawson,	)	
Respondent-Appellee.	)	
(THE PEOPLE *ex rel.* LISA MADIGAN, ATTORNEY GENERAL,	)	Honorable Susan M. Coleman, Judge Presiding.
Respondent-Appellee)).	)	

JUSTICE REYES delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming circuit court's dismissal of will contest initiated by relatives of testator alleging undue influence by an attorney designated as the contingent executor under the will.

¶ 2 These consolidated appeals address whether the circuit court of Cook County properly dismissed a will contest initiated by relatives of a testator based upon the alleged exertion of undue influence by an attorney. The petitioners alleged that the attorney had prepared the will; the will designated the attorney as the contingent executor with the power to select charitable organizations and distribute the estate to them in the event the testator's wife predeceased him. For the reasons stated below, we agree with the circuit court that the petitioners failed to plead facts supporting a claim of undue influence. We affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 In a document entitled "Will of Harry Lawson," dated October 12, 1979 (the Will), Harry Lawson[1] (Harry) identified his heirs as his wife Maria Lawson (Maria) and his three sisters. The Will provides, in pertinent part, as follows:

> "At this time my heirs are my wife, MARIA LAWSON and my sisters SHIELA BOELKENS, DORIS WHALEY and JEAN PETERSON.
>
> * * *
>
> If my spouse survives me, I give her all my personal effects, household goods, automobiles, and all other items of goods and chattels and any insurance on them.
>
> * * *
>
> If my spouse does not survive me, I give my entire estate to my executor and direct my executor to select in his sole discretion ten NotforProfit [*sic*] charitable organizations and after payment of all costs and expenses of administration distribute my entire estate, one-tenth to each such selected charity.
>
> * * *

[1] Harry Lawson was also known as Harry Lawson, Jr. and Harry Hill Lawson, Jr.

> I name MARIA LAWSON executor of this will. If she fails or ceases to act I name PAUL R. SOBOL as executor."

Harry and two witnesses signed the Will; a notary public named Nancy J. Sobol notarized the Will.

¶ 5 Maria and Harry had no children, and both she and Paul Sobol (Sobol) predeceased Harry.[2] Harry died on September 4, 2012 at the age of 80. On November 19, 2012, the attorney for Nicholas G. Grapsas, the Cook County Public Administrator, filed a "Petition for Probate of Will and for Letters of Administration with Will Annexed" in the circuit court of Cook County. Grapsas indicated that he believed the Will to be the "last valid will of the testator." The petition further stated that Harry nominated as executor "Maria Lawson, predeceased and Paul R. Sobol, whereabouts unknown." The approximate value of the estate was listed as unknown. On January 30, 2013, the circuit court entered an order admitting the Will to probate and appointing Grapsas as the administrator of Harry's estate.

¶ 6 On July 29, 2013, Harry's two surviving sisters, Jean Lawson Peterson and Doris Lawson Whaley, and the children of his third sister[3] — Steven Boelkens, Gordon Boelkens, and Wesley Boelkens, Jr.[4] — filed a three-count "Petition for Will Contest and Complaint to Invalidate Will" (the Complaint). The Complaint alleged, in part, as follows:

> "17. The 1979 Will acknowledged that Harry Lawson's sisters, Jean, Doris, and Maureen Lawson Boelkens, were Harry Lawson's natural heirs in addition to his

[2] At a hearing in the circuit court on January 15, 2014, counsel for the Illinois Attorney General stated: "Paul Sobol died many, many years ago. The wife [Maria] died only a couple of years ago."

[3] The Will refers to the third sister as "Shiela Boelkens," but the parties all refer to her as "Maureen Lawson Boelkens." Ms. Boelkens died unmarried on June 11, 2012.

[4] Jean Lawson Peterson, Doris Lawson Whaley, Steven Boelkens, Gordon Boelkens, and Wesley Boelkens, Jr. are referred to collectively herein as the "petitioners."

wife, Maria Lawson.

18. On information and belief, the 1979 Will was prepared and drafted by attorney Paul R. Sobol.

19. Beginning in 1970, Paul R. Sobol was admitted to practice law in the State of Illinois.

20. On information and belief, at the time the 1979 Will was prepared and drafted by Paul R. Sobol, and purportedly executed by Harry Lawson, an attorney-client relationship existed between Harry Lawson and Paul R. Sobol.

21. In addition to preparing and drafting the 1979 Will, attorney Paul R. Sobol named himself as the executor of the 1979 Will in the event that Maria Lawson failed or ceased to act as the executor. Exhibit A, Art. VII.

22. Moreover, in the event that Maria Lawson did not survive Harry Lawson, the 1979 Will provided that the entire estate of Harry Lawson would be given to the executor of the 1979 Will, namely attorney Paul R. Sobol. Exhibit A, Art. III. If the estate passed in such fashion, the 1979 Will directed the executor, attorney Paul R. Sobol, 'to select in distribute my entire estate, one tenth to each such selected charity.' [sic] *Id.*"[5]

The Complaint further alleged that Harry maintained a "loving and close relationship" with his sisters and their families prior to the execution of the Will, but Maria "did not approve of Harry Lawson's family" and attempted to "isolate, exclude and alienate Harry Lawson from his family and natural heirs" at the time of execution of the Will. The Complaint stated that, as part of such efforts, Maria "enlisted the aid of Paul R. Sobol to prepare, draft, and procure the 1979 Will and

[5] The petitioners refer to the "1979 Will." Nothing in the record indicates that Harry executed any will other than the Will dated October 12, 1979, which is the subject of these consolidated appeals.

disinherit the Petitioners[.]" Notwithstanding Maria's efforts, Harry "continued to maintain a loving relationship" with his sisters and their families and "would surreptitiously attend Lawson family reunions without advising Maria Lawson" even after execution of the Will.

