2016 IL App (1st) 152484-U

FIRST DIVISION
October 24, 2016

No. 1-15-2484

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the Circuit
	)	Court of Cook County,
	)	Probate Division
In re ESTATE OF EMIL T. SERGO, Deceased (Shirley	)	
Gorski, Petitioner-Appellant, v. Vincent Cainkar, Adm'r;	)	No. 14 P 2738
Irene Sergo; and William Jones, Respondents-Appellees).	)	
	)	Honorable
	)	James G. Riley,
	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's dismissal of petitioner's will contest is affirmed where petitioner's allegations did not give rise to inferences that the testator either lacked testamentary capacity or was unduly influenced in the making of his will, and where petitioner was collaterally estopped from relying on a presumption of undue influence by a fiduciary.

¶ 2 Shirley Gorski (Shirley) contested the will of her deceased father, Emil Sergo (Emil), on the grounds that Emil lacked testamentary capacity and was unduly influenced by Shirley's stepmother, Irene Sergo (Irene), who stood to receive the bulk of her husband's estate. Shirley

also petitioned for a discovery citation requiring Irene to appear and submit to discovery concerning Emil's assets.

¶ 3 The circuit court determined, with respect to her claims for lack of testamentary capacity and undue influence, that Shirley failed to state a claim for which relief could be granted. It also concluded that findings made in earlier guardianship proceedings barred Shirley from asserting a claim for a presumption of undue influence by a fiduciary. With no pending challenge to her father's will, the circuit court held that Shirley lacked standing to initiate citation proceedings and denied her petition for a discovery citation.

¶ 4 We affirm the decision of the circuit court. We agree with the court that Shirley's allegations in support of counts I and II failed to state a claim for lack of testamentary capacity or undue influence. We also conclude that count III, Shirley's separate claim for a presumption of undue influence, was properly dismissed on grounds of collateral estoppel. Finally, following Irene's death on August 25, 2016, we dismiss as moot Shirley's appeal of the circuit court's denial of her petition for a discovery citation to be issued to Irene.

¶ 5 BACKGROUND

¶ 6 The decedent, Emil Sergo, died on March 15, 2014. A last will and testament executed by Emil on April 9, 2008, was admitted to probate on June 18, 2014. The will appointed Emil's attorney, Vincent Cainkar, as the independent administrator of Emil's estate and called for Emil to be buried alongside his deceased second wife, Rita. Aside from a cash gift of $10,000 to William Jones, Emil's stepson from his marriage to Rita, the will left the entire residue of Emil's estate to his then wife, Irene Sergo, who was the defendant in this case until we allowed her executor to substitute as the defendant following her death. Emil's will provided that, if Irene did not survive Emil by 30 days—which she did—Emil's entire estate would go to Shirley Gorski,

Emil's natural daughter from his first marriage.

¶ 7 On November 12, 2014, Shirley filed a petition to contest Emil's will with three counts, claiming that (1) Emil lacked testamentary capacity, (2) the will was the product of Irene's undue influence, and (3) the facts gave rise to a presumption of undue influence by Irene.

¶ 8 On December 3, 2014, Shirley filed a second petition, this time for issuance of a discovery citation pursuant to section 16-1 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/16-1 (West 2014)). This petition asked the circuit court to order Irene to appear and answer questions concerning Emil's assets and Irene's actions as his agent.

¶ 9 After her first petition contesting the will was dismissed without prejudice, Shirley filed an amended petition on April 28, 2015. She asserted the same claims for relief but included a number of new allegations concerning events that took place from the time of Emil's retirement in 2001 until his relocation to an assisted living facility in early 2012. Shirley alleged that "[a]t the time of the execution of the purported [w]ill, and for at least 7 years prior thereto, [Emil] suffered from memory loss, confusion, dementia, and other cognitive deficiencies."

¶ 10 In her amended petition, Shirley explained that Emil had served as the mayor of the Village of McCook for over 40 years and was well known in his community. By the time of his retirement in 2001, however, Shirley alleged that Emil's "cognitive impairments were beginning to manifest." For example, Emil walked to work one day, a distance of three-fourths of a mile, in his long underwear and repeatedly left home without his keys, requiring Shirley to let him back into his home. Following his retirement, Emil was appointed to an advisory position requiring him to attend regular breakfast meetings with community representatives. Although he had always enjoyed this type of work, Shirley alleged that, in 2003, Emil uncharacteristically stated that he would no longer attend the meetings.

¶ 11 Shirley further alleged that, in 2003 or 2004, Emil became lost while driving to his condominium in Florida, a trip he had made on numerous prior occasions. On that same trip, he became lost and confused in a grocery store and, upon his return, became lost in Midway airport for such a long time that Irene finally left without him and he took a taxi home.

