

No. 1-16-2069

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).

Estate of: Kenneth G. Pigott, Deceased)	Appeal from the
)	Circuit Court of
CHRISTINE BROWN,)	Cook County
)	
Plaintiff-Appellant,)	
)	
v.)	
)	No. 2015 P 1902
JANE DIRENZO PIGOTT, as Independent Co-Executor,)	
ESTATE OF KENNETH G. PIGOTT, Deceased;)	
DAVID RAMON, as Independent Co-Executor,)	
ESTATE OF KENNETH G. PIGOTT, Deceased;)	
ANN DURHAM; AMY POT; JOHN PIGOTT;)	
STEVEN PIGOTT; KATHERINE PIGOTT;)	
SHELBY PIGOTT; JANE DIRENZO PIGOTT;)	
DONNA DEGRAFFENRIED a/k/a DONNA)	
MCCAFFREY; JANE DIRENZO PIGOTT, as Co-Trustee)	
of the KENNETH G. PIGOTT Trust Under Agreement)	
Dated December 22, 1989 as Amended; and DAVID RAMON,)	
as Co-Trustee of the KENNETH G. PIGOTT TRUST)	
Under Agreement Dated December 22, 1989 as Amended;)	
THE LYRIC OPERA OF CHICAGO, an Illinois)	
Not For Profit Corporation, and ATTORNEY GENERAL)	
LISA MADIGAN, in Her Official Capacity as Protector)	
of the Public Interest in Charitable Trusts,)	Honorable
)	James Riley,
Defendants-Appellees.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed the dismissal of plaintiff’s complaint contesting the validity of the deceased’s will and for tortious interference with testamentary expectancy and contract, holding that plaintiff failed to state a cause of action for undue influence, tortious interference with testamentary expectancy, and tortious interference with contract.

¶ 2 Testator, Kenneth G. Pigott died on February 13, 2015. His will, dated November 13, 2014, made three months prior to his death, was admitted to probate. On October 14, 2015, Christine Brown (Kenneth’s daughter), filed a four-count complaint against Kenneth’s second wife, Jane Drenzo Pigott, in the probate court as a supplemental proceeding. Counts I and II of the complaint sought to contest the validity of Kenneth’s will and trust for lack of testamentary capacity and undue influence. The remaining counts, III and IV, were brought against Jane for tortious interference with testamentary expectancy and with contract. The circuit court dismissed all four counts of Christine’s complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). Christine appeals the dismissal of counts II, III, and IV. We affirm.

¶ 3 In her complaint, Christine alleged that Kenneth was previously married to Donna deGraffenried and they had six children, including Christine, Ann Durham, Amy Pot, John Pigott, Steven Pigott, and Katherine Pigott. Kenneth and Donna divorced in 1982. The judgment of dissolution of marriage contained an agreed marital settlement agreement providing in pertinent part, “Kenneth agrees to execute and keep in full force and effect during his life a valid will which provides that he will give and bequeath at least 50% of his net estate to the six children of the parties in equal shares, and their descendents, *per stirpes*. The bequest may be made in the form Kenneth determines, either in trust or outright, as a child’s best interest may dictate.”

¶ 4 Kenneth subsequently married Jane and they had one child, Shelby Pigott. Although the complaint did not indicate the date Kenneth and Jane were married, Jane asserted in pleadings before the circuit court, and in her appellee's brief on appeal, that they were married for almost 25 years at the time of Kenneth's death. Christine does not dispute the length of their marriage.

¶ 5 Kenneth established the Kenneth G. Pigott Trust (trust) on December 22, 1989. Kenneth's will provides that substantial portions of his estate are bequeathed and pour over into the Trust. Jane is one of the co-trustees of the Trust.

