2012 IL App (1st) 120129-U

SECOND DIVISION
December 17, 2013

No. 1-12-0129

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 WILLIAM P. DREWRY, Deceased,	)	Appeal from the Circuit Court of Cook County.
GUY HUMPHREY DREWRY, III, PAUL GARDNER DREWRY, PAMELA DREWRY,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 2009 P 8098
MARSHALL KELTZ, individually and as Trustee of the William P. Drewry Trust dated December 20, 1998	)	Honorable Susan M. Coleman,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Harris and Pierce concurred in the judgment.

O R D E R

¶ *1* *HELD*: Family members and prior beneficiaries brought an action against the trustee, who is also the sole beneficiary of decedent's trust, by challenging the validity of amendments to the trust as being the product of defendant's undue influence, and tortious interference with expectancy and sought to set aside the amendments and create a constructive trust in their favor and remove defendant as trustee for breach of fiduciary duties. The complaint

> sufficiently alleges the factual elements of a cause of action for undue influence, tortious interference with an expectancy, a request for a constructive trust and removal of the trustee for breach of fiduciary duties and should not have been dismissed for failure to state a claim. The order dismissing the complaint is reversed and the cause is remanded for further proceedings.

¶ 2 I. INTRODUCTION

¶ 3 The plaintiffs are five relatives of the decedent, William P. Drewry, who filed an action in state court over Drewry's trust alleging (1) that Drewry's new life partner, Marshall Keltz, exerted undue influence over Drewry; (2) that Kelz tortiously interfered with their expectancy; (3) that there exists a constructive trust in their favor, and (4) sought removal of Keltz as the trustee of the Drewry trust for breach of his fiduciary duties. The executor of the Drewry estate seeks funds that are not a part of the trust but belong to the estate that allegedly were misappropriated by Keltz. Plaintiffs' first two complaints were dismissed for insufficient pleading. The circuit court dismissed plaintiffs' second amended complaint for failure to state a claim, with prejudice, on December14, 2011. The court also denied all requests for discovery, except for the Drewry Trust federal and state estate tax returns. Plaintiffs filed their timely notice of appeal on January 11, 2012.

¶ 4 After the parties concluded their briefing, this court's preliminary review of the issues on appeal revealed that certain beneficiaries of the trust in question were not joined as parties, including charitable organizations. Because those beneficiaries of the trust may have been indispensable parties, any final judgment could not be entered without affecting their interests. 735 ILCS 5/2-407 (West 2010); see also 735 ILSC 5/2-406(a). Therefore, by summary order dated August 21, 2012, this court, *sua sponte*, remanded the case to the circuit court for joinder of necessary parties before further proceedings in this court. *Drewry v. Keltz,* 2012 IL App (1st) 120129-U (Summary Order dated August 21, 2012) (citing *Lah v. Chicago Title Land Trust Co.*, 379 Ill. App. 3d 933, 940 (2008); *Lakeview Trust & Savings Bank v. Estrada,* 134 Ill. App. 3d 792, 811 (1985); *Lerner v. Zimmerman*, 69 Ill. App. 3d 620, 624 (1979). The requirement of joinder of necessary parties is absolute and inflexible and applies equally to the trial courts and appellate courts. *Glickhauf v. Moss*, 23 Ill. App. 3d 679, 683 (1974); *In Interest of Vaught*, 103 Ill. App. 3d 802, 804 (1981). By motion of the appellee to recall the mandate, this court was informed that all necessary directives contained in this court's remand order were fulfilled. Therefore, this appeal was reinstated on September 4, 2013.

¶ 5 While this case was on remand, on March 13, 2013, our supreme court issued its opinion in *DeHart v. DeHart*, 2013 IL 114137, affirming an appellate court case discussed by the parties in their briefs. Therefore, this court, *sua sponte*, allowed the parties until October 29, 2013, to file supplemental briefs to address the applicability of the supreme court's *DeHart* opinion to the issues raised in the pending appeal. Both parties filed supplemental briefs.