¶ 7 Count I of the Complaint alleged that the "1979 Will that was submitted by Administrator is not signed by Harry Lawson or anyone at his direction, as required by Illinois law."[6] In Count II, the petitioners asserted "invalidity based upon impossibility," contending that "the 1979 Will fails to adequately describe the proper distribution of the estate and how the 1979 Will is to be performed and carried out." In Count III, the petitioners alleged that Sobol exercised "undue influence" over Harry.[7]

¶ 8 In the undue influence count, the petitioners asserted that, in an "effort to retain the business of Maria Lawson in the event that Harry Lawson passed away and enrich himself in connection with the estate of Harry Lawson, Paul R. Sobol agreed to assist Maria Lawson in her effort to disinherit the Petitioners." The petitioners alleged that Sobol "participated in the procurement, preparation, and drafting" of the Will. The Complaint further provided that "[o]n information and belief, the 1979 Will was executed at the offices of attorney Paul R. Sobol and Sobol's wife, Nancy Sobol, notarized the signatures on the 1979 Will." By naming himself as the contingent executor, Sobol allegedly "stood to benefit by placing himself in the position to earn significant fees for the administration of the 1979 Will in the event that Harry Lawson passed away and Maria Lawson was unable or unwilling to serve as the executor." The petitioners

[6] The photocopy of the Will that was initially submitted by Grapsas to the circuit court omitted the lower portions of certain pages, including where Harry had signed. A copy of the Will, with Harry's signatures, subsequently was filed with the court and is included in the record on appeal.

[7] Count III was "brought in the alternative to Counts I and II, to the extent that this Court determines that the 1979 Will attached as Exhibit A meets the requirements for the due execution of a will under Illinois law, and adequately describes the proper distribution of the estate and how the 1979 Will is to be performed and carried out."

asserted that in the event Maria predeceased Harry, Sobol "placed himself, as executor, in the position to use Sobol's unfettered discretion to select charities to receive distributions" from Harry's estate. The Complaint alleged that Sobol breached his fiduciary duty to Harry and "stood to benefit personally and professionally by placing himself as the executor with complete authority to control the distribution of Harry Lawson's sizeable estate." According to the Complaint, the Will "was contrary to the inclinations of Harry Lawson, who was not known by his friends or family to express charitable desires." But for Sobol's undue influence, the petitioners alleged, Harry would not have executed the Will.

¶ 9 On September 9, 2013, the administrator of Harry's estate filed a motion to dismiss the Complaint pursuant to sections 2-619(a)(5), 2-619(a)(9) and 2-615 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/1-101 *et seq.* (West 2012)). The administrator argued, in part, that dismissal of Count III under section 2-615 was appropriate given that: (a) Sobol received no benefit under the Will because he was not a named beneficiary; (b) the petitioners' allegation of undue influence based on the fact that Sobol stood to earn "significant fees" as executor was "even more tenuous" given that he was not designated as the primary executor; (c) there is no indication of who drafted the Will on its face; (d) because Sobol and Maria are both deceased, "[m]any if not most" of the allegations contained in Count III are incapable of being proven; and (e) any evidence that would support the allegation that Harry was not known to express charitable desires "would in all likelihood be barred by the Dead Man's Act. 735 ILCS 5/8-201." The administrator also noted that, while Harry's estate was sizeable, "there is no indication that the estate was anywhere near this size in 1979" and a review of the assets of his estate "indicates that roughly half of [Harry's] estate consists of assets that belonged to [Maria], which he inherited from her upon her death."

¶ 10 The People of the State of Illinois *ex rel.* Lisa Madigan, Attorney General of the State of

Illinois (the Attorney General), also sought dismissal of the Complaint.[8] Citing sections 2-615 and 2-1005 of the Code, the Attorney General contended, in part, that Count III of the Complaint "utterly fails to sufficiently allege" that Sobol was "named to personally receive a substantial benefit" under the Will as "a legatee or beneficiary" and therefore "no set of facts exist that will allow the Petitioners to legally sustain a cause of action for undue influence[.]"

¶ 11 In their combined response to the two motions to dismiss, the petitioners withdrew Counts I and II of the Complaint. As to Count III, the petitioners argued, among other things, that the Complaint adequately alleged that: (a) a fiduciary relationship existed between Sobol and Harry; (b) Sobol "stood to receive a substantial benefit" under the Will; and (c) the Will was "prepared, procured or executed in circumstances where Sobol was either instrumental or participated." The petitioners asserted that "numerous Illinois cases have found that an attorney need not be directly named as a beneficiary or legatee in order to receive a 'substantial benefit' for purposes of raising the presumption of undue influence." According to the petitioners, "one could easily imagine the manner in which attorney Sobol would substantially benefit from the power to distribute the [*sic*] Mr. Lawson's $4 million estate."

