

THIRD DIVISION
May 14, 2014

Nos. 1-12-2887; 1-12-2888 (Consolidated)

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE ESTATE OF HELEN TOM)	Appeal from the
WING, Deceased.)	Circuit Court of
_____)	Cook County.
LAI TOM,)	
)	
Petitioner-Appellee,)	Nos. 10 L14717 and
)	10 P 3886
v.)	
)	
ELAINE Y.F. KONG, Individually and as)	
Executor of the Estate of Helen Wing Tom,)	The Honorable
Deceased,)	Susan M. Coleman,
)	Judge Presiding.
Respondent-Appellee.)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

¶ 1 *HELD*: Order of the circuit court dismissing petitioner's amended pleadings challenging her mother's will and seeking recovery of estate assets affirmed where petitioner failed to allege sufficient facts to support her claims.

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¶ 2 Petitioner Laiphong (Lai) Tom appeals an order of the circuit court dismissing, with prejudice, her second amended complaint and citation to recover estate assets. On appeal, petitioner argues that the court erred in finding that she failed to allege sufficient facts to support her claims. For the reasons explained herein, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Decedent Helen Tom Wing died testate on June 21, 2010, at the age of 95. Respondent Elaine Kong, decedent's long-time hairdresser and friend, was named the executor of Wing's will. In her will, decedent Wing ordered that all her personal effects be divided into "shares of substantially equal value" amongst Kong and decedent's three children: Gary Tom, Gordon Tom and petitioner, Lai Tom. Decedent's will was executed on October 9, 2009. Based on the record, it appears that this was the first and only testamentary document executed by decedent.

¶ 5 Following her mother's death, petitioner commenced legal action to challenge her mother's will, filing a citation to discover assets and a complaint against Kong, in which petitioner advanced claims of undue influence and intentional interference with inheritance expectancy. The actions were subsequently consolidated in the circuit court and respondent filed a motion to dismiss both actions. The circuit court granted Kong's motion, and dismissed both actions without prejudice, affording petitioner an opportunity to replead.

¶ 6 Thereafter, petitioner filed amended pleadings, including the second amended complaint at issue in the instant appeal and a citation to recover assets. In her second amended pleadings, petitioner advanced claims of fraud and undue influence. In support of those claims, petitioner alleged that at the age of 94, decedent suffered from a multitude of health issues, including

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diabetes mellitus, hypertension, gastrointestinal reflux, coronary heart disease, renal failure, congestive heart failure, hyperlidemia, glaucoma, and hearing loss. She was hospitalized for more than a week in July 2009 as a result of complications caused by her heart disease and diabetes. Following her discharge on July 7, 2009, decedent was admitted to a rehabilitation facility with the knowledge and consent of her three children. Petitioner further alleged that respondent checked decedent out of the rehabilitation facility on July 14, 2009, against the advice of medical professionals, and without the knowledge or consent of Wing's children. Petitioner acknowledged that "the full extent of Wing's assets has not been traced and the gross value of her estate has not been conclusively determined" but estimated that her mother's net worth was over \$500,000 as of July 2009, and that it was her mother's intent for all or most of those assets to pass to her three children absent a formal probate proceeding.

¶ 7 In the week following Wing's discharge, petitioner alleged that decedent, with respondent's assistance, closed two of her bank accounts, requested money released from her life insurance policy, cashed in various Treasury Bonds, and released money from various other investment accounts. Thereafter, on July 29, 2009, decedent opened a new checking account with Pacific Global Bank, naming Kong as a joint tenant of the account. Decedent subsequently opened a second account at the same bank on August 7, 2009, in which respondent was again named a joint tenant of the account. Petitioner alleged that "Kong took Wing to the bank to open these accounts as part of her wrongful scheme to take Wing's money for herself." Petitioner further alleged that "Kong took control of Wing's finances in July 2009." Specifically, Kong would fill in checks for decedent who would then sign the checks. Although decedent confirmed

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to a court-appointed guardian ad litem that respondent was writing out checks for her, she reported that she maintained control over her checkbook and that "her money was only being used for her well being." Petitioner, however, nonetheless alleged that "[m]any of the checks signed by Wing take out large amounts of money either for cash or to third parties unknown to Wing's children. Wing had no known needs which would require such large cash expenditures." Finally, petitioner alleged that "[a]s part of her scheme to take [petitioner's] money, Kong impeded Wing's ability to communicate with her children and in fact actively isolated Wing from her children" before Wing executed her will on October 9, 2009. The will was "prepared by attorneys at Chuhak & Tecson and [was] notarized by Mitchell Feinberg. * * * Upon information and belief, Wallace Moy [Kong's personal attorney] translated the written will to Wing and oversaw the signing of the will. Kong was either present or otherwise assisted Wing in meeting with Moy and executing the will." Pursuant to the terms of decedent's will, Kong and her three children were to be awarded equal shares of her estate.

