

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
SECOND DISTRICT

KELLY L. FERMAZIN,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 16-CH-789
	)	
DANIEL V. COTHERN, Trustee of the	)	
Valerie Cothorn Living Trust,	)	Honorable
	)	Bonnie M. Wheaton,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing the plaintiff's claims for undue influence, tortious interference with an inheritance, and lack of testamentary capacity. The trial court properly dismissed the plaintiff's claim reformation based on mistake.

¶ 2 The plaintiff, Kelly Fermazin, filed suit against her only sibling, the defendant, Daniel Cothorn. The plaintiff sought to set aside her deceased mother's living trust, which had not named the plaintiff as one of the beneficiaries. The defendant moved to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2018)). The trial court granted the defendant's motion to dismiss. We affirm in part and reverse in part.

¶ 3 BACKGROUND

¶ 4 The decedent, Valerie Cothorn, passed away on February 16, 2016, at age 74. The decedent was survived by her two children, the plaintiff and the defendant. The plaintiff filed a complaint and an amended complaint seeking to set aside the decedent's trust. Both of those complaints were dismissed for failure to state a cause of action pursuant to section 2-615 of the Code. On November 17, 2017, the plaintiff filed a second amended four-count complaint seeking to set aside the decedent's living trust on the basis of undue influence, mistake, tortious interference with an inheritance, and lack of testamentary capacity.

¶ 5 The decedent executed her living trust on Saturday, June 2, 2001. In the trust, the decedent acknowledged that she had two children, the plaintiff and the defendant, and four grandchildren. (The plaintiff and the defendant each had two children.) The decedent named herself as the initial trustee of the trust and named the defendant as the disability trustee and death trustee. The successor trustees were Sandra Cece, a friend of the decedent, and Dawn Cothorn, the defendant's wife. The trust stated that, upon the decedent's death, each of the four grandchildren would receive six percent of her estate (24% total) and that the defendant would receive the remaining trust property (76%). The trust also indicated that if there was no person or entity to receive the decedent's trust property, "then all the trust property shall be distributed to SANDRA CECE." The record indicates that Cece was the decedent's best friend. The trust did not contain a disinheritance clause pertaining to the plaintiff.

¶ 6 The plaintiff's second amended complaint alleged the following relevant facts. In February 1999, the plaintiff was going through a bitter divorce with her husband, Rick Fermazin, and she and her two sons moved in with the decedent, who owned a home in Warrenville. Fermazin was physically abusive to the plaintiff, their children, and the decedent. The decedent was scared of Fermazin and had filed an order of protection against him. Fermazin had made unfounded reports to the Department of Children and Family Services (DCFS) while the children

were living with the plaintiff and the decedent. The two DCFS reports were in August 2000 and May 2001. The latter report was dated May 24, 2001, one week prior to the decedent signing her trust.

¶ 7 The complaint further alleged that the defendant knew that the decedent despised Fermazin and convinced the decedent to disinherit the plaintiff to ensure that Fermazin would not receive any of the decedent's estate. The defendant allegedly told the decedent that Fermazin would never be out of the plaintiff's life. Additionally, the defendant knew that the decedent did not want to be put in a nursing home and allegedly told the decedent numerous times that the plaintiff would put her in a nursing home.

¶ 8 The complaint further alleged that the plaintiff and her sons lived with the decedent continuously until her death, a total of 17 years. During the years they lived together, the decedent told the plaintiff numerous times, and as recently as 2013, that the plaintiff would inherit half of the decedent's estate. However, the plaintiff alleged that prior to the execution of the 2001 trust, the defendant placed himself in a position of trust and confidence with the decedent, the defendant and the decedent had a fiduciary relationship, and the defendant gained influence over the decedent and destroyed her free will.

¶ 9 The plaintiff attached numerous exhibits to her complaint, including power of attorney forms from 1994 for healthcare and property that showed the defendant was the agent and the plaintiff was the successor agent. Also attached to the complaint were affidavits from Don Wargo and Terry McGill. The plaintiff incorporated these affidavits by reference into each count of her complaint. In his affidavit, McGill stated that he knew the decedent for about 14 years. In 2015, she paid him to paint some rooms in her house. While he was painting the first floor interior, he had asked the decedent what she thought about the new paint job. The decedent

responded by saying: “I don’t care what it looks like, Kelly and Dan are getting the house and they can worry about how it looks.”