¶ 12 The Attorney General replied, in part, that "while Petitioners allege that Paul R. Sobol may have been retained to draft the 1979 Lawson Will [cite], they fail to allege any specific facts surrounding its drafting or execution and they fail to allege how or why they believe that Paul R. Sobol somehow procured it." The Attorney General contended that "none of the cases cited in the [petitioners' response] cures the pleading deficiencies of Count III of the Will Contest." In his reply, the administrator of Harry's estate argued, in part, that Sobol did not stand to receive

[8] The Attorney General's dismissal motion provided that the "PEOPLE OF ILLINOIS are the ultimate beneficiaries of charitable assets and bequests and have an interest in all matters pertaining to charitable assets, interests, trusts, and bequests in Illinois[.]" (Emphasis in original.)

any substantial benefit as a result of being named contingent executor in the Will and thus one of the "critical elements for stating a cause of action for undue influence is lacking[.]"

¶ 13 After hearing the parties' arguments on January 15, 2014, the circuit court concluded:

> "[B]elieve me, I wish it was different because it would be nice if the family members would have been able to take. It would be great, but based upon what happened here, I don't believe that your petition as it is framed is sufficient to state a cause of action for undue influence by Mr. Sobol so therefore, the motion to dismiss is allowed."

The petitioners' counsel asked whether there was "an opportunity to replead." The court granted 28 days to replead but directed the petitioners: "[D]on't replead the same thing because it's going to be a waste of time for everybody." In a written order entered on January 15, 2014, the circuit court: (a) granted the motions to dismiss; (b) dismissed the "remaining count" of the Complaint and granted the petitioners until February 13, 2014 "to replead if they choose"; and (c) continued the matter for status on February 25, 2014.

¶ 14 The petitioners did not timely file an amended petition for will contest and complaint to invalidate will. At the February 25, 2014 status hearing, the court denied the petitioners' oral motion for an extension of time and set an August 2014 status date. On March 26, 2014, the petitioners filed a motion for clarification, seeking confirmation "whether this Court has in fact dismissed this Will Contest in its entirety, and whether the Court's January 15, 2014 ruling is now final and appealable." On April 4, 2014, the court entered an order striking the August status date and providing: "Petitioners having made clear that they do not intend to amend their Will Contest and that they wish to stand on the Will Contest previously dismissed by this Court's January 15, 2014 Order, said Will Contest is hereby dismissed in its entirety and such dismissal is final as of today's date[.]"

¶ 15 On March 26, 2014, the petitioners filed a notice of appeal from the circuit court's orders entered on January 15, 2014 and February 25, 2014, assigned appeal number 1-14-0874. On April 9, 2014, the petitioners filed a notice of appeal from the April 4, 2014 order, assigned appeal number 1-14-1530. We granted the petitioners' motion to consolidate the two appeals.

¶ 16 ANALYSIS

¶ 17 As a threshold matter, the petitioners argue that the Attorney General cited an unpublished Rule 23 order in her response brief. We agree that such citation is improper, and we thus disregard the decision for purposes of our analysis herein. See Ill. S. Ct. R. 23(e) (eff. July 1, 2011); *Doe v. Boy Scouts of America*, 2014 IL App (2d) 130121, ¶ 45 (noting that unpublished decisions are not precedential); *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 17 (stating that a party's citation to a Rule 23 order "to support any claim or argument" in the party's brief is "strictly prohibited").

¶ 18 On appeal, the petitioners contend that they have pleaded facts which, if taken as true for purposes of the section 2-615 motions, were "sufficient to establish a presumption of undue influence on the part of Sobol that invalidates the [Will], and therefore were sufficient to state a cause of action for undue influence." Specifically, the petitioners assert that "[n]umerous Illinois cases have found that an attorney need not be directly named as a beneficiary or legatee in order to receive a 'substantial benefit' for purposes of raising the presumption of undue influence." The petitioners also contend that the estate administrator's "assertions that [the petitioners] cannot prove their allegations are purely speculative at this point, and should play no role in this Court's decision."

¶ 19 The administrator of Harry's estate[9] contends that the petitioners failed to allege sufficient

[9] We note that David A. Epstein, the current Cook County Public Administrator, is the successor to Nicholas G. Grapsas; Epstein filed the response brief with this Court.

facts to support a finding of undue influence and thus invalidate the Will. He further claims that "no presumption of undue influence can arise where the only claimed gain or benefit to be realized by the fiduciary is a speculative fee for administering the will." The Attorney General similarly contends that the petitioners failed to establish a presumption of undue influence because they failed to adequately plead that Sobol received a "substantial benefit" from the Will. She asserts that "the mere fact that an attorney is named as executor or trustee of a will, and is to be compensated for such professional services, does not confer beneficiary status on the attorney, let alone support a finding that he received a substantial benefit." The Attorney General contends that the petitioners "also failed to plead specific facts setting forth the remaining elements of undue influence," *e.g.*, that an attorney-client relationship existed between Harry and Sobol, that Sobol was involved in the drafting or procurement of the Will, or that Harry was dependent upon Sobol or "reposed trust and confidence" in Sobol.

¶ 20 A section 2-615 motion[10] attacks the legal sufficiency of the complaint. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. "When ruling on a section 2-615 motion to dismiss, a court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them." *Id.* "The crucial inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action on which relief may be granted." *Id*. "Whether a complaint should be dismissed under a section 2-615 motion presents a question of law, which we review *de novo*." *In re Estate of DiMatteo*, 2013 IL App (1st) 122948, ¶ 52.

[10] The estate administrator sought dismissal of Count III of the Complaint under section 2-615 of the Code. 735 ILCS 5/2-615 (West 2012). The Attorney General's motion to dismiss was brought under sections 2-615 and 2-1005 – the summary judgment provision – of the Code. 735 ILCS 5/2-1005 (West 2012). We address the question raised by the petitioners on appeal: whether the Complaint "stated an adequate cause of action to withstand a challenge under section 2-615 of the Code of Civil Procedure."