¶ 12 According to Shirley, members of the McCook police department, many of whom were familiar with Emil from his time as mayor, specifically noted his mental decline during this period. In November 2004, for example, Emil was involved in an automobile accident and the officer who drove him home described him as "disoriented." By 2005, "various members" of the police department had reported witnessing Emil fall and had observed his changed behavior. Emil reportedly engaged one officer in the same conversation each time they met, "as if [he] did not remember having the conversation previously." In the spring of 2006, a police officer responding to a call of a confused and suspicious man in the vicinity of a little league baseball field, identified Emil and escorted him home.

¶ 13 Shirley alleged that other behavior of the decedent also changed over time. According to her, his "temper began to worsen and he often had tantrums." Emil uncharacteristically did not attend the wake or funeral of his own sister in 2004 or those that same year of his sister's husband, who had been a coworker of Emil's for more than 30 years. From 2004 to 2007, Emil also uncharacteristically stopped visiting his condo in Florida, something he had previously done a few times per year.

¶ 14 Shirley alleged that, although the two had lived separately for a number of years, Irene moved in with Emil in the summer of 2006, "presumably, at least in part, to help care for [Emil] given his declining cognitive functions and advancing age." From this point forward, "particularly in 2007 and 2008," Emil's "mental status significantly deteriorated."

¶ 15 Shirley detailed additional examples of her father's uncharacteristic and erratic behavior, including refusing medical treatment and failing to keep regular appointments with physicians; putting his Florida condo, which he had previously stated would belong to Shirley one day, up for sale in 2006 or 2007; failing to attend the funeral or wake of a favorite nephew in 2007; dressing "sloppily" in sweatshirts and sweatpants when he had formerly been "an impeccable dresser"; driving to Missouri to visit his stepson, whom he planned to drive to Florida with, only to become very upset on arrival and immediately drive home to Illinois; and flashing large sums of money in public.

¶ 16 According to Shirley, in 2007, Emil suffered a fall while on a trip to Florida and his stepson had to clean him up several times when he soiled himself. Cutting the trip short, Emil returned to Illinois, where he received a call from the Florida police informing him that his renters had found $9,000 in cash Emil apparently left under a pillow in his condo. In April of that year, Emil also could not recall attending the recent funeral of McCook's mayor.

¶ 17 Shirley further claimed that Emil's behavior toward Shirley and her husband "changed dramatically after [Irene] moved into [Emil]'s home in 2006" and that "it was evident that [Emil] was being influenced by [Irene]." She alleged, for example, that Emil was "very quiet and reserved" whenever Irene was present and that he stopped relying on Shirley's husband for recommendations regarding home repairs, "uncharacteristically allowed [Irene] to make decisions and to speak for [him]," and "uncharacteristically allowed inferior work to be performed" on his home.

¶ 18 In the months preceding the signing of his will, Shirley alleged that Emil's condition only worsened. In the fall of 2007, he failed to recognize a police officer he knew. In early 2008 he reportedly became agitated on a drive with Irene back from the condo in Florida, "grabbed the

steering wheel and caused the car to spin out." And in late March 2008, while attending the grand opening of a store, Emil was found in the men's room, standing in front of a mirror and "looking lost." When Shirley's husband asked if he was all right, Emil slowly replied "get me out of here."

¶ 19 Shirley also detailed Emil's rapid physical decline in the months following the signing of his will. In May 2008, Emil was hospitalized for a fistula and related sepsis, conditions for which he apparently refused treatment. He arrived at the hospital "disoriented" and was reported during his stay as being "out of it." In 2010, Emil was found with facial injuries lying on the ground outside his home and appeared "confused." Shirley alleged that, in January 2011, Irene called her twice about Emil: once because she could not wake him and once when he left the house and Irene could not find him. On February 6, 2011, Emil finally suffered a severe stroke, for which he was hospitalized and later admitted to a rehabilitation facility. Upon his return home, he "was entirely dependent upon [Irene] and the caregivers hired by her for his physical care."

¶ 20 In the last years of Emil's life, Shirley alleged that Irene "instructed [Emil]'s caregivers to withhold or conceal [his] health condition from [Shirley] and her husband." Following an incident in which Emil purportedly asked Shirley's husband to remove his pistol from the home and neither the pistol nor certain other items could be located, Shirley alleged that Irene also began to restrict her access to Emil, insisting that Shirley and her husband visit Emil only in the kitchen of his home and later changing the locks on the house. According to Shirley, Irene also concealed the fact of her own stroke and three- to four-week recovery in late 2011.