¶ 6 II. BACKGROUND

¶ 7 a. The Decedent, His Life Partners and His Estate Plan

¶ 8 The decedent, William P. Drewry (Drewry) died on October 19, 2009. For forty years, Drewry was in a committed same-sex relationship with Thomas Matier. Drewry and Matier were life partners who resided together. In 1988, Drewry established the William P. Drewry Trust which was to provide for Matier in the event of Drewry's death. The trust also provided that upon Matier's death, the trust estate was to be distributed in equal shares to Drewry's five nieces and nephews and to Matier's brother.

¶ 9 Drewry's life partner, Matier died in December 2002. In February 2003, Drewry amended his trust to reflect the death of Matier. He eliminated all provisions for Matier and set up outright distributions of the trust estate to his five nieces and nephews, the plaintiffs in this case.

¶ 10 In December 2003, Drewry, age 79, met Marshall Keltz, age 64. Prior to their meeting, Keltz's life partner, Norman Cutler, had also died in 2002. In March 2004, Drewry and Keltz began living together and informed Drewry's family of their same-sex relationship. In July 2004, Drewry and Keltz attended the Drewry family reunion together. Following the Drewry family reunion where Keltz claimed to have received religiously and sexually biased remarks from a Drewry family member, Keltz reported the incident to Drewry. Thereafter, Drewry revoked the power of attorney he gave to Paul Drewry. Drewry named his life partner, Keltz as his power of attorney for all of Drewry's financial and health matters in the event of Drewry's disability. These powers were never put into effect as Drewry was never declared disabled prior to his death.

¶ 11 In September 2004, Drewry amended his trust to name Keltz as both the successor trustee and sole beneficiary of the trust. In June 2005, Drewry amended his trust which eliminated all but James Drewry as contingent beneficiaries of the trust.

¶ 12 In July 2005, Canada passed a law that allowed for same-sex marriages. In September 2005, Drewry, age 81 and Keltz, age 66 traveled to Canada and were married. Keltz's family was informed, but only post-occurrence announcements were sent to Drewry's family members regarding this occasion.

¶ 13 In January 2006, Drewry amended his trust by reducing the percentage left to the contingent beneficiaries. In May 2007, Drewry amended his trust to include Keltz's son and daughter, Ira Sean

Keltz and Amy Sara Cardella, as contingent beneficiaries.

¶ 14 In January 2008, Drewry amended his trust to restrict those entitled to an accounting of his trust to vested beneficiaries and removed the specific bequest to James Drewry and removed Paul Drewry as a successor trustee of the trust.

¶ 15 On October 19, 2009, William Drewry died in the hospital at the age of 89.

¶ 16 b. Pre-Litigation Probate History

¶ 17 On October 23, 2009, Drewry's attorney filed the Last Will and Testament of William P. Drewry dated February 14, 2003, which nominated Harris Trust & Savings Bank as Executor. However, Drewry did not own assets in his name individually sufficient to necessitate the probate of his estate.

¶ 18 On December 23, 2009, plaintiff, Pamela Drewry Downey, a prior contingent beneficiary of the Drewry trust, filed a petition for Letters of Administration under the will. The following day, Pamela Drewry Downey's attorney issued a *subpoena duces tecum* to Capital Management Corporation stating he was the attorney for the executor of Drewry's estate. The subpoena sought all documents relating to any accounts of Drewry, including all documents relating to the trust. Keltz filed a motion to quash the subpoena which the court granted on February 25, 2010. Although Downey had also prepared petitions for discovery citations against Keltz and Drewry's attorney, Downey did not move forward with these petitions given the court's ruling on Keltz's motion to quash the subpoena.

¶ 19 Plaintiff, Paul Drewry, who held William Drewry's prior power of attorney for medical and financial matters and was the prior trustee and beneficiary of Drewry's trust, was then appointed executor of Drewry's will. As executor of Drewry's will, on April 28, 2010, Paul Drewry renewed attempts previously made by Downey to seek information from Capital Management Corporation, Harris Bank, Keltz and Drewry's attorney. The court denied the request for a discovery citation against Drewry's attorney. The court allowed plaintiff, Paul Drewry, 21 days to amend the remaining petitions for discovery, but no amended petitions for discovery were ever filed or noticed up for hearing.