¶ 10 In his affidavit, Wargo stated that he had been a close friend of the plaintiff and the decedent since 1985. The decedent told him that she wanted the plaintiff to inherit her Hummel collection. Wargo also averred that the plaintiff took care of the decedent when she was sick, and the plaintiff’s sons helped take care of snow removal, lawn care and other domestic duties. The defendant did not help care for his mother and did not visit during her final illness. Wargo stated that the decedent had suffered from depression as a result of her husband’s infidelity and the decedent’s ultimate divorce (which the record indicates occurred in 1993). During and after the decedent’s divorce, she would consume copious amounts of alcohol. The decedent’s best friend, Cece, feared that the decedent might drink herself to death. In 1999, the decedent learned about the plaintiff’s troubled marriage and invited the plaintiff and her sons to live in her home. Once the grandchildren moved in, the decedent limited her alcohol consumption to social situations or when she did not watch the grandchildren.

¶ 11 Wargo further stated that the decedent had a swimming pool. Prior to 2000, the defendant rarely accepted the decedent’s invitations to utilize her swimming pool. However, in 2000 and 2001, the defendant utilized the swimming pool nearly every weekend that the weather would allow. During those visits, the defendant and the decedent would consume considerable amounts of alcohol. After 2001, the decedent would often express sadness and depression that the defendant rarely visited with her. In contrast, Wargo described a close and loving relationship between the plaintiff and the decedent.

¶ 12 Finally, Wargo stated that the decedent had feared Fermazin because Fermazin had assaulted the plaintiff and the decedent. The decedent told Wargo that if the plaintiff ever reconciled with Fermazin, the plaintiff would be disinherited. Wargo further stated that on more

than one occasion, the defendant told the decedent that Fermazin would never be out of the plaintiff's life. The defendant also told the decedent that the plaintiff would put her in a nursing home and forget about her. However, the plaintiff told the decedent that she would never put her in a nursing home. Wargo stated that, based on his interactions and conversations with the decedent, he believed that the decedent wanted the plaintiff to inherit from her estate. He was shocked to hear that the defendant would receive 76% of the decedent's estate since the defendant had virtually no relationship with the decedent.

¶ 13 In count I, for undue influence, the complaint alleged that, during the defendant's prolonged visits with the decedent in 2000 and 2001, he weakened the decedent's intellect and gained influence over her. The visits were meant to influence the decedent so she would execute her living trust in favor of the defendant. After the trust was executed, the defendant stopped regular visits and would only visit about two times per year. The complaint alleged that, prior to the execution of the trust, the defendant entered a fiduciary relationship with the decedent and was the dominant party. The defendant manipulated the decedent and she would often give in to his demands. Despite statements both before and after the trust was executed, indicating that the decedent wanted both her children to inherit from her estate, the decedent executed a trust that left the majority of the estate to the defendant. The complaint alleged that "through his undue influence, [the defendant] substituted his own intents and desires for the intents and desires of [the decedent]." The decedent was diagnosed with breast cancer in October 2013. Despite having the power of attorney for healthcare, the defendant never contacted the decedent's doctors or discussed her treatment. The plaintiff solely provided care for the decedent while she was sick. The defendant told the plaintiff that the decedent tried to discuss her estate plan with him in 2013 but he told her there was no reason to discuss it because she would live forever.

¶ 14 In count II, reformation due to mistake, the complaint alleged that there was no period and a large space after this statement in the trust (and looked as follows):

“The remaining trust property shall be distributed to my son, Daniel V. Cothorn

[.]”

The plaintiff asserted that the lack of punctuation and the large space indicated that the sentence should have continued to name the plaintiff as the other beneficiary of the trust property. The plaintiff noted that the trust did not contain a disinheritance clause. The plaintiff also asserted that the clause leaving trust property to Cece, if there was no other person to receive trust property, did not make sense without a disinheritance clause because there would always be another person, namely, the plaintiff. The plaintiff claimed that these inconsistencies indicated that it was the decedent’s true intention to leave trust property to the plaintiff and that reformation of the trust was needed to effectuate the decedent’s true intentions.

¶ 15 In count III, tortious interference with an inheritance, the complaint alleged that, in 1994, the plaintiff was a beneficiary of the decedent’s will and was a designated power of attorney for healthcare and property. As recently as May 2015, the decedent expressed to the plaintiff and others an intent to divide her estate equally among her children. The plaintiff alleged that she had an inheritance expectancy and the defendant intentionally interfered with that expectancy by unduly influencing the decedent to execute her 2001 trust in the defendant’s favor. The undue influence stripped the decedent of her free will. Absent the undue influence, the decedent would not have excluded the plaintiff as a beneficiary of her trust.