¶ 21 Although the two concepts are closely interrelated and frequently conflated, the Illinois Supreme Court in *DeHart v. DeHart*, 2013 IL 114137, "[made] clear that there is a difference between alleging a cause of action for undue influence and alleging a presumption of undue influence." *DiMatteo*, 2013 IL App (1st) 122948, ¶ 62; see, *e.g.*, Robert S. Hunter, *Undue Influence*, 19 Ill. Prac., Estate Planning & Admin. § 200:4 (4th ed. 2014) (noting that undue influence may be established in either of two ways: "the opponent of the will introduces proof of specific conduct which is alleged to constitute undue influence" or "introduce[s] proof of a fiduciary relationship and the other elements that together create a presumption of undue influence which the proponent must rebut"). While the petitioners on appeal focus on the *presumption* of undue influence, we analyze both concepts herein.

¶ 22 Undue Influence

¶ 23 The Illinois Supreme Court in *DeHart*, 2013 IL 114137, quoting its earlier decision in *In re Estate of Hoover*, 155 Ill. 2d 402, 411-12 (1993), described undue influence as follows:

> "[U]ndue influence which will invalidate a will is any improper *** urgency of persuasion whereby the will of a person is over-powered and he is indeed induced to do or forbear an act which he would not do or would do if left to act freely. [Citation.] To constitute undue influence, the influence must be of such a nature as to destroy the testator's freedom concerning the disposition of his estate and render his will that of another. [Citations.]
>
> What constitutes undue influence cannot be defined by fixed words and will depend upon the circumstances of each case. [Citation.] The exercise of undue influence may be inferred in cases where the power of another has been so exercised upon the mind of the testator as to have induced him to make a devise or confer a benefit contrary to his deliberate judgment and reason. [Citation.]

> Proof of undue influence may be wholly circumstantial. [Citation.] The influence may be that of a beneficiary or that of a third person which will be imputed to the beneficiary. [Citations.] False or misleading representations concerning the character of another may be so connected with the execution of the will that the allegation that such misrepresentations were made to the testator may present triable fact questions on the issue of undue influence. [Citations.]" (Internal quotation marks omitted.) *DeHart*, 2013 IL 114137, ¶ 27.

We have described undue influence as "influence that is excessive, improper or illegal." *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 13. The undue influence sufficient to void a will "must be specifically directed toward procuring the will in favor of a particular party or parties, and it must be such as to destroy the freedom of the testator's will and render the instrument more the offspring of the will of another than of his own." *In re Estate of Lemke*, 203 Ill. App. 3d 999, 1005 (1990). Furthermore, the undue influence "must be directly connected with the execution of the instrument, operate at the time it was made, and be directed toward procuring the will of a particular party or parties." *DiMatteo*, 2013 IL App (1st) 122948, ¶ 62.

¶ 24 The general rule in Illinois is that the pleading of undue influence in a will contest 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. *In re Estate of Sutera*, 199 Ill. App. 3d 531, 536 (1990). The Complaint did not include any well-pleaded allegations of behavior engaged in by Sobol that caused Harry's will to be impaired or that rendered the Will "more the offspring" of Sobol's will than Harry's. While the Complaint alleged that Sobol "deprived Harry Lawson even of the authority to designate the charitable organizations that would receive the benefit of his largesse," this conclusory statement was not supported by facts. Furthermore, the Complaint failed to set forth well-pleaded facts relating to any undue influence by Sobol directly connected with the

execution of the Will and present at the time of the execution. Even if the Will was, as the Complaint stated, "contrary to the inclinations" of Harry in that "it disinherited his natural heirs and surviving family, purportedly in favor of unknown charities and unidentified charities to be selected by Paul R. Sobol," the Complaint did not include facts supporting the allegations that Sobol "exercised undue influence" over Harry or that such purported undue influence "overrode the will of Harry Lawson," causing him to act contrary to his "inclinations." "To aver undue influence as a conclusion, facts must be stated warranting that conclusion and must go to the extent of showing the testator was thereby deprived of his free agency." *Sutera*, 199 Ill. App. 3d at 538 (1990). The petitioners failed to allege such facts.

¶ 25 As the Attorney General observes on appeal, the Complaint "vaguely referenced a conspiracy between Sobol and Maria Lawson to disinherit Petitioners." The Complaint alleged that as part of Maria's efforts to "isolate, exclude and alienate Harry Lawson from his family and natural heirs, Maria Lawson enlisted the aid of Paul R. Sobol to prepare, draft, and procure the 1979 Will and disinherit the Petitioners[.]" The Complaint further provided that "[i]n an effort to retain the business of Maria Lawson in the event Harry Lawson passed away and enrich himself in connection with the estate of Harry Lawson, Paul R. Sobol agreed to assist Maria Lawson in her effort to disinherit the Petitioners." We agree with the Attorney General that "[t]hese conclusory allegations were insufficient to show that Maria Lawson exercised any influence over her husband's testamentary wishes, let alone that such influence was improper or excessive, or overrode his will." Moreover, the Complaint included no factual basis for imputing any influence exerted by Maria to Sobol.

¶ 26 In ruling on a motion to dismiss, "[o]nly the well-pleaded facts are taken as true; conclusions of law or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest are not taken as true and are not to be considered by the court[.]"