¶ 8 Kong responded with a motion to dismiss petitioner's second amended complaint and the related citation to recover assets. In pertinent part, respondent argued that petitioner's pleadings were "full of conclusions and unsubstantiated conjecture" rather than facts as required by Illinois law. In support of her motion to dismiss, respondent affixed a report completed by Paul Franciskowicz, a court-appointed guardian ad litem.¹ In that report, Franciskowicz stated that

¹ The report was completed when decedent's children initiated a guardianship action sometime in 2009. The action was either dismissed or withdrawn and no permanent legal guardian was ever appointed.

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decedent informed him that her relationship with her children had "deteriorated" and that she "look[ed] to [respondent] to help her with all her appointments" and home care. Decedent also reported that respondent helped her in paying for her bills, but clarified that respondent simply wrote out the checks for her. Decedent stated that she alone maintained control of her checkbook and she "signe[d] every check." Finally, the guardian ad litem indicated that he had spoken to decedent's treating physician, who opined that decedent was "competent" and did not need a legal guardian, but stated that she did need some assistance due to her physical infirmities. Decedent expressed her intent to divide her estate into four equal shares amongst respondent and her three children.

¶ 9 The circuit court subsequently presided over a hearing on respondent's motion to dismiss petitioner's amended pleadings. After reviewing the pleadings and the arguments of both parties, the court dismissed both actions with prejudice. The court explained its ruling as follows:

"In this case, the court has reviewed the citation * * *. The facts that the court reviewed included that the citation respondent arranged caregivers for the decedent. That the respondent took her to doctor's appointments. That the respondent visited decedent during the week.

* * *

The petition is also rife with many allegations and many, many conclusions such as that the respondent was in control of the decedent's finances. That the respondent engaged in a course of conduct designed to gain the trust of the decedent. That the respondent isolated her from her family. That the respondent impeded the ability of the

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decedent to have contact with her children.

That the respondent took control of her finances. That she caused the decedent to liquidate investments. That she became involved in the decedent's personal, medical and financial affairs. Those are all conclusions.

There is a conclusion that the decedent and that the respondent w[ere] in a fiduciary relationship with the decedent, but there are no facts that tell this court how those actions may or may not have been taken by respondent.

Also, nowhere is there an allegation that the respondent is in possession of the estate's assets or that she concealed, converted or embezzled estate property. * * * Based upon the allegations that are contained in the citation, the petition for citation, the court does not believe that there are sufficient well-pled facts to allow the citation to issue against the respondent Kong. Therefore, the motion to dismiss the citation is granted.

With regards to the motion to dismiss the second amended complaint for the will contest, regarding the will contest, the two allegations in the complaint are based upon undue influence and fraud in the inducement. Counsel for respondent Kong rightfully argues that in order to plead a cause of action for undue influence sufficient to invalidate a will, there must be facts alleged that the undue influencer procured or participated in the execution of the will and that undue influence existed at the time of the execution.

The complaint here focuses on the many months before the decedent's death and restates most of the allegations that are—that form the basis of the citation, but in order to prove undue influence, the allegations with regards to undue influence at the time of the

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execution of the will must be clear. Counsel for will contestant argues today that since respondent Kong's personal attorney interpreted the will for the decedent at the time of execution, that that fact alone should be sufficient to show that the—to show the respondent's undue influence at the time of the execution.

Even accepting that fact as true, this court is not persuaded by that argument. Moreover, the complaint is otherwise devoid of any well-plead facts to establish undue influence at the time of the execution of the will. Again, there are many conclusions and legal conclusions and many allegations contained in the complaint, but there are no —there are not sufficient well-pled facts to establish account of undue influence.

Moreover, the same can be said for the [*sic*] Count II which alleges—I'm sorry—Count I which alleges fraud. There are just not enough sufficient well-pled facts to establish a cause of action of fraud. Therefore, the motion to dismiss the will contest is allowed with prejudice."

¶ 10 Following the court's ruling, petitioner filed a timely notice of appeal.

¶ 11 II. ANALYSIS

¶ 12 On appeal, petitioner argues that the circuit court erred in dismissing her amended pleadings with prejudice because she alleged sufficient facts to establish that respondent established a fiduciary relationship with decedent and used her relationship to exercise undue influence over decedent when decedent executed her will and named respondent as one of her beneficiaries.²

² Although petitioner included a fraud claim in her second amended complaint, she raises

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¶ 13 Respondent, in turn, argues that the circuit court properly dismissed petitioner's amended citation to recover assets and second amended complaint because she failed to plead facts establishing the existence of a fiduciary relationship and that she used that relationship to exercise undue influence over decedent.