¶ 20 c. Litigation History

¶ 21 As a preliminary observation, neither party mentioned in their opening briefs that two beneficiaries of the William P. Drewry Trust sued Keltz, individually and as trustee of the Drewry trust, in federal court. This court's research uncovered the case and one opinion entered regarding the federal case. Count I of the federal case sought an accounting of the trust and Count II sought Keltz's removal as trustee for breach of his fiduciary duties. Although the federal case and the memorandum opinion entered by the federal district court on January 31, 2012, clearly related to the subject matter of the currently pending appeal on the Illinois state case, neither party discussed how, or if, the federal case affects this case. See *Downey v. Keltz*, 2012 WL 280716 (Jan. 31, 2012, N.D. Ill.). The federal district court granted Keltz's motion to dismiss Count II - breach of fiduciary duty, but denied Keltz's motion to dismiss Count I - request for an accounting. The request for an accounting was fully briefed in March 2012. Downey v. Keltz, Docket No. 11-CV-01323 (J. Tharp N.D. Ill.). On March 6, 2013, the federal district court, recognizing "the potential conflict from Keltz's dual roles as both the trustee and the [sole] beneficiary receiving payments from the trust", ordered Keltz to provide a full accounting of the trust. Drewry v. Keltz, 2013 WL 855725 (J. Durkin, N.D. Ill.). This order concluded the federal court litigation.

¶ 22 On August 17, 2010, five of Drewry's nieces and nephews filed the instant complaint seeking to have Drewry's six amendments to his trust invalidated, beginning with the September 2004 amendment that named his life partner, Keltz as successor trustee and sole beneficiary of his trust. On November 30, 2010, Keltz filed a motion to dismiss the complaint. On December 21, 2010, the plaintiffs issued subpoenas to Capital Management Corporation, Harris Bank, ING Direct and Aurora National Life Assurance Company. On January 7, 2011, Keltz moved to quash all subpoenas. On February 28, 2011, the circuit court granted Keltz's motion to dismiss plaintiffs' complaint and quashed all of plaintiffs' subpoenas.

¶ 23 The plaintiffs filed an amended complaint on April 26, 2011, which was again dismissed following Keltz's motion to dismiss for failure to state a claim, along with all attempts at discovery by the executor of the decedent's will, Paul Drewry, being quashed.

¶ 24 On September 2, 2011, plaintiffs filed their second amended complaint. The four-count complaint alleged the following: (1) that Keltz exerted undue influence over Drewry; (2) that Keltz tortiously interfered with the plaintiffs' expectancy; (3) that there exits a constructive trust in favor of plaintiffs; and (4) that Keltz should be removed as trustee of the Drewry trust for breach of his fiduciary duties. On October 5, 2011, again, Keltz filed a motion to dismiss pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure. Full briefing of the motion was scheduled, as well as oral argument. On December 14, 2011, the circuit court dismissed the plaintiffs' second amended complaint for failure to state a claim, with prejudice, and quashed subpoenas and granted dismissal of discovery citations except for production of Drewry's federal and state estate tax returns.

¶ 25 This appeal followed.

¶ 26 d. Facts Alleged in Plaintiffs' Second Amended Complaint

¶ 27 The second amended complaint alleges that during Drewry's lifetime, he was a loving, involved, family member who organized family reunions, family telephone conferences and regularly sent postal cards and e-mails, among other things, to cultivate a vibrant familial relationship. Drewry's entire family always welcomed Drewry's same-sex partner of forty years, Thomas Matier, to family gatherings and invited Matier's family. Matier was always treated by the Drewry family as a family member and there was never any unpleasantness either due to the same-sex household Drewry kept with Matier, or otherwise. Family was important to Drewry and he was generous with his family knowledge and made substantial financial contributions for educating the next Drewry generation, among other things.

¶ 28 The allegations continue by recounting Drewry's relationship with the defendant, Keltz. Drewry met the defendant in December 2003 and the defendant moved in with Drewry by March 2004. The complaint alleges that as early as March 2004, the defendant took control of Drewry's e-mail communications.