DiMatteo, 2013 IL App (1st) 122948, ¶ 58. The Complaint did not include any well-pleaded facts adequately alleging a cause of action for undue influence.[11]

¶ 27 Presumption of Undue Influence

¶ 28 The Illinois Supreme Court in *DeHart* also considered whether the plaintiff had alleged sufficient facts to create a *presumption* of undue influence. The court stated: "It is well settled that a presumption of undue influence will arise under certain circumstances and one such circumstance is where (1) a fiduciary relationship exists between the testator and a person who receives a substantial benefit from the will, (2) the testator is the dependent and the beneficiary is the dominant party, (3) the testator reposes trust and confidence in the beneficiary, and (4) the will is prepared by or its preparation procured by such beneficiary." *DeHart*, 2013 IL 114137, ¶ 30.

¶ 29 The primary question addressed by the parties on appeal is whether the Complaint adequately alleged that Sobol received a "significant benefit" from the Will; we address that issue below. We then address whether the petitioners adequately pled the remaining elements needed to establish a presumption of undue influence.

¶ 30 *Substantial Benefit*

¶ 31 The Complaint provided, in part, that "Sobol prepared and drafted the 1979 Will in such a fashion that afforded Sobol himself a substantial benefit." According to the Complaint, Sobol "named himself as the executor in the event that Maria Lawson ceased or failed to act as

[11] The petitioners also contend that the estate administrator's argument in his motion to dismiss that the Complaint contains only inadmissible or unprovable conclusions is "purely speculative" and "should play no role in this Court's decision." We agree. In considering this section 2-615 motion – which requires us to consider all well-pleaded facts as true – we did not consider the applicability or the effect of the Dead Man's Act (735 ILCS 5/8-201 (West 2012)) or any related law. We further note that the fact that Sobol predeceased both Harry and Maria does not affect our analysis. As the petitioners observe on appeal. "[t]he issue here goes to the formation of the will, not the events that occurred afterward."

executor of the 1979 Will." The Petitioners alleged that "[i]n this capacity, Sobol stood to benefit by placing himself in the position to earn significant fees for the administration" of the Will.

¶ 32 However, as the Illinois Supreme Court stated in *Brown v. Commercial Nat'l Bank of Peoria*, 42 Ill. 2d 365, 369 (1969): "The mere fact that an attorney or confidential agent who writes the will is named executor and trustee, to be compensated as such, does not alone raise a legal presumption of undue influence." In *Pond v. Hollett*, 310 Ill. 31, 36 (1923), our supreme court similarly observed: "To say that one becomes a beneficiary by being paid what is fair and equitable for services is utterly groundless."

¶ 33 The petitioners contend that *Brown* and *Pond* are distinguishable because the Complaint "alleges far more" than that Sobol potentially would receive fees as the executor of the Will. The Complaint also alleged that Sobol "stood to benefit personally and professionally by placing himself as the executor with complete authority to control the distribution of Harry Lawson's sizeable estate." The Attorney General and the estate administrator respond, in part, that even where an attorney writes a will or trust and is named therein as a compensated executor or trustee, the presumption of undue influence arises only if the attorney received a substantial benefit as a legatee or beneficiary. *E.g.*, *Brown*, 42 Ill. 2d at 369.

¶ 34 According to the petitioners, "[n]umerous Illinois cases have found that an attorney need not be directly named as a beneficiary or legatee in order to receive a 'substantial benefit' for purposes of raising the presumption of undue influence." However, as discussed below, the cases cited by the petitioners are distinguishable or inapposite.

¶ 35 In *McFail v. Braden*, 19 Ill. 2d 108, 113 (1960), a woman in her 80s executed a quitclaim deed conveying property to an attorney's secretary. The following day, the secretary executed a quitclaim deed conveying the property to the woman and the attorney's adult son. *Id.* A few

years later, the attorney, alleging himself to be her nephew, filed a petition to commit the woman as a mentally ill person; she was committed to a state hospital and died intestate. *Id.* at 115-16. Her "next of kin and heirs-at-law" filed an action to set aside the deeds and for related relief, including an accounting for rents and profits. *Id.* at 110. The trial court found that the attorney's son was holding title as constructive trustee for the heirs-at-law, ordered that the two deeds be vacated and set aside, and referred the cause to a master for an accounting. *Id.* at 110. Affirming the trial court's decision,[12] the Illinois Supreme Court stated that "it is clear a fiduciary relationship came into existence" between the attorney and the decedent. *Id.* at 117. Our supreme court also observed that "there is not one iota of competent proof that he was a relative, or that she had any intention of giving him her property, either outright or as an inducement to some agreement." *Id.* at 116.

¶ 36 In *In re Estate of Burren*, 2013 IL App (1st) 120996, ¶ 1, the challenged will named the testator's three children and his attorney's two children as the principal legatees of the estate, and in the years before his death, the testator "made out many checks" to the attorney totaling almost $500,000. *Id.* ¶¶ 1, 7. The court concluded that, by listing the attorney's children in the will as beneficiaries, the testator had conferred a benefit on the attorney. *Id.* ¶ 21.

¶ 37 In *Zachary v. Mills*, 277 Ill. App. 3d 601, 603 (1996), the complaint alleged that attorney Zollie Arbogast prepared the testator's will; Zollie and his son Daniel were law partners and Daniel's wife was the daughter of the testator's first cousin. Zollie and Daniel were designated as co-executors, and Daniel was a residuary beneficiary under the will. *Id.* The testator's nieces – and sole heirs – challenged the will. *Id.* The trial court entered judgment, on the jury's verdict, in favor of the beneficiaries. *Id.* at 607. The appellate court concluded, in part, that the trial

[12] Our supreme court reversed only the portion of the trial court's decree that taxed a portion of the costs against the plaintiffs. *Id.* at 122.

court erred "in failing to give a proper [jury] instruction as to Zollie's involvement in the preparation of the will." *Id.* at 610. The appellate court held that "in the unique circumstances presented by this case, a question of fact existed as to whether the bequest to Daniel constituted a benefit both to Zollie and the firm." *Id.* at 612. Remanding the case for a new trial on one of the counts, the court stated that "since we have held that Zollie and the firm could have received a benefit by the bequest to Daniel," the proper jury instruction "would include Zollie, Daniel and the firm." *Id.* at 613.

