SIXTH DIVISION
September 14, 2018

No. 1-17-0322 & 1-17-2864
(Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT PURCELL, as Independent Executor of the Estate of RONALD E. LARSEN, and in his role as Administrator to Collect of the Estate of CECILIA J. LARSEN, Plaintiff-Appellant, v. CAMILLE C. CALKINS, individually, and as successor trustee of the WILBUR P. LARSEN TRUST dated June 26, 1991, and as a trustee under the CECILIA J. LARSEN TRUST, dated June 26, 1991, as purportedly restated on December 4, 2007, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. Nos. 12 P 6180 & 13 CH 01011 (Consolidated) Honorable Karen L. O'Malley, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Mikva and Griffin concurred in the judgment.

ORDER

¶ 1 ***Held*:** We affirm the circuit court grant of summary judgment as to counts I, II, VIII, and IX. We reverse the grant of summary judgment as to counts III, IV, V, VI, and VII because a question of fact remains as to the testamentary capacity of Cecilia Larsen in December 2007.

¶ 2 This cause of action was originally filed by Ronald E. Larsen against his sister, defendant-appellee, Camille Calkins, seeking an accounting, trust construction and other relief related to their parents' estates. Ronald Larsen passed away on March 20, 2014, during the pendency of this case.

¶ 3 Robert Purcell, as independent executor of Ronald's estate substituted in as plaintiff. After several dismissals, plaintiff filed a third amended verified complaint raising several causes of action. Counts I and II sought an accounting from defendant. Counts III and IV alleged tortious interference with inheritance expectancy. Count V alleged breach of fiduciary duty. Count VI alleged a lack of testamentary capacity on the part of their mother, Cecilia Larsen, to execute the 2007 restatement of her trust and will. Count VII alleged undue influence by defendant in the drafting of the Cecilia's 2007 Trust. Count VIII alleged an inherent ambiguity in the 2007 Trust. Count IX sought the imposition of a constructive trust over the 2007 Trust.

¶ 4 After discovery, the circuit court granted summary judgment in favor of defendant on counts III, IV, VI, VII, VIII, and IX of the third amended complaint. The court granted plaintiff's request for Rule 304(a) language and plaintiff appealed that judgment. After this first grant of summary judgment, defendant moved for summary judgment on the remaining counts (I, II, and V). After briefing from the parties, the circuit court ruled in favor of defendant on the remaining counts. Plaintiff appealed this judgment. In the interest of justice and judicial economy, this court consolidated the two appeals.

¶ 5 Before this court, plaintiff argues the circuit court erred in granting summary judgment in favor of defendant on each count. For the reasons stated more fully below, we affirm the circuit court grant of summary judgment as to counts I, II, VIII, and IX. We reverse the grant of summary judgment as to counts III, IV, V, VI, and VII.

¶ 6 JURISDICTION

¶ 7 This action commenced on January 11, 2013. On December 7, 2016, the circuit court granted defendant's motion for summary judgment as to counts III, IV, VI, VII, VIII, and IX. The order granting this summary judgment also made an express finding under Illinois Supreme Court Rule 304(a) that there was no just reason to delay appeal of the December 7 order. Plaintiff filed a notice of appeal on January 4, 2017. Accordingly, this court has jurisdiction over the December 7 order pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 304(a). Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 304(a) (eff. March 8, 2016).

¶ 8 On September 29, 2017, the circuit court granted defendant's summary judgment motion as to counts I, II, and V. These were the last pending counts. On November 22, 2017, plaintiff filed a motion in this court pursuant to Illinois Supreme Court Rule 303(d), which allows this court to extend the time under which a notice of appeal can be filed if appellant's motion meets certain conditions. Ill. S. Ct. R. 303(d) (eff. July 1, 2017). We granted the motion, and allowed plaintiff to file his notice of appeal. Accordingly, this court has jurisdiction over the September 29 order pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 9 On our own motion, we consolidated the two appeals on June 4, 2018.[1]

¶ 10 BACKGROUND

¶ 11 This case was filed on January 11, 2013, by Ronald E. Larsen (hereinafter "Ronald"), against his sister, defendant-appellee, Camille C. Calkins (hereinafter "the defendant"). The