¶ 29 In July 2004, it is alleged that the defendant fabricated an argument with a Drewry family member during the Drewry family reunion wherein he falsely accused the family member of making both homosexual slurs and religious slurs to his face. Defendant repeated these falsehoods to Drewry and published a letter to all family members which recounted the incident. In the letter, he described how incensed Drewry was at hearing of the incident by writing that "Bill's greatest displeasure as to your thoughts towards homosexuality, and towards him personally was your failure to tell him directly. I fully agree. Bill asked me why I didn't show you to the door after your defaming us as persons." The letter demanded an apology. It is alleged that this fabricated incident by Keltz caused Drewry to revoke the power of attorney he gave to Paul Drewry and to place it with Keltz.

¶ 30 Just over a month later, plaintiffs allege that defendant caused Drewry to execute an amendment to the Drewry Trust which withdrew the appointment of Paul Drewry as trustee of his trust and name the defendant, Marshall Keltz, as trustee and sole beneficiary upon Drewry's death.

¶ 31 The complaint alleges that from that point on defendant intercepted Drewry's postal mail and e-mail from Drewry's family. After that, no family mail was received from Drewry and he stopped organizing family conference calls and the family reunions or contributing financially to any family member's education.

¶ 32 At Christmas 2004, Drewry did speak with one family member only to recount how the defendant, Keltz was still upset and continued to accuse Drewry's family of snubbing him. Drewry did not have a cell phone and this call was the one instance where defendant did not answer the land-line phone in the Drewry home. The allegations are that defendant, through his new position of trust in Drewry's household, effectively cut off the Drewry family's communication with Drewry and used his position to sow seeds of misrepresentations to Drewry regarding his family and to lie about the Drewry family.

¶ 33 In September 2005, when defendant and Drewry traveled to Canada to be married, the Drewry family was not informed until after the ceremony.

¶ 34 In the summer of 2007, Drewry's financial advisor had dinner with Drewry and the defendant, Keltz. He is alleged to have reported that Drewry's health had deteriorated, that Drewry has recently fallen and needed assistance. Drewry's financial advisor reported to the Drewry family after having dinner with Drewry and the defendant that he believed defendant "exercised substantial influence and control over Bill Drewry and believed that 'it was obvious what was going on'. [Defendant, Keltz] was after Bill Drewry's money."

¶ 35 The significant allegations regarding Drewry's many health problems which affected his ability to walk, speak, hear and communicate and his dependency on the defendant to assist him with all of his affairs and his day-to-day living are riddled throughout the second amended complaint despite the plaintiffs' handicap in allegedly being cut-off from receiving updates from Drewry on his current medical condition which was typically received from Drewry before defendant's influence.

¶ 36 There are allegations of the defendant's behavior which one could characterize as callous animosity toward Drewry's family by not informing them of Drewry's death and cremating his remains and disposing of the ashes without their knowledge. Additionally, allegations are made that defendant continued to receive monies from an annuity that were payable only to Drewry and were to cease upon his death by intentionally not informing the insurance company that Drewry had died. Additionally, allegations are made that the defendant withdrew monies from an account held only in Drewry's name that was not part of the trust and that rightfully belonged to Drewry's estate and refused to return the monies. Defendant is also alleged to have sold much of Drewry's possessions that were not a part of the trust, but belonged to the Drewry estate and kept the proceeds and refused to either provide an accounting or give the estate the proceeds.

¶ 37 It is also alleged that the defendant, Keltz, is a disbarred attorney who used his specific knowledge of the law and his influence over Drewry in his ever-increasingly dependent physical state to craft the trust amendments to his and his family's benefit and to specifically exclude Drewry's family. It is alleged that because of Drewry's physical ailments, Keltz transported Drewry to his attorney visits and because of Drewry's inability to hear, was present with Drewry and his attorney during their consultations and execution of the trust amendments and conveyed the attorney's comments to Drewry during those visits.

¶ 38 III. ISSUES PRESENTED FOR REVIEW

¶ 39 1. Did the circuit court err when it granted defendant's motion and dismissed the plaintiffs' second amended complaint for failure to state a claim ?

¶ 40 2. Did the circuit court err in granting Keltz's motion to quash subpoenas ?

¶ 41 3. Did the circuit court err when it denied, in part, discovery sought by the executor of Drewry's will?