¶ 21 Shirley alleged that, "no longer willing or physically capable of caring for [him]," Irene eventually transferred Emil to an assisted living community. By letter dated January 31, 2012, Irene informed Shirley that she would not have access to Emil's health care and financial

information and that Emil could not be removed from the facility without Irene's permission. Shirley stated that "[Irene] refused or failed to keep [Shirley] informed of [Emil]'s health, failed to keep [Shirley] informed when [Emil] was admitted to and released from the hospital, and, in fact, failed to inform [Shirley] when [Emil] passed away."

¶ 22 According to Shirley, Irene admitted to her that Emil's mental health was not good. When Irene drove to Florida in 2007 to retrieve the money Emil left at the condo, she allegedly told Shirley that she was leaving her dog with Shirley and not Emil because she did not trust him to care for it. And when Emil was hospitalized following his stroke in February 2011, Shirley claimed that "[Irene] affirmatively conceded that [Emil] had been deteriorating mentally for ten (10) years."

¶ 23 Shirley further alleged that Emil "relied on [Irene] to make personal decisions for him and to handle his financial affairs." She claimed that, even before she moved into Emil's home, Irene accompanied Emil in 2004 to the village hall in McCook to make her the beneficiary of his life insurance policies, in contravention of the divorce decree issued when Emil and Shirley's mother were divorced. Shirley further recounted how, on April 9, 2008, the same day he executed his will, Emil signed health care and property powers of attorney naming Irene as his agent and Shirley as his successor agent. She alleged that Irene then "caused [Emil] to remove [Shirley] as the pay-on-death beneficiary on all accounts and CDs and otherwise to retitle or transfer all such accounts into joint tenancy with [Irene]." Shirley stated that the last of these transfers occurred just after Emil's stroke, when Irene and a caregiver drove him to a bank and, while the caregiver waited in the lobby, Irene and Emil met with a personal banker. Shirley also alleged, upon information and belief, that Irene caused Shirley to be eliminated as a beneficiary of the trust owning the Florida condo.

¶ 24 Finally, Shirley alleged that "[b]y virtue of [Irene's] dominance and control over [Emil], who suffered from advanced age and mental and physical infirmities, and by virtue of the trust placed in [Irene] by [Emil], [Irene] was able to exert influence over [Emil] and caused [Emil] to take certain actions with regard to his estate, including, but not limited to, executing the [w]ill."

¶ 25 Irene filed a motion pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)) to dismiss Shirley's amended petition on the grounds that counts I (lack of testamentary capacity) and II (undue influence) still failed to state a claim on which relief could be granted and count III (presumption of undue influence) was barred by the doctrine of *res judicata*. Irene argued that Shirley's allegations regarding events occurring both before and after Emil signed his will, many of which related solely to his physical condition and not to his mental state, were insufficient to allege that Emil lacked testamentary capacity on the day the will was signed. She additionally argued that Shirley failed to allege that a fiduciary relationship existed between Irene and Emil, that Irene dominated Emil at the time the will was signed, or that Irene in any way participated in or was instrumental to the signing of Emil's will.

¶ 26 Irene also argued that Shirley's claim for a presumption of undue influence was barred by an order entered in a guardianship action that Shirley had filed before Emil died. In that case, Shirley had petitioned to be appointed guardian of her disabled father and his estate and to invalidate the powers of attorney naming Irene as Emil's agent. On June 20, 2012, the court in the guardianship action had dismissed Shirley's petition and made the following findings, upon which Irene based her argument that the doctrine of *res judicata* barred Shirley's claim for a presumption of undue influence:

> "1. The Powers of Attorney for Property & Healthcare executed by Emil T. Sergo on April 9, 2008 substantially conform

to the tenets of the Ill. Power of Attorney Act and are valid.

2. There is no finding of breach of duty by the agent under said powers Irene F. Sergo the now acting agent.

3. Irene Sergo is now acting as agent under said powers."

¶ 27 Following oral argument, the circuit court in this case entered an order on June 29, 2015, dismissing counts I and II of Shirley's amended petition pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)), without prejudice, and dismissing count III pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)), with prejudice. Shirley elected not to replead, instead requesting a dismissal with prejudice and entry of a final and appealable order, which the circuit court entered on August 4, 2015. In the same order, the circuit court denied Shirley's petition for issuance of a discovery citation for lack of standing.

¶ 28 JURISDICTION

¶ 29 Shirley timely filed her notice of appeal on September 1, 2015 from the circuit court's August 4, 2015, final order. We therefore have jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 30 ANALYSIS

¶ 31 Our review of an order granting a motion to dismiss pursuant to either section 2-615 or section 2-619 of the Code is *de novo*. *Freeman v. Williamson*, 383 Ill. App. 3d 933, 936 (2008).