[1] Because of the procedural history of this case, the parties filed two sets of briefs. The first set briefed the dismissal of counts I, II, and V. The second set briefed counts III, IV, VI, VII, VIII, and IX.

action relates to the wills and trusts of their parents Wilbur P. Larsen (hereinafter "Wilbur") and, his wife, Cecilia J. Larsen (hereinafter "Cecilia"). During their lives, the pair retained the services of attorney, Lyman W. Welch, to prepare their estate plans. On June 26, 1991, Wilbur created the Wilbur P. Larsen Trust. The terms of his will named the Wilbur P. Larsen Trust as the sole beneficiary of Wilbur's estate. The terms of the Wilbur P. Larsen Trust named his surviving spouse as the trust's beneficiary up to the amount of the applicable marital deduction, with any funds exceeding this figure to be added to a testamentary trust created in Wilbur P. Larsen Trust, known as the Larsen Family Trust (hereinafter "the Family Trust"). Absent a power of appointment, upon the death of the surviving spouse, the trustee was to allocate the remaining assets of the Family Trust to Wilbur's remaining children *per stirpes*. The power of appointment allowed his spouse to direct any or all of the assets of the Family Trust to another trust. This power could be exercised during the spouse's life or through a will. At the same time, Cecilia also created the Cecilia J. Larsen Trust, which contained identical terms.

¶ 12 Wilbur died on November 23, 2000. Upon his death, the assets of the Wilbur P. Larsen Trust were allocated in two shares, one to Cecilia up to the amount of the marital deduction, and the remainder to the Family Trust. Cecilia became trustee of the Family Trust. If Cecilia was unable or unwilling to act, the Family Trust named defendant and Ronald as successor co-trustees.

¶ 13 Cecilia initiated conversations with Lyman Welch, her estate attorney, in July 2007 about amending her estate plan. The pair had numerous conversations during this time. Based on their conversations, Welch suggested a unitrust format that would pay out a certain percentage per year to the residuary beneficiaries. Welch sent correspondence to Cecilia on August 20, 2007, outlining the proposed terms of the amendments she requested. The correspondence described that Ronald and defendant's shares would be held in trust following Cecilia's death, with a

percentage paid out each year to the pair. Welch suggested a four percent pay out. During their subsequent conversations, Cecilia asked Welch to increase the percentage to 10 percent per year. Welch sent drafts to Cecilia on September 18, 2007. Welch was present when Cecilia executed her restated will and trust on December 4, 2007 (hereinafter "the 2007 Will" and "the 2007 Trust"). Before the signing, Welch again reviewed the documents with Cecilia to make sure they reflected her intentions. While defendant traveled with Cecilia to Welch's office this day, Welch stated that defendant was specifically excluded from the room while he reviewed the documents with Cecilia.

¶ 14 To carry out the terms, Cecilia served as the initial trustee of the 2007 Trust and she named Merrill Lynch Bank & Trust Co., F.S.B., or its corporate successor, as the successor trustee. Defendant was not named trustee or successor trustee of the 2007 Trust, but was identified as the trustee "designator." The 2007 Trust only allowed an "independent trustee" to serve as a successor trustee. This was defined to mean "either a corporate trustee or an individual trustee who is not a beneficiary of any trust under this instrument and who has no legal obligation to support any beneficiary of any such trust and who is not a related or subordinate party (as defined in 672(c) of the Code) with respect to any beneficiary of the trust."

¶ 15 Upon Cecilia's death in 2012, neither the 2007 Trust nor the Family Trust maintained accounts at Merrill Lynch. As trustee, Cecilia had moved both of them to Wells Fargo to follow the transition of her investment advisor Edward Morris. Following her death, defendant was advised by Morris about Reliance Trust Company and its ability to serve as successor trustee. Defendant, in her role as trustee designator, attempted to name Reliance as successor trustee of the 2007 Trust, but Reliance would only take on the obligation if a scrivener's error it identified was corrected.