¶ 38 In *In re Estate of Stuhlfauth*, 88 Ill. App. 3d 974, 976 (1980), Thomas J. Kelly, the decedent's attorney, provided "services to the decedent" that "extended beyond the scope of a mere legal advisor to the point where he became [the decedent]'s confidante and friend." A few years prior to her death, the decedent approached Kelly about drafting a will that would name Kelly as the decedent's beneficiary, or, alternatively, a testamentary plan that would benefit Kelly's son. *Id.* at 977. According to Kelly's uncontradicted testimony, "this request was flatly refused on more than ten occasions." *Id.* The decedent eventually visited another attorney, Edwin O. Daw, who — like Kelly — suggested a "more appropriate object of her bounty would be her son[.]" At Daw's suggestion, the decedent returned home and "considered again the appropriateness of her designs." *Id.* at 978. The decedent later returned to Daw's office, and he drafted a will which named Kelly's son as the primary beneficiary. *Id.* The decedent mailed an executed copy of the will to Kelly. *Id.* at 979. Upon reviewing the will, Kelly "was distressed that the scrivener had chosen to make the primary bequest using a guardianship device rather than a trust device." *Id.* at 980. "Having accepted the fact that he could not deter [the decedent] from her testamentary designs," Kelly drafted, and the decedent executed, a codicil to the Daw will "which would have replaced the guardianship with a trusteeship and which would have expressly disinherited" the decedent's son. *Id.* at 980-81. The decedent passed and the will and

codicil were admitted to probate; the trial court dismissed challenges by the decedent's son and niece. *Id.* at 976. The appellate court concluded that "it was not against the manifest weight to find no undue influence on the testatrix" with respect to the *will*, but that the evidence was sufficient to raise a presumption of undue influence with respect to the *codicil*. *Id.* at 980-81. "But for the initiative and purposeful actions of attorney Kelly," the court reasoned, "the codicil would never have been executed." *Id.* at 981.

¶ 39 Although their facts differ substantially, *McFail*, *Burren*, *Zachary* and *Stuhlfauth* each involve the question of whether a benefit to a relative of the decedent's attorney constituted a benefit to the attorney. In the instant case, neither Sobol nor his relatives was a legatee or beneficiary under the Will. The petitioners' contention that "an attorney need not be directly named as a beneficiary or legatee in order to receive a 'substantial benefit' for purposes of raising the presumption of undue influence" may be correct. However, none of their cited cases addresses a scenario comparable to that presented in these cases: an attorney who was designated as a contingent executor with the power to select charities and distribute the decedent's estate to those charities. Under the Will, Sobol could have become executor only if Maria had failed or ceased to act. Even if he became executor, he would only be able to choose "ten NotforProfit [*sic*] charitable organizations" and distribute Harry's estate to the selected charities if Maria predeceased Harry. Simply put, we do not view the *potential* power – if Maria has passed – to choose charities and distribute estate funds to them as a benefit to Sobol. Furthermore, even assuming *arguendo* this potential power was a "benefit" to Sobol, such benefit would be speculative at best – significantly different from the property at issue in *McFail*, *Burren*, *Zachary* and *Stuhlfauth* and certainly not substantial since it was contingent and the contingency never occurred. We conclude that the petitioners failed to adequately allege that the benefit, if any, to Sobol under the Will was a "substantial" benefit, as is required to raise a presumption of undue

influence.[13]

¶ 40 The petitioners also cite two decisions of the Supreme Court of Wisconsin for the proposition that "even though Sobol did not draft the Will to include a direct bequest to himself personally, this fact does not preclude a finding of undue influence where the benefit is less direct." As a preliminary matter, we note that "cases from foreign jurisdictions are not binding on this court." *Mikrut v. First Bank of Oak Park*, 359 Ill. App. 3d 37, 58 (2005); *Carroll v. Curry*, 392 Ill. App. 3d 511, 517 (2009) (noting that the "decisions of foreign courts are entitled to respect" but "they are not binding upon this court"). In any event, the cases do not change our analysis.

¶ 41 In *In re Perssion's Estate*, 20 Wis. 2d 537 (1963), the court stated that "if a benefit in some form is probably to be received by the attorney-draftsman by reason of a substantial bequest to the beneficiary, the inference" of undue influence "ought to arise. Human nature and the experience of mankind justify such inference." *Id.* at 541-42. *Perssion's Estate* involved an attorney whose mother was the sole legatee of the decedent. *Id.* at 541. The instant case, as discussed above, is factually dissimilar. Regardless of whether we agree with the Wisconsin court's observation quoted above, it is inapplicable to this case.