¶ 32 A motion to dismiss brought pursuant to section 2-615 of the Code is a facial challenge asserting that the complaint fails to state a cause of action upon which relief can be granted. 735 ILCS 5/2-615 (West 2014); *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 147 (2002). "The proper

inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). At the pleading stage, a plaintiff "need only allege sufficient facts to state all elements of the cause of action" and "is not required to prove his case." *Nelson v. Quarles and Brady, LLP*, 2013 IL App (1st) 123122, ¶ 27. A complaint is sufficient where the facts alleged indicate that recovery is possible; it need not be certain. *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill. App. 3d 154, 160-61 (1986). Because Illinois is a fact-pleading jurisdiction, however, a plaintiff must make sufficient factual allegations to bring her claim within a legally recognized cause of action. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429-30 (2006). Unsupported conclusions of law or fact are thus not taken as true and not considered. *In re Estate of Dimatteo*, 2013 IL App (1st) 122948, ¶ 58.

¶ 33 A motion to dismiss pursuant to section 2-619 of the Code "admits the legal sufficiency of a plaintiff's complaint but raises defects, defenses, or other affirmative matters that appear on the complaint's face or that are established by external submissions acting to defeat the complaint's allegations." *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1029 (2006). A motion made pursuant to this section should be granted where "a plaintiff's claim can be defeated as a matter of law or on the basis of easily proven issues of fact." *Gadson v. Among Friends Adult Day Care, Inc.*, 2015 IL App (1st) 141967, ¶ 14.

¶ 34 A. Lack of Testamentary Capacity

¶ 35 We first consider the dismissal of Shirley's claim for lack of testamentary capacity pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). Our supreme court has defined the "standard test" for testamentary capacity as follows: "the testator must be capable of knowing what his property is, who are the natural objects of his bounty, and also be able to

understand the nature, consequence, and effect of the act of executing a will." (Internal quotation marks omitted.) *DeHart v. DeHart*, 2013 IL 114137, ¶ 20. To state a claim for lack of testamentary capacity, it is not necessary to specify the name of the unsoundness of mind alleged, what caused it, or even "how it came about that the unsound mind and memory caused [the] writing to be drawn and signed," as these are "matters of evidence that need not be alleged." (Internal quotation marks omitted.) *DeHart*, 2013 IL 114137, ¶ 20. A plaintiff must allege, however, a "causal and temporal connection between th[e] mental unsoundness and the execution of the will." *In re Estate of Sutera*, 199 Ill. App. 3d 531, 540 (1990).

¶ 36 Leaving aside those allegations relating solely to Emil's declining physical condition—which do not support the inference that his mind, as opposed to merely his body, was failing him—Shirley described in her amended petition a number of incidents indicating that Emil's memory regarding things that were once familiar to him was gradually fading. He occasionally failed to remember acquaintances, for example, or became lost in places that were once familiar to him. Irene argues that the bulk of these alleged incidents were too remote in time to be relevant to Emil's state of mind on April 9, 2008. We are not convinced, however, that the allegations should be disregarded solely on this basis. Although "[p]roof of a testator's lack of testamentary capacity, to be relevant, must pertain to at or near the time the will was made" (*In re Estate of Harn*, 2012 IL App (3d) 110826, ¶ 26), it is "well recognized that evidence of the mental condition of [a] testator a reasonable time before or after the making of a will is relevant to show his mental condition at the time of the execution of the instrument [citations], especially where the mental condition is of a continuous nature" (*In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 512 (1993)). See also *Voodry v. Trustees of the University of Illinois*, 251 Ill. 48, 51 (1911) (facts concerning the testator's mental condition two years prior to the execution of a will

were relevant); *Ergang v. Anderson*, 378 Ill. 312, 315 (1941) (facts concerning the testator's capacity over a period of three years were relevant).