¶ 16 Reliance pointed out an apparent scrivener's error involving the mis-reference to two article numbers. The alleged scrivener's error was present in Article 3, section 3.3 of the 2007 Trust and in Article 3 of the 2007 Will. The Will states in relevant part:

> "The Trustee shall use each share created for a child of mine to fund a Child's Trust for such child under Article 6 of my Living Trust. The Trustee shall distribute each share created for the descendants of a deceased child of mine per stirpes to such descendants, subject to postponement of possession as provided in Article 8 of my Living Trust as to any such descendant who is under the age of thirty-five years at the time of distribution."

Section 3.3 of the 2007 Trust states:

> "The Trustee shall use each share created for a child of mine to fund a Child's Trust for such child under Article 6. The Trustee shall distribute each share created for the descendants of a deceased child of mine per stirpes to such descendants, subject to postponement of possession as provided in Article 8 as to any such descendant who is under the age of thirty-five years at the time of distribution."

Article 4 is titled "Child's Trust," Article 6 is titled "Postponed Possession," and Article 8 is titled "Trust Interpretive Provisions." Cecilia exercised the power of appointment granted to her by the Family Trust in her 2007 Will. The language in the 2007 Will appointed the Family Trust assets to the 2007 Trust to be distributed in shares of equal value to separate Child's Trusts established for her children.

¶ 17 In an attempt to rectify the alleged scrivener's error and allow Reliance to become successor trustee, Welch prepared a trust construction agreement. The construction agreement would change references to Article 6 to Article 4 and from Article 8 to Article 6. Ronald was

notified of defendant's attempts to appoint Reliance and the preparation of the trust construction agreement. He opposed the efforts to correct the scrivener's error and refused to sign the construction agreement. His refusal prevented the appointment of a successor trustee and the distribution of trust assets.

¶ 18 After refusing to sign the construction agreement, Ronald initiated this action against defendant. During the lawsuit's pendency, Ronald passed away on March 21, 2014. Robert Purcell, as independent administrator for Ronald's estate substituted in as plaintiff. After several dismissals, the parties proceeded into discovery based on the allegations contained in the third amended complaint. This complaint had nine counts: count I (accounting for the 1991 version of Cecilia's Trust), count II (accounting for the Family Trust), count III (tortious interference with inheritance expectancy undue influence related to the 1991 version of Cecilia's Trust), count IV (tortious interference with inheritance expectancy undue influence related to the Family Trust), count V (breach of fiduciary duty related to the Family Trust), count VI (set aside 2007 Trust for lack of capacity), count VII (set aside 2007 Trust for undue influence), count VIII (set aside 2007 Trust for inherent ambiguity) and count IX (imposition of a constructive trust over the 2007 Trust).

¶ 19 On December 7, 2016, the circuit court granted defendant's motion for summary judgment as to counts III, IV, VI, VII, VIII, and IX. The court found Cecilia had testamentary capacity to make the changes to her estate in 2007. The court found no support in the record for the undue influence claim. The court also agreed with defendant that the 2007 Will and 2007 Trust contained a scrivener's error, and defendant's construction gave effect to the entire document. Since the 2007 Will and Trust were valid and enforceable, the court entered judgment in favor of defendant on the tortious interference claims. At the same time, the circuit court denied cross-summary judgment in favor of plaintiff on counts VIII and IX.

¶ 20 On September 29, 2017, the circuit court entered summary judgment in favor of defendant on remaining counts (I, II, and V). The court found defendant was not the trustee of either the Family Trust or 1991 version of Cecilia's Trust and therefore had no duty to account. The court found no fiduciary relationship between Ronald and defendant and therefore no breach of a fiduciary duty.

¶ 21 This appeal followed.

¶ 22 ANALYSIS

¶ 23 On appeal, plaintiff challenges the grant of summary in favor of defendant on each count he brought. Summary judgment is appropriate where the pleadings, admissions on file, and depositions show there are no genuine issues of material fact so that the movant is entitled to judgment as a matter of law. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. In making that determination, courts must view such items in the light most favorable to the nonmovant. *Guterman Partners Energy, LLC v. Bridgeview Bank Group*, 2018 IL App (1st) 172196, ¶ 48. If a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). To survive this motion, the nonmoving party need not prove its case, but must present some evidentiary facts that would arguably entitle it to judgment. *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8 (2004). We review the circuit court's summary judgment ruling *de novo. In re Application of Will County Collector*, 2018 IL App (3d) 160659, ¶ 12.