¶ 16 In count IV, lack of testamentary capacity, the complaint alleged that, pursuant to Wargo, the decedent was depressed and drinking copious amounts of alcohol at the time she executed her trust. Further, the decedent’s testamentary capacity was destroyed by the influence exerted

upon her by the defendant and she did not have the testamentary capacity to know and remember the natural objects of her bounty, to comprehend the kind and character of the property she held, or to make disposition of her property according to some plan formed in her mind. The plaintiff thus alleged that the decedent was of unsound mind and memory and did not have the testamentary capacity to execute her trust.

¶ 17 On December 12, 2017, the defendant filed a motion to dismiss the second amended complaint for failure to state any cause of action. As to counts I and III, for undue influence and tortious interference with an inheritance, the defendant argued that the allegations did not establish undue influence or a fiduciary relationship between the defendant and the decedent. As to count II, the defendant argued that it should be dismissed because Illinois law did not allow for a trust to be reformed in a manner not expressed in the trust, no matter how clearly a different intention could be proved by extrinsic evidence. Further, the defendant argued that the lack of punctuation and the lack of a disinheritance clause did not establish that there was any mistake. As to count IV, lack of testamentary capacity, the defendant argued that the allegations did not establish that the decedent was of unsound mind or memory when she executed her trust in 2001.

¶ 18 On April 26, 2018, the trial court granted the defendant's motion to dismiss. The defendant did not attend the hearing and the trial court ruled on the written pleadings. However, the dismissals of the original complaint and the first amended complaint indicate that the trial court found that the allegations did not establish a fiduciary relationship or that the decedent was deprived of her free will. In dismissing the first amended complaint, the trial court found that the plaintiff needed to prove more than mere influence. The plaintiff needed to prove undue influence—influence that deprived the decedent of her free will. The trial court found that the decedent's death 15 years after the trust was executed, and the fact that the defendant rarely

visited during that time, belied the existence of undue influence. The plaintiff filed a timely notice of appeal from the trial court's order dismissing her complaint.

¶ 19

ANALYSIS

¶ 20 On appeal, the plaintiff argues that the trial court erred in granting the defendant's section 2-615 motion to dismiss her second amended complaint. A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of a complaint, based on facial defects of the complaint. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 382 (2004). The critical inquiry is whether the allegations of the complaint, when viewed in the light most favorable to plaintiff, are sufficient to state a cause of action on which relief may be granted. *Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 85 (2002). A trial court should grant a section 2-615 motion to dismiss only if "it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). A court must accept as "true all well-pleaded facts and all reasonable inferences that may be drawn from those facts." *Id.* This court conducts a *de novo* review of a trial court's ruling on a motion to dismiss. *U.S. Bank National Association v. Clark*, 216 Ill. 2d 334, 342 (2005).

¶ 21 The plaintiff argues that the trial court erred in dismissing her claim for undue influence because she alleged sufficient facts to state a cause of action. Undue influence necessary to invalidate a will is that influence which prevents the testator from exercising his own free will in the disposition of his estate. *In re Estate of Maher*, 237 Ill. App. 3d 1013, 1017 (1992). Undue influence must be directly connected with the execution of the instrument, operate at the time it was made, and be directed toward procuring the will in favor of a particular party or parties. *Id.* Our supreme court has defined "undue influence" as follows:

“ [U]ndue influence which will invalidate a will is “ ‘any improper * * * urgency of persuasion whereby the will of a person is over-powered and he is indeed induced to

do or forbear an act which he would not do or would do if left to act freely.’ [Citation.]”

To constitute undue influence, the influence “ ‘must be of such a nature as to destroy the testator’s freedom concerning the disposition of his estate and render his will that of another.’ ” [Citations.]

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

¶ 22 In *Hoover*, our supreme court recognized that a testator’s will could be overpowered by a defendant’s misrepresentations about a plaintiff and that this could amount to a “subtle, invidious kind of undue influence.” *Hoover*, 155 Ill. 2d at 413. The *Hoover* court referred to this as “secret influences,” meaning that even if a testator appeared to act as if guided by his own will, he or she might really be guided by the undue influence of another. In those cases, “a plaintiff may introduce circumstantial evidence to demonstrate that the influence was connected with and operative at the time of execution of the will and that the influence was directed toward

procuring the will in favor of the beneficiary.” *DeHart*, 2013 IL 114137, ¶ 27 (citing *Hoover*, 155 Ill. 2d at 414).