¶ 42 IV. ANALYSIS

¶ 43 a. Standard of Review

¶ 44 Whether this court will sustain the circuit court's dismissal of a complaint for failure to state a claim pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615(West 2012)) is a question of law which we review *de novo*. *Imperial Apparel Ltd. v. Cosmo's Designer Direct*, Inc., 227 Ill. 2d 381, 392 (2008). *De novo* review simply means we perform the same analysis that the trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). "In considering a motion to dismiss, we accept as true all well-pleaded facts and draw all inferences from those facts in favor of the non-movant." *Lee v. Nationwide Cassel, L.P.*, 174 Ill. 2d 540, 545

(1996). This court will affirm the trial court's dismissal of a complaint for failure to state a claim "only if it clearly appears that no set of facts could be proved under the allegations which would entitle the party to relief." *Id.* at 545.

¶ 45 Additionally, this court gives *de novo* review to the circuit court orders denying the citations and subpoenas. *In re Estate of Lashmett*, 369 Ill. App. 3d 1013, 1016 (2007).

¶ 46 b. Plaintiffs' Failure To Name All Beneficiaries of the Trust as Party Defendants

¶ 47 Illinois law requires that "beneficiaries of a trust are necessary parties to foreclose their interest." *Schlosser v. Schlosser*, 218 Ill. App. 3d 943, 947 (1991)(citing *Illinois National Bank v. Givin*, 390 Ill. 345 (1945) and *Village of Lansing v. Sundstrom*, 379 Ill. 121 (1942)). After a summary order of this court was entered on August 21, 2012 requiring joinder of all necessary parties, the parties reported to this court that this was accomplished. Therefore, this court recalled this court's mandate and allowed the appeal to proceed.

¶ 48 c. Count I - Undue Influence

¶ 49 Our supreme court has recently reiterated its definition of "undue influence" and stated the allegations necessary to allege an undue influence claim, as follows:

> " ' Undue influence *** is " 'any improper *** urgency of persuasion whereby the will of a person is overpowered and he is indeed induced to do or forbear an act which he would not do or would do if left to act freely.'[Citation.] To constitute undue influence, the influence 'must be of such a nature as to destroy the testator's freedom concerning the disposition of his estate and render his will that of

> another.' " [Citations.]
>
> What constitutes undue influence cannot be defined by fixed words and will depend upon the circumstances of each case. [Citation.] The exercise of undue influence may be inferred in cases where the power of another has been so exercised upon the mind of the testator as to have induced him to make a devise or confer a benefit contrary to his deliberate judgment and reason. [Citation.] Proof of undue influence may be wholly circumstantial. [Citation.] The influence may be that of a beneficiary or that of a third party which will be imputed to the beneficiary. [Citations.] False or misleading representations concerning the character of another may be so connected *** that the allegation that such misrepresentations were made to the testator may present triable fact questions on the issue of undue influence.' [Citations.]" *DeHart v. DeHart*, 2013 IL 114137, ¶ 27 (quoting *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993)).

¶ 50 The four necessary elements of a cause of action challenging the validity of amendments to a trust due to undue influence are: (1) a fiduciary relationship existed between the testator and a substantial beneficiary under the trust; (2) a testator in a dependent situation in which the substantial beneficiary is in a dominant role; (3) a testator who reposed trust and confidence in that beneficiary; and, (4) a trust prepared, procured and executed in circumstances wherein such beneficiary was instrumental or participated. *In re Estate of Julian*, 227 Ill. App. 3d 369, 376 (1991).

¶ 51 For a trust or a trust amendment to be invalidated because of undue influence, there must be factual allegations of undue influence at the time the trust and trust amendments were executed. *In re Estate of Osborn*, 128 Ill. App. 3d 453, 455 (1984) (citing *Sterling v. Kramer*, 15 Ill. App. 2d 230, 234 (1957)). "[T]he pleading of undue influence must contain a specific recital of the manner in which the free will of the testator was impaired at the time the instrument was executed. The mere conclusion that the testator was influenced by the dominant nature of the disproportionate beneficiary is insufficient." *DeHart v. DeHart*, 2012 IL App (3d) 090773, ¶22 (quoting *In re Estate of Julian*, 227 Ill. App. 3d 369, 376 (1991)) aff'd *DeHart v. DeHart*, 2013 IL 114137. "[T]o aver undue influence as a conclusion, facts must be stated warranting that conclusion and must go to the extent of showing the testator was deprived of his free agency." *In re Estate of Anthony J. Sutera*, 199 Ill. App. 3d 531, 558 (1990).