¶ 24 Before turning to an analysis of each count, we address the issue of defendant's failure to admit the 2007 Will to probate. At oral argument defendant admitted the 2007 Will had yet to be admitted to probate, and based on this, plaintiff claims the 2007 Will "has not been before this or any other Court for the purposes of contesting its validity, the capacity of the testator, or the influence of Camille over its preparation and execution." In support of his argument that the

failure to admit the will to probate prevented the circuit court from ruling on its validity, plaintiff relies on *Beatty v. Clegg*. 214 Ill. 34 (1905). The court in *Beatty* stated, "[a] court of equity will not recognize or act upon a will until it has been admitted to probate." *Beatty*, 214 Ill. at 38.

¶ 25 After reviewing the case law cited by the parties, we disagree with plaintiff and conclude the failure to admit the 2007 Will to probate did not deprive the circuit court of jurisdiction to rule on its validity. *Beatty* and *Hicks* represent a bygone era for the Illinois court system. In the time of *Beatty* and *Hicks*, courts of law and courts of equity were separate entities with separate and distinct jurisdictions. "The judicial article embodied in the Illinois Constitution of 1970 has abolished the distinction between courts of law and equity so that our circuit courts have original jurisdiction of all justiciable matters." *Meyer v. Murray*, 70 Ill. App. 3d 106, 115 (1979); Ill. Const. 1970, art. VI, § 9. Under Article 9, an Illinois circuit court has original jurisdiction over any "justiciable matter" regardless of court division. *Id.* The fact that the 2007 Will was "never admitted to probate" did not deprive the circuit court of jurisdiction to rule on it.

¶ 26 Plaintiff's argument also finds no support in the Probate Act. Section 6-4 states, "[i]f the proponent establishes the will by sufficient competent evidence, it shall be admitted to probate, unless there is proof of fraud, forgery, compulsion or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will." 755 ILCS 5/6-4 (West 2016). This language demonstrates that the competency of a will is decided **before** the will is admitted to probate. If the court decides a will is a product of "compulsion or other improper conduct," as plaintiff alleges here, it is not admitted to probate.

¶ 27 It is also disingenuous of plaintiff to make such an argument because his third amended complaint clearly puts the 2007 Will at issue. In his request for relief under Count VI of the third amended complaint, plaintiff seeks to have "this Court issue an order declaring that the purported

exercise of a power of appointment allegedly by Cecilia J Larsen is invalid for undue influence." The "purported exercise of a power of appointment" is contained in the 2007 Will.

¶ 28 Additionally, as plaintiff admits in his brief before this court, "[f]or an exercise of a power of appointment to be valid and effective, two requirements must be satisfied. First, the intention of the testator to exercise the power must be shown. Second, there must be compliance with any conditions established by the donor for its exercise." *Estate of MacLeish*, 35 Ill. App. 3d 835, 838 (1976) citing *Northern Trust Co. v. House*, 3 Ill. App. 2d 10 (1954). Section 3.3 of the Wilbur Trust provided Cecilia with the power of appointment either during her life or through her will. If it was exercised through her will, the Wilbur Trust stated, "any such direction shall be made by Will making specific reference to this power." Article 3 of the 2007 Will states,

> "[u]nder Section 3.3 of the WILBUR P. LARSEN TRUST dated June 26, 1991, I have the power to appoint any or all of the Family Trust established for me under that instrument. *** I exercise that power and appoint all assets held in such trust at my death to then acting Trustee of my Living Trust, to be held as follows: *** The Trustee shall use each share created for a child of mine to fund a Child's Trust ***."

This language from the 2007 Will satisfies the two requirements necessary to make a power of appointment effective. It unequivocally shows Cecilia's intention to exercise the power given to her in section 3.3 of the Wilbur Trust. It also comports with this trust's requirement that the power to appoint be exercised via a will with a specific reference to said power. Based on the above, if Cecilia had testamentary capacity at the time, then she properly exercised the power of appointment given to her in the Wilbur Trust.[2]

[2] We address the lack of capacity and undue influence claims separately.