¶ 23 In *DeHart*, the plaintiff filed a complaint contesting the will of his adoptive father on the basis of undue influence. *DeHart*, 2013 IL 114137, ¶ 1. The plaintiff alleged that a prior will named the plaintiff and his sons as beneficiaries. *Id.* ¶ 7. About a year after the then 83-year old decedent married the 54-year old defendant, the decedent executed a new will, disinheriting the plaintiff. In the new will, the decedent stated that he had no children. *Id.* ¶ 9. The decedent died a couple of months after executing the new will. *Id.* ¶ 12. In his complaint, the plaintiff alleged that, between the time of the marriage and the signing of the new will, the defendant had made several misrepresentations about the plaintiff and his character. *Id.* ¶ 11. The plaintiff alleged that the defendant told the decedent that the plaintiff was not his son, intercepted phone calls, and destroyed cards and letters that were sent to the decedent from his family. The *DeHart* court determined that the plaintiff stated a cause of action for undue influence because he alleged that he had a close relationship with the decedent and that the decedent disinherited the plaintiff shortly after the misrepresentations. *Id.* ¶¶ 27-28.

¶ 24 While the allegations of undue influence in the present case are not as strong as those in *DeHart*, they are nonetheless sufficient to survive a section 2-615 motion to dismiss. The plaintiff alleged that the defendant cultivated a close relationship with the decedent at the time the plaintiff was going through a divorce. The decedent was susceptible to misrepresentations and influence because the plaintiff’s ex-husband had physically and emotionally abused the decedent and the plaintiff. The defendant knew that the decedent despised the plaintiff’s ex-husband and would not want him to indirectly inherit any of her money. The plaintiff alleged that the defendant made misrepresentations by telling the decedent that plaintiff would never be rid of Fermazin and that plaintiff would put the decedent in a nursing home. The defendant

allegedly increased his visits with the decedent just prior to the time the living trust at issue was executed and during those visits the defendant used his knowledge to exert influence over the decedent so she would change her estate plan. Additionally, just as in *DeHart*, the plaintiff alleged that she and the decedent had a very close relationship. Given the rule in favor of liberal construction, we hold that plaintiff sufficiently stated a cause of action for undue influence and that the trial court erred in dismissing count I of the plaintiff's complaint.

¶ 25 The plaintiff's second contention on appeal is that she properly stated a claim for reformation based on mistake. She relies on the lack of a period following the sentence that indicates that trust property should be distributed to the defendant and the space that follows before the next section of the trust. The plaintiff argues that the foregoing omissions indicate that the decedent intended to include the plaintiff as a beneficiary. She also relies on the lack of a disinheritance clause and the statement granting trust property to Cece if there was no other person to receive trust property. The plaintiff argues that, because the decedent did not specifically disinherit the plaintiff, there would always be someone to receive trust property—the plaintiff. The plaintiff asserts that these inconsistencies demonstrate that the decedent's true intention was to include the plaintiff in the distribution of the trust property.

¶ 26 “When construing trusts, the court will apply the same rules of construction it applies when it construes wills.” *In re Estate of McInerny*, 289 Ill. App. 3d 589, 597 (1997). Illinois courts have long held (with narrow exceptions not pertinent here) that “[a] will cannot be reformed to conform to any intention of the testator not expressed in it, no matter how clearly a different intention may be proved by extrinsic evidence.” *Turek v. Mahoney*, 407 Ill. 476, 482 (1950); see also *Handelsman v. Handelsman*, 366 Ill. App. 3d 1122, 1132 (2006) (generally stating that this rule also applies to will substitutes). Illinois courts have stressed that, even in cases involving trusts, the use of extrinsic evidence to nullify the effect of unambiguous

language should be allowed “only in extreme cases.” *Estate of McInerny*, 289 Ill. App. 3d at 598.