¶ 37 Although we agree that Irene focuses too narrowly on the date that Emil's will was executed, we nevertheless conclude that Shirley's allegations failed to establish a causal connection between the alleged unsoundness of Emil's mind and the making of his will. "[A] testator need not be of absolutely sound mind in every respect in order to have sufficient testamentary capacity to make a will." *Harn*, 2012 IL App (3d) 110826, ¶ 27 (citing *Anthony v. Anthony*, 20 Ill. 2d 584, 588 (1960)). In assessing such a claim, we are not called upon to determine if the testator was a fully functioning member of society capable of performing all of those tasks that he once did. Our focus is much narrower. We ask only if the testator was capable of performing the specific task of making a will: did he know his property and who he could give it to, and was he capable of expressing his wishes on this subject? See *Bowers v. Evans*, 269 Ill. 453, 456 (1915) ("the real question *** [i]s whether the testator, at the time of making his will, had sufficient mind and memory to enable him to understand the particular business in which he was then engaged *** the disposition of his property by that instrument"); *Waugh v. Moan*, 200 Ill. 298, 303 (1902) (the "ability to transact ordinary business is a more stringent test of testamentary capacity than the law requires"); *American Bible Society v. Price*, 115 Ill. 623, 637 (1886) ("the competency of the mind should be judged of by the nature of the act to be done"); *id.* at 635-36 ("The only material question *** [i]s whether the writing produced was the product of an unsound mind and memory."); *Sutera*, 199 Ill. App. 3d at 539 (distinguishing between an allegation that a testator "was incapable of making a just and proper distribution of his estate," which "was not a charge of mental incapacity to make a will" and an allegation that a testator "did not have the mental capacity to make a valid will" which, if supported by sufficient facts,

could state such a claim).

¶ 38 Courts considering the sufficiency of allegations of testamentary capacity have emphasized the importance of this link between the alleged mental condition and the specific act of making the will. In *DeHart*, for example, our supreme court held that a plaintiff sufficiently alleged a lack of testamentary capacity where he alleged that the testator's will itself, containing a statement that the testator had no children, plainly contradicted the testator's behavior over the course of 60 years, during which time he had consistently held the plaintiff out to be his son. *DeHart*, 2013 IL 114137, ¶ 22. Conversely, in *In re Estate of Nicholson*, where a plaintiff alleged that the testator suffered from an insane delusion, in that he imagined that he had given the plaintiff large annual gifts in support of his education, this court affirmed the dismissal of the complaint because the "plaintiff ha[d] not sufficiently connected th[e] delusion to the enactment of the will." 268 Ill. App. 3d 689, 696 (1994).

¶ 39 Here, it can certainly be inferred from Shirley's allegations that Emil suffered from some worsening mental impairments that sometimes made it more difficult for him to navigate the world around him. As our supreme court said in *Heseman v. Vogt*, however, "[t]he mind of a testator may be affected in a degree, and may be in a partial sense unsound, but, as a matter of law, that alone would not incapacitate him from making a valid will if he [still] possesse[d] the capacity to know and understand what disposition he w[ould] make of his property." 181 Ill. 400, 405 (1899). Here, none of Shirley's allegations support the specific inferences that Emil was incapable of knowing his own property, recognizing and remembering the family and loved ones he might choose to include in his will, or understanding the consequences of making a will.

¶ 40 Because Shirley's allegations, taken as a whole in the light most favorable to her, do not state a claim for lack of testamentary capacity, we affirm the circuit court's dismissal of count I.

¶ 41 B. Undue Influence

¶ 42 We next consider the circuit court's dismissal, also pursuant to section 2-615, of Shirley's claim that Emil's will was the product of undue influence by Irene. In contrast to a claim for lack of testamentary capacity, which focuses on the condition of the testator, a claim for undue influence requires sufficient allegations of conduct by the alleged influencer. See, *e.g.*, *Heavner v. Heavner*, 342 Ill. 321, 324 (1930) (affirming dismissal where "[n]o act or word" of the defendant was alleged indicating the decedent's will was the result of defendant's undue influence). Here, Shirley's allegations also fall short. "[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." (Internal quotation marks omitted.) *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993) (quoted with approval by *DeHart*, 2013 IL 114137, ¶ 27). "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." (Internal quotation marks omitted.) (Emphasis added.) *Hoover*, 155 Ill. 2d at 411. "What constitutes undue influence cannot be defined by fixed words and will depend upon the circumstances of each case." *Id.*

¶ 43 *Hoover* and *DeHart* make it clear that the causal connection between certain acts of alleged undue influence and the making of a testator's will may be established by circumstantial evidence. However, they are both consistent with the long-standing rule in Illinois 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*." (Emphasis in original and internal quotation marks omitted.) *Sutera*, 199 Ill. App. 3d at 536 (quoting *Merrick v. Continental Illinois National Bank & Trust Co.*, 10 Ill. App. 3d 104, 111

(1973), and *Sterling v. Kramer*, 15 Ill. App. 2d 230, 234 (1957)).