¶ 29 The other predominant issue in this case is Cecilia Larsen's capacity during the creation of the 2007 estate documents. If she had testamentary capacity in December 2007 then the 2007 estate documents would control. If she did not have testamentary capacity, the 1991 estate documents would control.

¶ 30 In order to have testamentary capacity, "the testator must know what his property is, who are the natural objects of his bounty, and also be able to understand the nature, consequences and effect of the act of executing a will." *Id*. quoting *Dowie v. Sutton*, 277 Ill. 183, 196 (1907). "The absence of any one of these requirements would indicate a lack of testamentary capacity." *Id.* "Since the law presumes every person sane until the contrary is proved, the burden rests on the party asserting the lack of testamentary capacity to prove it." (Internal quotation marks omitted.) *In re Estate of Barth*, 339 Ill. App. 3d 651, 665 (2003) quoting *Wiszowaty v. Baumgard*, 257 Ill. App. 3d 812, 816 (1994). "Evidence regarding a testator's testamentary capacity must relate to a reasonable period before, during or after execution of the testamentary document." *Estate of Wrigley*, 104 Ill. App. 3d 1008, 1017 (1982). This evidence is competent as long as it relates to the testator's condition at the time the testamentary documents were executed. *Id.*

¶ 31 After reviewing the evidence in a light most favorable to plaintiff, a question of fact exists as to Cecilia's testamentary capacity at the time the 2007 estate documents were executed. While defendant presented the testimony of Camille Calkins and Welch regarding the competency of Cecilia, plaintiff presented the affidavit of Dr. James Patras. Dr. Patras reviewed medical records from Northwest Community Hospital, HCR Manor Care and other subsequent facilities. He opined that the records showed from December 2007 through February 2008, Cecilia showed impairments indicative of dementia: short term memory impairment, focus and planning ability impairment, reasoning and judgment impairment, confusion, paranoia, balance deficits, paranoid ideations, and delusions. He opined to a reasonable degree of medical certainty

Cecilia "lacked the ability to meaningfully understand and participate in her own decision making when concerning safety or finances on or about December 4, 2007."

¶ 32 This is sufficient to create an issue of fact as to the testamentary capacity of Cecilia. We now review each count knowing a question of fact exists as to Cecilia's capacity.

¶ 33 Count I sought an accounting under the 1991 version of the Cecilia Trust, while Count II sought an accounting under the Family Trust. Plaintiff alleges defendant became trustee of the 1991 Cecilia Trust and Family Trust when Cecilia became incompetent in 2007. It is true that if Cecilia was incompetent in 2007, defendant and plaintiff became successor trustees of both of those trusts. However, in her motion for summary judgment, defendant submitted an affidavit which averred that during discovery she had given him all necessary documents to complete an accounting of the Family Trust and Cecilia Trust. Plaintiff submitted no counter-affidavit to call this into question. "[F]acts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counter-affidavit are admitted and must be taken as true for purposes of the motion." *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986). The lack of a counter-affidavit resulted in the admission of those statements. Accordingly, even if defendant became the trustee (and that remains an open question dependent on the capacity issue), defendant has provided all the documentation necessary for plaintiff to complete an accounting. Since plaintiff has received all the information necessary to complete an accounting of the trusts, summary judgment was correctly entered on counts I and II.

¶ 34 Count III alleged tortious interference with inheritance expectance for the 1991 Cecilia Trust based on the undue influence of defendant. Count IV made the same allegations except as to the Family Trust. The tort of tortious interference with testamentary expectancy does not contest the validity of the will; it is a personal claim against the individual tortfeasor. *In re Estate of Ellis*, 236 Ill. 2d 45, 52 (2009). To state a cause of action of tortious interference with a

testamentary expectation, plaintiff must allege sufficient facts to indicate: "(1) the existence of an expectancy; (2) defendant's intentional interference therewith; (3) tortious conduct such as undue influence, fraud, or duress; (4) a reasonable certainty that the expectancy would have been realized but for the interference, and (5) damages. *DeHart*, 2013 IL 114137, ¶ 36.