¶ 52 In this case, the second amended complaint contains an allegation that defendant , Keltz, held Drewry's power of attorney. The power of attorney held by Keltz created a general fiduciary relationship between Drewry, the grantor and Keltz, the grantee, as a matter of law. *DeHart v. DeHart*, 2012 IL App (3d) 090773, ¶ 23 (citing *Simon v. Wilson*, 291 Ill. App. 3d 495, 503 (1997)). Therefore, the first and third elements of this cause of action are met.

¶ 53 Sufficient facts were alleged that although Drewry and Keltz knew each other for less than a year, Drewry made Keltz sole beneficiary of his trust and placed the trust in his hands as trustee upon his death. The facts outlining Drewry's ever-deteriorating health coupled with his advanced age and Keltz's position to intercept postal mail, e-mail and telephone calls from family members, coupled with the cessation of Drewry's family activities he was previously so fond of are sufficient allegations to show Keltz had quickly gained significant influence over Drewry and was in a position to dominate him. *DeHart v. DeHart*, 2012 IL App (3d) 090773, ¶ 23 (citing *Simon v. Wilson*, 291 Ill. App. 3d 495, 503 (1997); aff'd *DeHart v. DeHart*, 2013 IL 114137).

¶ 54 Additionally, the allegations in the second amended complaint that Drewry's amendments to his trust began shortly after Keltz's allegedly false accusations about a family member's sexual and religious slurs and that these misrepresentations coincided with Drewry's initial amendment are sufficient. After Keltz's efforts to isolate Drewry from his family members was implemented, the amendments to Drewry's trust continued, all to benefit Keltz and his family to the detriment of Drewry's family. These allegations are sufficient at the pleading stage to state a cause of action. *DeHart v. DeHart*, 2012 IL App (3d) 090773, ¶ 25-27 (citing *In re Estate of Hoover*, 155 Ill. 2d 402, 411-414 (1993), aff'd *DeHart v. DeHart*, 2013 IL 114137).

¶ 55 The allegations concerning the ever-increasing physical dependency of Drewry on Keltz for his mobility and hearing, coupled with Keltz's isolation of Drewry from his family and Keltz always accompanying Drewry on his visits to his attorney to amend his trust are also sufficient at the pleading stage to state a cause of action for undue influence. In fact, our supreme court has stated that these are the types of circumstances that, if alleged, will create a presumption of undue influence, (*DeHart v. DeHart,* 2013 IL 114137, ¶ 30) and also held that "a presumption of undue influence is something that can only be ultimately determined — at the earliest — after the close of plaintiff's case. [Citations.] Once the presumption is established, the defendant would then have the burden to rebut it." *Id*. ¶ 29.

¶ 56 The allegations of active agency by the new, sole beneficiary, Keltz, in procuring amendments to the trust to benefit him and his family, especially in the absence of those who had an interest and a testator who is increasingly debilitated by age and illness who is ever more dependent on the defendant for daily living, is a circumstance indicating a probable exercise of undue influence. *In re Estate of Maher*, 237 Ill. App. 3d 1013, 1018(1992) (citing *Mitchell v. Van Scoyk*, 1 Ill. 2d 160, 172 (1953)). Courts have held that even in the absence of a fiduciary relationship, where someone procures an estate from a testator that benefits himself to the detriment of others having claim to the bounty of the testator, who is infirm due to age or illness, a presumption arises that the beneficiary used undue influence. *Id.*; *Swenson v. Wintercorn*, 92 Ill. App. 2d 88, 101-02 (1968); *Schmidt v. Schwear*, 98 Ill. App. 3d 336, 345 (1981).