¶ 27 In the present case, the plaintiff has failed to establish any basis for reformation of the trust. The lack of punctuation and the space following the bequest to the defendant do not indicate that the plaintiff intended to include the plaintiff as a beneficiary of her trust. Following that section of the trust, there is section stating how the shares of the trust should be distributed. There is a subsection explaining distribution to the defendant and another subsection for distribution to the grandchildren. However, there is no subsection for any distribution to the plaintiff. Further, the lack of a disinheritance clause is not a basis for reformation as such clauses are not required in Illinois. *Young v. Whisler*, 19 Ill. 2d 501, 505 (1960) (“the rule [is] that ordinarily a will purporting to devise and bequeath all property of a testator to a named beneficiary is equivalent to the expression of an intention to disinherit all other persons”). Further, leaving any remaining trust property to Cece, if there was no other person to receive trust property, does not indicate an intention to leave any trust property to the plaintiff. The plaintiff also relies on the affidavits of McGill and Wargo as demonstrating that the decedent intended to include the plaintiff as a beneficiary of her estate. However, when the terms of a trust are clear, a court may not consider extrinsic evidence to vary the expressed intention of the testator. *Fischer v. LaFave*, 188 Ill. App. 3d 16, 19 (1989). Accordingly, the trial court properly dismissed count II of the plaintiff’s second amended complaint.

¶ 28 The plaintiff’s next contention is that the trial court erred in dismissing her claim for tortious interference with an inheritance. To recover for tortious interference with an inheritance, the plaintiff must establish the following: (1) the existence of her 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, ¶ 39. Unlike a will contest, someone who tortiously interferes with another's inheritance is subject to personal liability to the other for the loss. *Id.* "The remedy is not the setting aside of the will, but a judgment against the individual defendant, which would include money damages for the amount of the benefit tortiously acquired." *Id.*

¶ 29 In the present case, the plaintiff has sufficiently stated a cause of action for tortious interference with an inheritance. The plaintiff alleged that she was a beneficiary of the decedent's will since at least 1994 and that the decedent had told her as recently as 2013 that she would inherit half of the decedent's estate. The plaintiff thus properly alleged a reasonable expectancy. The plaintiff also alleged that the defendant intentionally interfered with her inheritance expectancy by unduly influencing the decedent to execute her 2001 trust in favor of the defendant. The plaintiff alleged that, absent the defendant's undue influence, the decedent would not have excluded the plaintiff as beneficiary of the trust and the plaintiff would have realized her inheritance expectancy. Based on these allegations, we hold that count III is legally sufficient to survive a section 2-615 motion to dismiss.

¶ 30 The plaintiff's next contention on appeal is that she properly stated a claim for lack of testamentary capacity. All individuals are presumed to be competent to execute a will until proven otherwise. *In re Estate of Harn*, 2012 IL App (3d) 110826, ¶ 26. Testamentary capacity requires that the testator has the sufficient mental ability to know and remember the natural objects of her bounty, comprehend the kind and character of property held, and make a disposition of that property in accordance with some plan formed in the testator's mind. *In re Estate of Osborn*, 234 Ill. App. 3d 651, 658 (1992). The absence of any one of these requirements would indicate a lack of testamentary capacity. *Dowie v. Sutton*, 227 Ill. 183, 196

(1907). Lack of testamentary capacity is established if the plaintiff can show that the will in question was the product of an unsound mind or memory. *DeHart*, 2013 IL 114137, ¶ 20.

¶ 31 In the present case, the allegations of lack of testamentary capacity are sufficient to state a cause of action. The plaintiff alleged that the decedent had at certain points engaged in excessive drinking. At about the time the 2001 trust was executed, the defendant was visiting with the decedent every weekend and serving her alcohol. The decedent signed her trust on a Saturday. Despite having a very close and loving relationship with the plaintiff, the decedent did not name the plaintiff as a beneficiary and gave no reason for failing to do so. The plaintiff also alleged that the decedent, as recently as 2013, told her she would receive half of the decedent's estate. Interpreting the well-pled facts in the light most favorable to the plaintiff, a reasonable inference can be made that the decedent was of unsound mind and memory when she executed the 2001 trust. The trial court thus erred in dismissing count IV of plaintiff's second-amended complaint.

¶ 32 The plaintiff's final contention on appeal is that the dismissal of her second amended complaint should be reversed in its entirety because the defendant's motion to dismiss exceeded the 10-page limit set forth in 18th Judicial Circuit (Du Page County) Local Rule 6.05(d). However, the plaintiff has failed to cite any authority to support this proposition. Accordingly, this argument has been forfeited. *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 19.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed in part and reversed in part. We affirm the dismissal of the plaintiff's claim for reformation based on mistake, but reverse the dismissal of the claims based on undue influence, tortious interference with an inheritance, and lack of testamentary capacity.

¶ 35 Affirmed in part and reversed in part; cause remanded.