¶ 44 Conspicuously absent from Shirley's amended petition are any allegations regarding the *manner* in which Emil's free will was overcome by any act of undue influence by Irene. Shirley did not allege, for example, that Irene repeatedly lied to Emil to disparage Shirley in his eyes, like the defendants in *DeHart*, *Hoover*, and cases on which *Hoover* relied. See *DeHart*, 2013 IL 114137, ¶ 28 (will beneficiary made "a series of misrepresentations concerning the plaintiff's character that occurred shortly before the execution of the will," including "lies about telephone calls that were made and the interception and destruction of cards and letters"); *Hoover*, 155 Ill. 2d at 412 (will beneficiary wrote letters to the testator claiming the plaintiff abandoned his daughters, treated his ex-wife poorly in their divorce settlement, and refused to fund his daughters' educations); *Sterling*, 15 Ill. App. 2d at 232-33 (will beneficiary and his wife conspired to force the plaintiff from her mother's home and represented to the mother that the plaintiff left voluntarily because she did not want to care for her mother); *Lyman v. Kaul*, 275 Ill. 11, 22 (1916) (will beneficiary made "false and fraudulent representations" that the testator's son had married a woman of immoral character); *Smith v. Henline*, 174 Ill. 184, 197 (1898) (will was made "at the instance and dictation of the beneficiaries in the will, and after false statements made by them as to the conduct and feelings of the absent relatives").

¶ 45 Shirley argues, citing *In re Estate of Kline*, 245 Ill. App. 3d 413, at 435-36 (1993), that "it is unnecessary to set forth specific conduct at the time that the testamentary instrument is executed." However, the rest of the quotation from that case is instructive:

> "While it is unnecessary to set forth specific conduct at the time that the testamentary instrument is executed, *a party must establish that specific acts of undue influence over the testator*

> *occurred*, that the specific acts were directly connected to the testator's execution of the will or codicil, and that the undue influence was operative at the time of the testamentary instrument's execution." (Emphasis added.) *Kline*, 245 Ill. App. 3d at 435-36.

¶ 46 These cases demonstrate that a plaintiff seeking to set aside a will on the grounds of undue influence is required to allege the form that the influence took and the manner in which it overcame the will of the testator. Shirley has not done this. Instead, her argument appears to be that the circumstances alleged lead to the conclusion that Emil must have been influenced by Irene. A cause of action for undue influence is not established, however, wherever the alleged facts indicate that a spouse was capable of persuading or influencing, or even did persuade or influence, his or her spouse. See *In re Estate of Glogovsek*, 248 Ill. App. 3d 784, 792 (1993) ("[t]he law does not and should not presume *** undue influence *** because the spouse has been able throughout the marriage to have considerable influence on her spouse"); *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 26 (conclusory allegations that testator was influenced in the last years of his life by his wife's "dominant nature" failed to state a claim for undue influence). As our supreme court has explained:

> "Advice, argument, or persuasion will not vitiate a will made freely and from conviction, though such will would not have been made but for such advice. [Citation.] The influence which will have the effect to avoid a will must be such as to destroy the freedom of the testator's will and make his act more the offspring of another's will than his own. [Citations.] It is not enough that the

> circumstances attending the execution of the will are consistent with the exercise of undue influence. They must be inconsistent with the absence of such influence." *Waterman v. Hall*, 291 Ill. 304, 309 (1920).

¶ 47 Contrary to Shirley's assertion on appeal, her amended petition is not "replete with allegations of facts and circumstances from which a finding of undue influence could be made." The allegations are instead merely *consistent* with such influence. They are equally consistent with either the lawful persuasion of one spouse by another or with a husband's desire, independent of any influence, to provide for his wife who moved back in with him to care for him.

¶ 48 At oral argument in this matter, Shirley insisted that it would be unfair for this court to affirm the dismissal of her claims where additional facts are outside of her knowledge. Shirley failed, however, even to allege such facts on information and belief. See *DiMatteo*, 2013 IL App (1st) 122948, ¶ 83 (noting that a plaintiff may, under certain circumstances, allege facts on information and belief, accompanied by allegations regarding what efforts were taken to discover those facts). Although Shirley contends that, from the time Irene moved in with Emil in 2006, she began to restrict Shirley's access to him, the only allegations of restricted access in Shirley's petition relate to actions taken by Irene following Emil's stroke in 2011, long after his will was signed. Shirley essentially urges us to apply a more lenient pleading standard in cases involving will contests, a proposition unsupported by the law. Although Shirley was not required to prove undue influence at this stage, she was still required to "allege sufficient facts to bring [her] claim within a legally recognized cause of action." *Baumgarten*, 2012 IL App (1st) 112155, ¶ 11. She failed to do so. Accordingly, we affirm the circuit court's dismissal of count II.

¶ 49 C. Presumption of Undue Influence

¶ 50 In count III, Shirley asserted a claim for a rebuttable presumption of undue influence, which the circuit court dismissed with prejudice pursuant to section 2-619 of the Code. The presumption Shirley sought to avail herself of arises 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 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.