¶ 35 In *DeHart*, our supreme court stated a plaintiff must meet four factors to give rise to a presumption of undue influence. A presumption of undue influence will arise 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 v. DeHart*, 2013 IL 114137, ¶ 30 citing *Herbolsheimer v. Herbolsheimer*, 60 Ill. 2d 574, 577 (1975).

¶ 36 After reviewing the record, summary judgment was improperly granted on counts III and IV because questions of fact remain.[3] As the *DeHart* court stated, "a presumption of undue influence is something that can only be ultimately determined – at the earliest – after the close of plaintiff's case." *DeHart*, 2013 IL 114137, ¶ 29 citing *In re Estate of Glogovsek*, 248 Ill. App. 3d 784, 798 (1993). We therefore reverse the grant of summary judgment as to counts III and IV.

¶ 37 In count V, plaintiff alleged defendant breached a fiduciary duty to him based on defendant being a trustee of the Family Trust. This issue is linked to the issue of Cecilia's capacity and therefore the circuit court improperly granted summary judgment on this count. Plaintiff and defendant were named as successor trustees to the Family Trust in the event Cecilia was no longer able to act. If Cecilia lacked capacity in 2007, she would not have been able to act as trustee of the Family Trust, nor would her power of appointment in her 2007 Will been

[3] Defendant admits that the power of attorney put her in a fiduciary relationship with Cecilia. *Simon v. Wilson*, 291 Ill. App. 3d 495, 503 (1997)

effective. In such a case, defendant would become the successor trustee and would owe a duty to plaintiff as a beneficiary of the trust. Since Cecilia's capacity in 2007 remains an open question, summary judgment was improperly granted on count V.

¶ 38 Summary judgment was also improperly granted on count VI. Count VI seeks to set aside the 2007 Trust based on Cecilia's alleged lack of capacity. Cecilia's capacity in 2007 remains in question and summary judgment was improperly granted on this count.

¶ 39 Count VII seeks to set aside the 2007 Trust based on undue influence. As stated above, questions of fact remain as to plaintiff's undue influence claims. Accordingly, summary judgment was improperly granted as to count VII.

¶ 40 Count VIII seeks to set aside the 2007 Trust based on inherent ambiguity. Count IX seeks to enforce the 2007 Trust as written. These claims are contingent on a finding that Cecilia had the testamentary capacity in 2007. If she did not have testamentary capacity in 2007, the 1991 estate documents will govern and these two claims will be moot. We address the issue in the interest of judicial economy so that after resolution of the capacity issue the circuit court can move to enforce either the 1991 estate documents or 2007 documents.

¶ 41 Section 3.3 of the 2007 Will allowed Cecilia to exercise a power of appointment over the Family Trust assets. Article 3 of the 2007 Will states in relevant part,

> "The Trustee shall use each share created for a child of mine to fund a Child's Trust for such child under Article 6 of my Living Trust. The Trustee shall distribute each share created for the descendants of a deceased child of mine per stirpes to such descendants, subject to postponement of possession as provided in Article 8 of my Living Trust as to any such descendant who is under the age of thirty-five years at the time of distribution."

Article 3, section 3.3 of the 2007 Trust, states in relevant part,

> "The Trustee shall use each share created for a child of mine to fund a Child's Trust for such child under Article 6. The Trustee shall distribute each share created for the descendants of a deceased child of mine per stirpes to such descendants, subject to postponement of possession as provided in Article 8 as to any such descendant who is under the age of thirty-five at the time of distribution."

Article 4, section 4.1(a)(1) of the 2007 Trust, titled Child's Trust, provides, "[e]ach year, the Trustee shall distribute to a child of mine, in equal monthly payments at the end of each month, the Percentage Amount. The Percentage Amount equals 10% of the average fair market value of the assets of the Child's Trust held for such child ***." Article 6 dealt with postponed possession, "[w]henever property is to be distributed subject to this Article to a child who is under the age of thirty-five years, the Trustee shall retain such property as a separate trust for the child."[4] Article 8 is titled Trust Interpretive Provisions.