¶ 57 The allegations made by plaintiffs in the supreme court case of *DeHart* are similar to the instant case. In *DeHart*, plaintiff alleged the decedent had previously executed a trust naming the plaintiffs as beneficiaries. *DeHart v. DeHart*, 2013 IL 114137, ¶ 7. The *DeHart* plainff also alleged that the decedent married the defendant, who was 29 years younger than decedent, within one year of meeting her. Id. ¶ 8. Allegations were made that the decedent signed a new will within one year, (Id. ¶ 9), and "defendant made several misrepresentations to [decedent] shortly before the execution of the will." *Id.* ¶ 11. These misrepresentations included not telling the decedent that the plaintiff and his family had called the decedent by phone and had sent cards and letters and that defendant had intercepted and destroyed these cards and letters and had not informed decedent of any telephone calls. *Id.* ¶ 11.

¶ 58 Quoting its prior decision from 1993, our supreme court reiterated that " 'false or misleading representations concerning the character of another may be so connected with the execution of the will that the allegation that such misrepresentations were made to the testator may present triable fact questions on the issue of undue influence.' " *DeHart v. DeHart*, 2013 IL 114137, ¶ 27 (quoting *In re Estate of Hoover,* 155 Ill. 2d 402, 411-12 (1993)). It characterized the allegations made in the *Hoover* case as " ' [a] subtle, invidious kind of undue influence' in which the testator's will was overborne by a series of misrepresentations by the defendant about plaintiff's character." *DeHart v. DeHart*, 2013 IL 114137, ¶ 27 (quoting *In re Hoover*, 155 Ill. 2d 402, 414 (1993)).

¶ 59 As *DeHart* instructs, plaintiffs may introduce circumstantial evidence to demonstrate that the influence that defendant exerted over the testator was connected with and operative at the time of the amendments to the trust estate and that such undue influence was directed at procuring amendments favorable to the new, sole beneficiary. *DeHart v. DeHart*, 2013 IL 114137, ¶ 27.

¶ 60 Similar to the facts in *DeHart*, the plaintiffs allege that they had a close family relationship with the decedent for the course of a lifetime and that the decedent disinherited the plaintiffs only after the defendant made the misrepresentations. *Id.* ¶¶ 27-28. The allegations in the instant case are also sufficient facts to survive a section 2-615 motion to dismiss as they state a cause of action of undue influence. *Id.* ¶ 28; see also *In re Estate of DiMatteo*, 2013 IL App (1st) 122948, ¶ 13.

¶ 61 Defendant argues in his supplemental brief that plaintiffs have alleged insufficient facts to show that the defendant had anything to do with either the formulation or the execution of the series of amendments to decedent's trust estate. However, such allegations are not fatal to the plaintiff's complaint at this stage. "Where the defendant plays an active role in procuring the execution of [amendments to a trust], it is not essential to show that he was present at the signing of the instrument in order to invalidate [the amendments] on the ground of undue influence." *Sterling v. Kramer*, 15 Ill. App. 2d 230, 237 (1957).

¶ 62 Consequently, the circuit court erred in dismissing this count.

¶ 63 d. Count II - Tortious Interference With Plaintiffs' Expectancy

¶ 64 The five necessary elements to state a claim of tortious interference with an economic expectancy are: (1) the existence of an expectancy; (2) the defendant's intentional interference with the expectancy; (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. *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1021 (1997).

¶ 65 *DeHart* again instructs that a contest over amendments to a trust and any contest of a will are "distinct from a tort action for interference with [a] testamentary expectancy." *DeHart v. DeHart*, 2013 IL 114137, ¶ 39. It defined the tort of interference with an expectancy as follows: "One who, by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he otherwise would have received is subject to liability to the other for the loss." *Id*. Our supreme court instructed that the remedy for this type of tort, in the instant case, is not voiding the trust amendments, "but a judgment against the individual defendant, which would include money damages in the amount of the benefit tortiously acquired." *Id.* According to *DeHart*, damages need not be specifically pled as they cannot be known until the contest over the amendments to the trust has been resolved. *Id.* ¶ 40. *DeHart* instructs that a plaintiff who is successful on a claim of undue influence which causes the amendments to a trust to be voided, would have his tortious interference count dismissed at that stage "because the adequacy of the [ ] relief would be undisputed and there would therefore be no damages in tort." *Id.* ¶ 41. Therefore, the fifth element of plaintiffs' complaint of tortious interference "can only be known if it exists after the resolution of" (*id.* ¶ 40) plaintiffs' count of undue influence involving a contest over the amendments to the Drewry Trust.