¶ 51 Irene's primary argument on appeal is that the claim was barred, under principles of *res judicata*, by findings made in the guardianship action that Irene did not begin acting as Emil's agent under the powers of attorney until June 20, 2012, and thus no fiduciary relationship existed when Emil's will was signed over four years earlier. In response, Shirley contends that *res judicata* cannot apply as between a guardianship action and a will contest and that the June 20, 2012 order in the guardianship case does not make clear when Irene began acting as agent under the power of attorney. Although we agree with Shirley that *res judicata* does not apply and that it is not necessarily clear when Shirley began acting as agent under the power of attorney, we nevertheless conclude that the record supports the circuit court's dismissal of count III.

¶ 52 Subsection 2-619(a)(4) of the Code provides for the dismissal of a claim where it is barred by a prior judgment (735 ILCS 2-619(a)(4) (West 2014)), under theories of *res judicata* or collateral estoppel. *Toys 'R' Us, Inc. v. Adelman*, 215 Ill. App. 3d 561, 564 (1991). Although Irene references the doctrine of "*res judicata*," it is clearly not applicable. *Res judicata* bars claims that a plaintiff has asserted or could have asserted in other proceedings. *Woolsey v. Wilton*, 298 Ill. App. 3d 582, 584 (1998). But Shirley did not and could not have contested

Emil's will in the guardianship proceeding. See *Robinson v. First State Bank of Monticello, 97 Ill. 2d* 174, 182 (1983) ("[t]he admission of a will to probate is a prerequisite to the right to contest the will in a direct proceeding"). Thus, *res judicata* does not bar this will contest.

¶ 53 However, section 2-619(a)(4) also allows for dismissal based on collateral estoppel (*Toys 'R' Us*, 215 Ill. App. 3d at 564), sometimes referred to as "issue preclusion" (*Hayes v. State Teacher Certification Board*, 359 Ill. App. 3d 1153, 1161-62 (2005)). "Collateral estoppel applies when a party participates in two separate and consecutive cases arising out of different causes of action and some controlling factor or question material to the determination of both cases has been adjudicated by a court of competent jurisdiction against the party in the former suit." *Hayes*, 359 Ill. App. 3d at 1162. "The three requirements of collateral estoppel are as follows: (1) the issues in the cases are identical, (2) there is a final judgment on the merits, and (3) the party against whom an estoppel is asserted is a party or is in privity with a party to the prior adjudication." *Id.* at 1162. Unlike claim preclusion, issue preclusion applies only to issues "*actually litigated and determined* and not as to other matters which might have been litigated and determined." (Emphasis in original and internal quotation marks omitted.) *Id.* at 1162.

¶ 54 Irene's argument is that, since Shirley relies in count III on the powers of attorney to establish the fiduciary relationship necessary as the first element of the presumption, this claim is barred by the fact that the agency relationship was not yet in place at the time the will was signed. According to Irene, the June 20, 2012 order in the guardianship case established that Irene did not begin acting as Emil's agent under the powers of attorney until the date of that order and Irene could not therefore have been acting as Emil's agent when he signed his will on April 9, 2008.

¶ 55 The problem with this argument, as Shirley points out, is that it is simply not clear from

the record that the court in the guardianship action made any finding regarding when Irene *began* acting as Emil's agent under the powers of attorney. The June 20, 2012 stated only that she "is *now* acting as agent under said powers." (Emphasis added.)

¶ 56 It is also unclear what basis the circuit court in this case relied on when it granted the 2-619 motion. Its order only states that "The Motion to Strike and dismiss is granted w/regard to Count III w/prejudice pursuant to 735 ILCS 5/2-619," and the record contains no transcript to accompany the court's ruling. Although Irene insists that, in granting her motion with respect to count III, the circuit court implicitly found that Irene was not acting as agent under the power of attorney at the time he signed his will was signed, that is not necessarily clear from the record before us.

¶ 57 Whatever the circuit court's reasons were, we may affirm its decision on any basis appearing in the record. *Goldberg v. Goldberg*, 103 Ill. App. 3d 584, 587 (1981). What is clear is that the court in the guardianship case made a finding in its June 20, 2012, order that there was "no finding of breach of duty by the agent under said powers, Irene F. Sergo, the now acting agent." This is sufficient to prevent Shirley from relying on a presumption that Irene acted improperly and exerted undue influence on her husband, even if she had, in fact, been acting as agent under the power of attorney at the time he signed his will. Thus the June 20, 2012 order in the guardianship case bars this claim either because Irene was not acting yet as agent under the power of attorney when Emil's will was signed or, if she was, because she did not exert undue influence.