¶ 14 A motion filed pursuant to section 2-615 of the Illinois Code of Civil Procedure (Civil Code) challenges the legal sufficiency of a complaint and asserts that it fails to state a cause of action upon which relief can be granted. 735 ILCS 5/2-615 (West 2010); *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21; *Oliviera v. Amoco Oil Co.*, 201 Ill. 2d 134, 147 (2002). A motion to dismiss filed pursuant to section 2-615 should only be granted if there are no sets of facts that can be proved, which would entitle the plaintiff to recover. *Iseberg v. Gross*, 227 Ill. 2d 78, 86 (2007); *In re Estate of DiMatteo*, 2013 IL App (1st) 122948, ¶ 56. Although a plaintiff need not set forth evidence in her complaint, because Illinois is a fact-pleading jurisdiction, a plaintiff must nonetheless set forth sufficient facts rather than conclusions that bring her claim within a legally recognized cause of action. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429-30 (2006); *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 11. On review, the relevant inquiry is "whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, and taking all the well-pleaded facts and all reasonable inferences which may be drawn from those facts as true, are sufficient to establish a cause of action upon which relief may

no argument with respect to that claim in her appeal, and accordingly, we will not consider that claim in this disposition. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013 ("Points not argued are waived * * *").

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be granted." *Napleton v. City of Hinsdale*, 229 Ill. 2d 296, 305 (2008). "[C]onclusions 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 in ruling on the motion."

DiMatteo, 2013 IL App (1st) 122948, ¶ 58; see also *Patrick Engineering, Inc., v. City of Naperville*, 2012 IL 113148, ¶ 31 ("[A] court cannot accept as true a mere conclusion unsupported by specific facts" when reviewing a section 2-615 motion to dismiss). A circuit court's dismissal of a complaint for failure to state a claim involves an issue of law, which is subject to *de novo* review. *Napleton*, 229 Ill. 2d at 305; *DiMatteo*, 2013 IL App (1st) 122948, ¶ 52.

¶ 15 We first address the circuit court's dismissal of petitioner's citation to recover assets. Citations to discover and recover assets are authorized by section 16-1 of the Probate Act (755 ILCS 5/16-1 (West 2010)). That statutory provision permits a party with an interest in an estate to seek recovery of estate assets from someone who has "concealed, converted or embezzled * * * [and] * * * has in h[er] possession or control" any property which belongs to the estate. 755 ILCS 5/16-1(a) (West 2010). "The objectives of a citation proceeding under the Probate Act are to obtain the return of personal property belonging to the estate but in the possession of, or being concealed by, others or to obtain information to recover estate property" and it is the burden of the petitioner to establish that specific property in the control of another belongs to the estate. *In re Estate of Elias*, 408 Ill. App. 3d 301, 315 (2011).

¶ 16 Here, petitioner alleged that after checking decedent out of a rehabilitation center, respondent arranged for decedent to receive care at decedent's own home and took control over

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decedent's finances. During this time, petitioner alleges that several of her mother's bank accounts were closed and the money contained in those accounts were transferred to accounts in which respondent was a joint tenant. Up until the date of her death, decedent signed checks made payable to various payees, none of whom included respondent. Although petitioner alleges that her mother's estate was depleted, petitioner does not quantify the value of the estate prior to July 2009, when respondent arranged for her mother's care at home or identify all of the assets that comprised the estate prior to respondent's daily involvement in her mother's life. Indeed, while petitioner identified several retirement accounts that were part of decedent's estate, she acknowledged "other financial accounts" were "unknown." Among the assets that petitioner did identify as being part of her mother's estate prior to July 2009, including annuities from New York Life Insurance Company and Boston Financial Company, petitioner includes no allegation that respondent concealed, embezzled or is in possession of those funds. There are no allegations at all that respondent has possession, custody or control over any of decedent's estate assets. The pleadings, at most show that respondent helped decedent use and spend her own money, something that she was permitted to do. Based on the lack of any specific factual allegations that respondent is in possession or control of any specific assets that belong to the estate, we do not find that the circuit court erred in dismissing petitioner's amended citation to recover assets.

¶ 17 We turn now to the circuit court's dismissal of petitioner's second amended complaint, in which petitioner advanced a claim of undue influence. Undue influence has been defined as any "influence that is excessive, improper, or illegal." *Baumgarten*, 2012 IL App (1st) 112155, ¶ 13. "Undue influence necessary to invalidate a will is that influence which prevents the testator from

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exercising his own free will in the disposition of his estate." *DiMatteo*, 2013 IL App (1st) 122948, ¶ 62. To constitute "undue influence," the 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 in favor of a particular party or parties." *Id.*; see also *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 13. In addition the influence "must be of such a nature to destroy the testator's freedom concerning the disposition of his estate and render his will that of another." *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993); see also *DeHart v. DeHart*, 2013 IL 114137, ¶ 27.