¶ 6 By November 2014, Kenneth had been suffering for many months from a precancerous bone marrow disorder. The disease and medications had ravaged his body and spirit significantly and he had become debilitated. By that time, Kenneth was dependent upon Jane, a licensed attorney, for assistance with his care and in all other daily living matters. Additionally, Kenneth had extensive financial holdings and many assets in many businesses, ventures, and accounts and for which he required assistance to manage. Jane assisted Kenneth with these financial matters and discussed with him his financial affairs, his assets, and his estate plan.

¶ 7 Kenneth amended the will and trust in November 2014, three months before his death, and also transferred an account of \$19 million into joint tenancy with Jane. The account previously had been in Kenneth's name alone. The transfer of the account into joint tenancy with Jane removed it from being subject to the will and trust. According to the complaint, as a result of the amendments to the will and trust and the transfer of the \$19 million account into joint tenancy with Jane, the monies bequeathed by Kenneth to his six children from his first marriage to Donna is less than 50% of his net estate, which violates the marital settlement agreement.

¶ 8 In count I of her complaint, Christine alleged that Kenneth lacked capacity to amend the will and trust in November 2014 and to transfer the \$19 million account into joint tenancy with Jane because he was suffering from cancer “that diminished his thinking and caused him to allow Jane to make choices for him, and as such allowed Jane to substitute her decisions for his, making [the amendments to the will and trust and the transfer of the account into joint tenancy] the product of Jane’s intent and not Ken’s intent.”

¶ 9 In count II, Christine alleged that the amendments to the will and trust and the transfer of the \$19 million account into joint tenancy were the product of Jane’s undue influence. Specifically, Christine alleged that, because of his disease, Kenneth was dependent upon Jane and that “Jane began to take control of Ken’s affairs in 2014 as *** she became Ken’s caregiver and was in fact his fiduciary.” Kenneth then “succumbed to the influence of Jane and he accepted her explanations and advice and he made the [w]ill and [t]rust and the transfer of \$19 million *** to joint tenancy *** not based on his will but under the will and influence of Jane.” Christine sought to have the will and trust declared null and void.

¶ 10 In count III, Christine brought an action for tortious interference with testamentary expectancy against Jane. Christine again asserted that Jane “occupied a fiduciary relationship” with Kenneth as a primary caregiver; “acted as the dominant party in the relationship”; and that Kenneth “reposed trust and confidence in Jane.” Pursuant to the marital settlement agreement, Kenneth was obligated to leave at least 50% of his \$60 million estate to the six children from his first marriage, amounting to about \$30 million, of which Christine would have received 1/6, or \$5 million. However, Jane intentionally interfered with Christine’s testamentary expectancy in November 2014 by convincing Kenneth to amend the will and trust and to transfer \$19 million to joint tenancy, resulting in Christine receiving less than \$5 million.

¶ 11 Finally, in count IV, Christine alleged a tortious interference with contractual relationship action against Jane. Christine asserted that Jane was aware of the provision in the marital settlement agreement requiring Kenneth to bequeath at least 50% of his net estate to the six children of his first marriage to Donna. Jane intentionally and tortiously interfered with the contract obligations Kenneth owed his six children under the marital settlement agreement when she convinced him to make the November 2014 amendments to the will and trust and to transfer the \$19 million account into joint tenancy with her.

¶ 12 The trial court dismissed all four counts of Christine's complaint pursuant to section 2-615 of the Code. Christine appeals the dismissal of counts II, III and IV; she does not appeal the dismissal of count I.

¶ 13 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint. *Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 85 (2002). 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. *Id.* at 86.

¶ 14 When ruling on a section 2-615 motion to dismiss, the court accepts as true all well-pleaded facts and all reasonable inferences arising therefrom. *Affiliated Health Group, Ltd. v. Devon Bank*, 2016 IL App (1st) 152685, ¶ 18. A cause of action should be dismissed under section 2-615 only if it is clearly apparent that no set of facts can be proven that will entitle plaintiff to recovery. *Id.* Our review is *de novo*. *Id.*

¶ 15 We proceed to address the dismissal of counts II, III, and IV of the complaint.