¶ 42 In *State v. Collentine*, 39 Wis. 2d 325 (1968), the Wisconsin Supreme Court admonished an attorney who had been pressured by the decedent into drafting a will where the attorney was a residuary legatee. *Id.* at 333. At the time of the will's execution, the attorney "knew that the

[13] The Attorney General contends that "even if Sobol had been appointed as executor to select the charities that would receive distributions from the estate – an impossibility since he predeceased both Lawsons – the 'duty' [citation] to choose charities to which the money will be distributed did not amount to a substantial benefit." The estate administrator similarly posits that the "strict duties and potential liabilities" imposed the Illinois Charitable Trust Act (760 ILCS 55-1, *et seq.* (West 2012)) "can be better characterized as a potential duty or burden subject to the court approval, rather than a potential benefit." Because we otherwise conclude that the petitioners failed to allege a "substantial benefit" to Sobol in the Complaint, we need not consider the applicability or effect of the Illinois Charitable Trust Act.

estate was insolvent and that as conditions existed then he, as residuary legatee, would receive nothing." *Id.* at 329. *Collentine* is distinguishable from the instant case. Unlike attorney Collentine, Sobol was not a "residuary legatee" under the Will; Sobol was not a legatee at all. Furthermore, *Collentine* did not involve a challenge to the decedent's will, as is the case here. Although the petitioners observe that *Collentine* was cited by the Illinois Supreme Court in *In re Vogel*, 92 Ill. 2d 55 (1982), another attorney disciplinary case, the facts of *Vogel* also are dissimilar to the facts of this case. In *Vogel*, our supreme court, after considering various mitigating circumstances, censured an attorney for preparing a will in which the attorney was a residuary beneficiary. *Id.* at 66. *Vogel*, like *Collentine*, does not involve a will challenge[14] and does involve an attorney who was a beneficiary, albeit a residuary one, under a will he had prepared. *Collentine*, like *Perssion's Estate*, does not affect our analysis.

¶ 43 *Other Elements*

¶ 44 The Illinois Supreme Court in *DeHart* stated that a presumption of undue influence will arise under certain circumstances, including "where (1) a fiduciary relationship exists between the testator and a person who receives a substantial benefit from the will, (2) the testator is the dependent and the beneficiary is the dominant party, (3) the testator reposes trust and confidence in the beneficiary, and (4) the will is prepared by or its preparation procured by such beneficiary." *DeHart*, 2013 IL 114137, ¶ 30. Even assuming *arguendo* that the petitioners adequately alleged that Sobol received a substantial benefit under the Will, the petitioners have failed to sufficiently allege the other elements required to raise a presumption of undue

[14] The petitioners contend on appeal that "[t]he Illinois Rules of Professional Conduct are similarly implicated by the potential conflict of interest for an attorney drafting a will wherein he or she is appointed as an executor or some other potentially lucrative fiduciary position." As noted above, the instant case involves a section 2-615 challenge to a petition for will contest and complaint to invalidate will, not an attorney disciplinary action. We need not consider the Illinois Rules of Professional Conduct for purposes of our analysis.

influence.

¶ 45 The Complaint alleged that "[o]n information and belief, at the time the 1979 Will was prepared and drafted by Paul R. Sobol, and purportedly executed by Harry Lawson, an attorney-client relationship existed between Harry Lawson and Paul R. Sobol." The Complaint further alleged that Sobol owed Harry a "fiduciary duty" and that "[i]n preparing and drafting the 1979 Will in a manner that served his own interests over those of his client, Paul R. Sobol breached the fiduciary relationship between" him and Harry. "A fiduciary relationship is defined as '[a] relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship.' " *Baumgarten*, 2012 IL App (1st) 112155, ¶ 17, quoting Black's Law Dictionary 1402 (9th ed. 2009). An attorney-client relationship is an example of a fiduciary relationship. *In re Estate of Osborn*, 128 Ill. App. 3d 453, 455 (1984).

¶ 46 While the Complaint provided that "Paul R. Sobol was admitted to practice law in the State of Illinois," the existence of an attorney-client relationship between Sobol and Harry was alleged "on information and belief." We recognize that, in some cases, "certain relevant facts of a cause of action will not be known to the plaintiff." *DiMatteo*, 2013 IL App (1st) 122948, ¶ 83. "[A]n allegation made on information and belief is not equivalent to an allegation of relevant fact [citation], but at the pleading stage a plaintiff will not have the benefit of discovery tools[.]" (Internal quotation marks omitted.) *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 40. However, a "plaintiff *will* have knowledge of what he did to learn the facts that he alleged on information and belief, and should allege any efforts taken to discover those facts." (Emphasis in original.) *DiMatteo*, 2013 IL App (1st) 122948, ¶ 83.

¶ 47 The Attorney General contends on appeal that the petitioners "also failed to plead facts supporting their conclusory allegations that [Harry] was dependent on Sobol who was in a dominant position, and that [Harry] reposed trust and confidence in Sobol." We agree. The

Complaint provided, in part:

> "40. In seeking out an attorney and professional to assist him in preparing a will, Harry Lawson placed himself in a dependent situation in which Harry Lawson relied upon attorney Paul R. Sobol to provide him with honest and loyal advice to further Harry Lawson's best interests.
>
> 41. Harry Lawson placed trust and confidence in Paul R. Sobol to provide him with advice that would further the interests of Harry Lawson and not the personal or professional interests of Paul R. Sobol."