¶ 42 The first purpose in construing a trust is to discover the settlor's intent from the trust as a whole, which the court will effectuate if it is not contrary to public policy. *First National Bank v. Canton Council of Campfire Girls, Inc.*, 85 Ill. 2d 507, 513 (1981). In construing trusts in this regard, the court will apply the same rules of construction that are applicable in construing wills. *Id.* The intention of the settlor is to be ascertained by examining the entire trust or will and giving the words employed their plain and ordinary meaning. *Harris Trust and Sav. Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991). If possible, the court should construe the will or trust so that no language used by the testator is treated as surplusage or rendered void or insignificant. *Id.* "[A] court should harmonize clauses which appear inconsistent or repugnant so as to give effect

[4] Ronald Larsen died without having any descendants.

to a testator's general intention" and "[e]quity will remedy any defect which is not of the essence but is only technical." *Estate of MacLeish*, 35 Ill. App. at 839.

¶ 43 After reviewing the document, we agree with the circuit court that the 2007 Will and Trust contain a scrivener's error. In finding a scrivener's error, the circuit court agreed with defendant's construction, which would replace the reference to Article 6 (Postponed Possession) with Article 4 (Child's Trust) and Article 8 (Trust Interpretive Provisions) with Article 6 in both Article 3, section 3.3 of the 2007 Trust and in Article 3 of the 2007 Will. In making these changes, all articles and sections in both documents will be harmonized and given effect.

¶ 44 We reject plaintiff's argument that no scrivener's error exists. Plaintiff's version is illogical and unreasonable. It fails to give effect to every provision specifically Article 4 (Child's Trust) of the 2007 Trust. Plaintiff's construction renders Article 4 mere surplusage. *Donovan*, 145 Ill. 2d at 172. Section 3.3 calls for the creation of Child's Trust for each of Cecilia's children. Section 4.1 specifically states, "[t]he provisions of this paragraph shall govern each Childs's Trust as long as the child of mine for whom such trust was created is living." It is obvious that the reference to Article 6 in section 3.3 is meant to be Article 4. Similarly under plaintiff's theory, the trustee would be unable to effectuate distribution to a child under 35 because Article 8 does not detail how distributions are to be made to a beneficiary under the age of 35. Plaintiff's argument that the 2007 Trust should be enforced as written is unworkable.

¶ 45 The defendant and circuit court's construction conforms to Cecilia's intentions. Welch testified during his deposition that Cecilia was concerned about Ronald inheriting a large sum of money all at once. While she did not hold the same concern for the defendant, she expressed to Welch that she wanted to treat her children equally. Welch suggested a unitrust formant that would pay each of her children four percent each year. Cecilia thought this amount would not be enough for Ronald and increased it to 10 percent. While Welch cautioned that such a percentage

may deplete the trust during Ronald's lifetime, Cecilia rejected the suggestion and insisted on the 10 percent. Section 4.1(a)(1) reflects Cecilia's intent that her children receive equal distributions of 10 percent. By changing the reference from Article 6 to Article 4 and from Article 8 to Article 6, the circuit court gave meaning and force to each provision of the 2007 Will and Trust and carried out Cecilia's intent. *Harris Trust and Sav. Bank,* 145 Ill. 2d at 172-73.

¶ 46 Based on the presence of the scrivener's error, we conclude the circuit court did not err in entering summary judgment in favor of defendant on count VIII. Under count VIII, plaintiff claims the 2007 Trust is "inherently ambiguous and complex," and should therefore be set aside. Despite his repeated assertions, he fails to state what portions are "inherently ambiguous and complex." He also fails to cite to any case law in support of this argument. Plaintiff's count VIII lacks any factual or legal support and the circuit court correctly rejected it.

¶ 47 Count IX of the third amended complaint sought to enforce the 2007 Trust as written. Enforcing the 2007 Trust as written would be untenable and fail to give force to each article contained within it. *Donovan,* 145 Ill. 2d at 172. For that reason, we conclude the circuit court properly entered summary judgment in favor of defendant on count IX.

¶ 48 CONCLUSION

¶ 49 For the reasons stated above, we affirm the circuit court grant of summary judgment as to counts I, II, VIII, and IX. We reverse the grant of summary judgment as to counts III, IV, V, VI, and VII. On remand, defendant should be given an opportunity to depose Dr. Patras.

¶ 50 Affirmed in part and reversed in part.
Cause remanded with directions.