¶ 58 Agents owe their principals fiduciary duties of loyalty, good faith, and honesty. *ARTRA Group, Inc. v. Salomon Brothers Holding Co.*, 288 Ill. App. 3d 467, 470 (1997). They must not engage in self-dealing or otherwise take actions contrary to the best interests of those to whom

such duties are owed. See *Blanchard v. Lewis*, 414 Ill. 515, 524 (1953) ("[t]he law of agency and the declared public policy of this State strictly require honesty and loyalty to the interests of the principal on the part of an agent"). Thus, when an agent unduly influences a principal, the act is also a breach of fiduciary duty. See *In re Marriage of Pagano*, 154 Ill. 2d 174, 184 (1992) (question on review was "whether [the agent] exerted undue influence *** *or otherwise breached its fiduciary duties*") (emphasis added), *superseded by statute on other grounds, as recognized in Brush v. Gilsdorf*, 335 Ill. App. 3d 356, 362 (2002). See also *Malkin v. Malkin*, 301 Ill. App. 3d 303, 316 (1998) (noting that an agreement between a lawyer and its client would be enforceable unless it was the result of "fraud, coercion, undue influence *or other breach of fiduciary duties*") (emphasis added).

¶ 59 If, as Shirley argues, Irene was acting under the powers of attorney at the time that Emil's will was signed and therefore had a fiduciary duty to Emil, the court in the guardianship case already held that she did not breach that duty. A finding by the circuit court in this case that, acting as a fiduciary, Irene unduly influenced Emil in the making of his will would have been completely at odds with the finding of the court in the guardianship action. Collateral estoppel therefore applied where this "controlling factor or question material to the determination of both cases" was adjudicated in that prior action. *Hayes*, 359 Ill. App. 3d at 1162. Accordingly, we affirm the circuit court's dismissal of count III pursuant to section 2-619 of the Code.

¶ 60 D. Petition for Issuance of a Discovery Citation

¶ 61 Shirley's notice of appeal also seeks a reversal of the circuit court's denial of her petition for issuance of a discovery citation on the basis that she lacks standing. Section 16-1 of the Probate Act governs citations issued on behalf of an estate to discover and ultimately to recover estate assets found to be in the possession or control of third parties. 755 ILCS 5/16-1 (West

2014). Subsection 16-1(a) establishes that a petition may be filed by the representative "or by any other person interested in the estate," and section 1-2.11 provides the following definition of an "interested person:"

> " 'Interested Person' in relation to any particular action, power or proceeding under this Act means one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative. *** This definition also applies to the following terms: 'interested party', 'person (or party) interested' and 'person (or party) in interest'." 755 ILCS 5/1-2.11 (West 2014).

¶ 62 The parties in this case sought a ruling from the circuit court on whether an individual such as Shirley—who was a disinherited heir (one who would inherit only in the absence of the will) and who had initiated but not yet prevailed in proceedings to contest the decedent's will—qualified as an "interested person" with standing to bring citation proceedings on behalf of the decedent's estate. Once it had dismissed all of Shirley's claims challenging the will, the circuit court determined she had no standing to bring a citation proceeding. We were prepared to address whether that was appropriate, as well as and the potentially harder question of whether Shirley had standing to bring a citation proceeding if she was successful on appeal. We requested supplemental briefing from the parties regarding the potential applicability of *In re Estate of Schlenker*, 209 Ill. 2d 456 (2004), an Illinois Supreme Court decision construing the Probate Code's definition of an "interested person."

¶ 63 Our inquiry was mooted, however, by Irene's death on August 25, 2016, of which the independent executor of her estate notified us by his motion to substitute filed on September 16, 2016. As a general rule, we do not "decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009). Here, resolution of Shirley's standing to pursue citation proceedings would have no practical effect where the relief sought in her petition, an order requiring Irene to personally appear and submit to discovery, can no longer be granted. *Midwest Central Education Ass'n., IEA-NEA v. Illinois Educational Labor Relations Board*, 277 Ill. App. 3d 440, 448 (1995) ("[a]n issue is 'moot' where its resolution could not have any practical effect on the existing controversy"). We therefore dismiss this portion of Shirley's appeal as moot. *Midwest,* 277 Ill. App. 3d at 448 ("where only moot questions are involved, this court will dismiss the appeal").

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, we affirm the circuit court's dismissal with prejudice of counts I (lack of testamentary capacity) and II (undue influence) pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)) and its dismissal with prejudice of count III (presumption of undue influence) pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). Shirley's appeal of the circuit court's denial of her petition for a discovery citation is dismissed as moot.

¶ 66 Affirmed.