"The mere conclusion that the persuasive or dominant nature of the beneficiary influenced the testator is not sufficient." *Baumgarten*, 2012 IL App (1st) 112155, ¶ 22. For example, in *DeHart*, 2013 IL 114137 (2013), the Illinois Supreme Court concluded that the complaint was sufficient to plead that the defendant-wife "gained a position of trust and confidence" over her testator-husband and "was the dominant party" where it alleged: (a) the wife was 29 years younger than her husband, who was "an elderly man" in his mid-80s; (b) although the couple "had been married for less than a year" and "he had amassed his fortune over an 84-year period, [the husband] placed considerable assets in joint tenancy with" the wife; (c) the wife held her husband's power of attorney; and (d) the wife attempted to exercise significant control over her husband's real estate dealings and "claimed the right to act on his behalf and in his stead with respect to" her husband's farm. *Id.* ¶ 31. In contrast, the conclusory statements in the Complaint that Harry "placed himself in a dependent situation" and that he "placed trust and confidence" in Sobol are insufficient.

¶ 48 Finally, the Complaint alleged that "[o]n information and belief, the 1979 Will was prepared and drafted by attorney Paul R. Sobol" and that Sobol "participated in the procurement, preparation, and drafting of the 1979 Will." The Complaint further alleged that, "[o]n

information and belief, the 1979 Will was executed at the offices of attorney Paul R. Sobol and Sobol's wife, Nancy Sobol, notarized the signatures on the 1979 Will." However, the petitioners have not set forth any factual basis to assert that Sobol advised Lawson in connection with the disposition of his property.

¶ 49 "After stripping the pleading of unsupported conclusions and inferences, sufficient facts must remain to sustain a cause of action." *Baumgarten*, 2012 IL App (1st) 112155, ¶ 11. Here, the petitioners did not plead sufficient facts to support the elements of a presumption of undue influence. Furthermore, when presented with the opportunity to replead, the petitioners failed to timely do so. We conclude that dismissal under section 2-615 was proper.

¶ 50 *Rebutting the Presumption of Undue Influence*

¶ 51 The petitioners point to the Illinois Supreme Court's decisions in *Klaskin v. Klepak*, 126 Ill. 2d 376 (1989) and *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452 (1983) regarding the evidence required to rebut a presumption of undue influence. The *Klaskin* court stated, in part:

> "When an attorney engages in a transaction with a client and is benefited thereby, a presumption arises that the transaction proceeded from undue influence. (*McFail v. Braden* [citation].) Once a presumption is raised, the burden shifts to the attorney to come forward with evidence that the transaction was fair, equitable and just and that the benefit did not proceed from undue influence. (*Franciscan Sisters Health Care Corp. v. Dean* [citation].) Because a strong presumption of undue influence arises when an attorney engages in a transaction with a client and is benefited thereby (*McFail v. Braden* [citation]), courts require clear and convincing evidence to rebut this presumption (*Franciscan Sisters Health Care Corp. v. Dean* [citation].) Some of the factors which this court deems persuasive

> in determining whether the presumption of undue influence has been overcome include a showing by the attorney (1) that he or she made a full and frank disclosure of all relevant information; (2) that adequate consideration was given; and (3) that the client had independent advice before completing the transaction. *McFail v. Braden* [citation]." *Klaskin*, 126 Ill. 2d at 386-87.

As discussed below, *Klaskin* and *Franciscan Sisters* are distinguishable from the instant case.

¶ 52 In *Klaskin*, the decedent's land trust agreement provided that his beneficial interest in the trust would pass to an attorney at the time of his death. *Id.* at 379. After his death, the administrator of the decedent's estate alleged that the attorney acted as the decedent's attorney when he purchased real estate and established the land trust and that the attorney had acquired an interest as successor beneficiary of the land trust by exerting undue influence over the decedent. *Id.* Following a bench trial, the circuit court in *Klaskin* concluded that attorney and the decedent maintained an attorney-client relationship and that the attorney failed to present clear and convincing evidence to rebut the presumption of undue influence. *Id.* The Illinois Supreme Court affirmed the decision of the circuit court, concluding that the "trial court's finding that [the attorney] failed to produce sufficient evidence to overcome the presumption of undue influence was not contrary to the manifest weight of the evidence." *Id.* at 396.

¶ 53 In *Franciscan Sisters*, an attorney prepared a will for a testator providing that the bulk of her estate would be divided between a hospital and the attorney. *Franciscan Sisters*, 95 Ill. 2d at 456. After the testator's death, the hospital alleged that the attorney had "presumptively exercised undue influence in obtaining his legacy." *Id.* The attorney admitted in his pleadings and stipulated at trial that a presumption of undue influence over the testator had been raised; the circuit court found that the attorney had not overcome the presumption. The issue appealed to the Illinois Supreme Court was "what is required to rebut such a presumption and whether that

requirement was met." *Id*. at 460. Our supreme court concluded that sufficient evidence had been produced to rebut the presumption of undue influence, and directed the circuit court to "hear additional evidence as to whether [the attorney] in fact exercised undue influence on [the testator] in the drafting of her will which provided a substantial beneficial interest to him." *Id.* at 466.

¶ 54 The attorneys in *Klaskin* and *Franciscan Sisters* each received a substantial benefit from the decedent. As discussed above, we do not believe the petitioners adequately pled that Sobol received a substantial benefit under the Will. Furthermore, *Klaskin* and *Franciscan Sisters* address the evidence needed to rebut a presumption of undue influence. We have concluded that the Complaint failed to allege sufficient facts to *establish* the presumption of undue influence; therefore, we need not analyze the requirements for, and the effect of, a *rebuttal* of the presumption.

¶ 55 CONCLUSION

¶ 56 For the reasons stated above, the circuit court of Cook County did not err in dismissing the petitioners' "Petition for Will Contest and Complaint to Invalidate Will." We affirm the judgment of the circuit court.

¶ 57 Affirmed.