¶ 18 The *prima facie* elements of undue influence include: (1) a fiduciary relationship between the testator and the person who is the recipient of a substantial benefit of the will; (2) a testator who was in a dependent situation and a beneficiary who was in a dominant role; (3) a testator who placed her trust and confidence in the beneficiary; and (4) a will that was prepared or executed under circumstances in which the beneficiary participated or was instrumental. *Baumgarten*, 2012 IL App (1st) 112155, ¶ 14; see also *DeHart*, 2013 IL 114137, ¶ 30 (stating that a presumption of undue influence exists when these elements are satisfied). Moreover, to sufficiently raise a claim of undue influence, the pleading "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. A mere conclusion that the testator was influenced by the persuasive or dominant nature of one of the beneficiaries is not sufficient." *Baumgarten*, 2012 IL App (1st) 112155, ¶ 14, quoting *In re Estate of Sutera*, 199 Ill. App. 3d 531, 536 (1990). What constitutes undue influence depends upon the facts and circumstances of each case. *DeHart*, 2013 IL 114137, ¶ 27;

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Hoover, 155 Ill. 2d at 411-12. "Proof of undue influence may be wholly inferential and circumstantial." *Id.*

¶ 19 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). "A fiduciary relationship may be found in one of two ways. A fiduciary relationship may be found to exist as a matter of law from the relationship of the parties, such as an attorney-client relationship, or may be found to exist by the facts of a particular situation, such as a relationship where trust is reposed on one side and results in superiority and influence on the other side." *In re Estate of Long*, 311 Ill. App. 3d 959, 963 (2000). The existence of a fiduciary relationship is never presumed; rather, facts that constitute the existence of such a relationship must be clearly and explicitly alleged. *Baumgarten*, 2012 IL App (1st) 112155, ¶ 20; *Estate of Bontkowski*, 337 Ill. App. 3d 72, 78 (2003). Factors to be considered to determine whether a fiduciary relationship exists include the degree of kinship between the dominant and servient party, the disparity of age, health and mental conditions between the parties and the extent to which the servient party was entrusted to handle the business and financial affairs of the dominant party. *Bontkowski*, 337 Ill. App. 3d at 78; *Long*, 311 Ill. App. 3d at 964.

¶ 20 Here, there is no dispute that decedent had significant physical health problems toward the end of her life and relied on respondent for assistance. Respondent was not a blood relative, but was decedent's long-time friend and hairdresser. Respondent arranged for caregivers to assist decedent at decedent's home and took her to doctor's appointments. Respondent also assisted

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decedent in paying her bills. Although petitioner alleged that respondent "controlled" her mother's assets and "caused" her mother to liquidate her assets, she failed to allege any specific facts to support these conclusory allegations. Moreover, these allegations are belied by statements made by decedent to the guardian ad litem that she alone maintained control of her checkbook and that respondent helped her pay her bills by writing out checks that decedent then signed. At most, petitioner's allegations show that her mother relied upon a friend during a period of poor health and this is not enough to establish a fiduciary relationship. See, *e.g.*, *Baumgarten*, 2012 IL App (1st) 112155, ¶ 20 (finding that a husband's reliance on his wife during poor health was not sufficient to establish a fiduciary relationship).

¶ 21 Moreover, even if it could be concluded that respondent controlled decedent's assets and was in a fiduciary relationship with decedent, we nonetheless find that petitioner's undue influence claim necessarily fails because there are no specific allegations as to any behavior engaged in by respondent that caused decedent's will to be overcome. See *Baumgarten*, 2012 IL App (1st) 112155, ¶ 22. Although petitioner cites decedent's failing physical health, she includes no allegations that decedent's physical ailments resulted in any cognitive impairments or in any way prevented her from making informed decisions about her personal or financial affairs. More importantly, petitioner includes no allegations that decedent's physical health issues impacted her cognitive function at the time she executed her will on October 9, 2009. Finally, there are no specific facts alleged that respondent participated or was instrumental in the preparation of decedent's will. At most, petitioner alleges that respondent's personal attorney acted as an interpreter for petitioner while other attorneys, with no ties to respondent, drafted the

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document. Petitioner does not raise any claims that the will was misinterpreted or that respondent took part in the preparation of the document and made misrepresentations to decedent prior to or during the signing of the will. Accordingly, because petitioner failed to satisfy the pleading requirements for a *prima facie* claim of undue influence, we conclude that the circuit court did not err in granting respondent's motion to dismiss. See, e.g., *In re Estate of Julian*, 227 Ill. App. 3d 369, 377 (1991) (upholding dismissal of complaint containing an undue influence claim where plaintiff failed to allege with specificity how the beneficiary overcame the testator's will and failed to allege that the beneficiary directly participated in the procurement or execution of the will); *see also Sutera*, 199 Ill. App. 3d at 537-39.

¶ 22

III. CONCLUSION

¶ 23 Accordingly, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.