¶ 66 Prior to Drewry meeting Keltz, the plaintiffs alleged that they had an expectancy that was discussed with them by Drewry openly. The allegations regarding defendant's actions mentioned in our summary of plaintiff's allegations are sufficient to plead intentional interference and tortious conduct of undue influence by Keltz. The allegations of Drewry's strong sense of family and the specific allegations of his organizing family reunions with his prior same-sex partner for many years, his generous financial contributions to his family's educational pursuits, and his many family telephone conferences together with his openly discussing his plans for his trust upon his death with his family prior to Keltz's appearance on the scene is enough at the pleading stage to satisfy elements four and five, listed above.

¶ 67 The circuit court erred in dismissing this cause of action at the pleading stage.

¶ 68 e. Count III - Constructive Trust

¶ 69 A constructive trust is an equitable remedy that arises by operation of law and a constructive trustee's sole duty is to transfer the benefit of the wrongfully acquired property to the real beneficiaries of the trust. *Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.*, 114 Ill. 2d 278, 293 (1986).

¶ 70 In order to state a claim for a request for imposition of a constructive trust, it is sufficient that the plaintiffs alleged that Keltz received money properly belonging to them under circumstances that, in law or in equity, Keltz should not be allowed to retain. *Suttles v. Vogel*, 126 Ill. 2d 186, 193 (1988). The sufficient allegations to state a claim for Count I - Undue Influence and Count II - Tortious Interference With Plaintiffs' Expectancy, permit this count to stand. It is well-established that if a person's property is wrongfully appropriated and converted into a different form, the court can create a constructive trust on the new trust property, not only while in the hands of the original wrongdoer, but as long as it can be followed and identified in the hands of a transferee, except for *bone fide* purchasers. *Sadacca v. Monhart*, 128 Ill. App. 3d 250, 256 (1984) (quoting 4 J. Popmeroy, Equity Jurisprudence § 1051 at 113 (5th ed. 1941)).

¶ 71 The circuit court erred in dismissing this count for failure to state a claim.

¶ 72 f. Count IV - Removal of Trustee for Breach of Fiduciary Duties

¶ 73 Friction between Keltz, the trustee of the Drewry Trust, and any of the beneficiaries under the trust is insufficient ground for removing a trustee unless the friction is so disruptive as to interfere with the proper administration of the trust. Restatement (Second) of Trusts, Chapt. 4, The Trustee, § 107, Removal of Trustee, Comment c. (West 2012). Proper grounds for removal of a trustee include breach of trust and dishonesty or corrupt failure to cooperate, among other things. *Id.* The factual allegations made against Keltz regarding the genesis of his appointment by Drewry as trustee and sole beneficiary and the other amendments to the trust, his allegedly dishonest actions regarding disposition of portions of the Drewry estate that were not part of the trust, as well as his lack of cooperation with the executor of the Drewry estate are sufficient for plaintiffs to withstand a motion to dismiss at the pleading stage of this cause of action. Other facts were alleged to demonstrate not just friction, but actual hostility between Keltz, the trustee and the beneficiaries that may, if proven, be grounds for removal. These allegations include Keltz's failure to timely notify the Drewry family of William Drewry's death and burial and refusal to provide the plaintiffs with any accounting of either his unilateral disposition of Drewry's monies and personal property from Drewry's estate or his administration of the Drewry Trust, to date. See 19 Ill. Prac., Estate Planning and Admin., Chapt. 227, Court Appointment and Removal of Trustee, § 227:8, Checklist: Grounds for Removal of a Trustee, (4th ed.) (West 2012).

¶ 74 The circuit court erred in dismissing this count for failure to state a claim.

¶ 75 V. Conclusion

¶ 76 We find that the plaintiffs have alleged sufficient facts to state a cause of action for undue influence, tortious interference, a request for a constructive trust and a request for removal of the trustee for breach of fiduciary duties. We reverse the circuit court's order that granted defendant's motion to dismiss all four counts of plaintiffs' complaint. The case is remanded for further proceedings. The issues regarding discovery requested, to date, are to be revisited in light of this ruling.

¶ 77 Reversed and remanded.