¶ 16 Count II alleged that the November 2014 amendments to the will and trust and the transfer of the \$19 million account into joint tenancy were the product of Jane's undue influence.

¶ 17 “Undue influence means influence that is excessive, improper, or illegal. [Citation.] The undue influence must be directly connected with the execution of the will or instrument and must be present at the time it was made. [Citation.] Further, to constitute undue influence, the influence must be of such a nature as to destroy the testator’s freedom concerning the disposition of his estate and render his will that of another.” (Internal quotation marks omitted). *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 13.

¶ 18 “The *prima facie* elements of a cause of action for undue influence are: (1) a fiduciary relationship between the testator and a comparatively disproportionate beneficiary under the will; (2) a testator who was in a dependent situation where the beneficiary is in a dominant role; (3) a testator who placed trust and confidence in the beneficiary; and (4) a will that was prepared or executed in circumstances where the beneficiary was instrumental or participated.” *Id.* ¶ 14.

¶ 19 *Baumgarten* is dispositive as to whether count II of Christine’s complaint stated a cause of action for undue influence. In *Baumgarten*, the petitioners filed their amended petition to set aside the will and trust of Robert L. Baumgarten based on the undue influence of Robert’s wife of more than 40 years, Marlene. *Id.* ¶¶ 3, 4. Petitioners alleged that a fiduciary relationship existed between Robert and Marlene in the last years of Robert’s life, at which time he was frequently ill. *Id.* ¶ 4. As his health declined, Robert placed trust and confidence in Marlene and relied on her to provide him with basic necessities such as transportation, meals, and medication. *Id.* Due to his physical condition, Robert was completely dependent on Marlene and easily influenced by her, and Marlene took advantage of her influence by coercing Robert into giving her total control of his finances and estate planning. *Id.* ¶ 5. Marlene caused Robert to surrender to her will by constantly criticizing and scolding him, and as a result thereof, Robert twice

amended his trust during the last years of his life and bequeathed almost all of his estate to her.
Id. ¶¶ 5, 8.

¶ 20 The circuit court dismissed petitioner’s petition pursuant to section 2-615 of the Code.
Id. ¶ 9.

¶ 21 On appeal, petitioners argued that they sufficiently alleged that a fiduciary relationship existed between Robert and Marlene, and that Robert “was in a dependent situation where Marlene was in a dominant role of the nature required for an undue influence cause of action.”
Id. ¶ 15.

¶ 22 The appellate court began its analysis by noting that “[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. A person acts in a fiduciary capacity when the person handles money or property which is not his or her own, or for his or her own benefit, but for the benefit of the other person. Such a relationship does not arise solely from marital status. Instead, specific facts and circumstances must be alleged. Several factors help determine whether a fiduciary relationship exists. These include the degree of kinship between the parties; the extent to which the ‘servient’ party entrusted the ‘dominant party’ with the handling of its business affairs; and the disparity between the parties’ age, health, mental condition and business experience.” (Internal quotations and citations omitted). *Id.* ¶ 17.

¶ 23 The appellate court held that “petitioners only offer conclusions that a fiduciary relationship existed between Robert and Marlene. The specific alleged facts that petitioners contend are sufficient to show a fiduciary relationship between Robert and Marlene are: (1) Robert was frequently ill during the last years of his life; (2) Marlene provided Robert with basic daily necessities due to his declining health; (3) Robert relied on Marlene for these basic daily

necessities such as transportation and meal preparation; (4) Robert was easily influenced by Marlene due to his physical and mental condition; (5) Marlene took advantage of Robert's trust and confidence and coerced him into giving her total control of their finances and the drafting of the challenged will and trust; and (6) the conclusion that Robert's dependence on Marlene created a fiduciary relationship between them." *Id.* ¶ 19.

¶ 24 The appellate court concluded:

“These facts, when taken as true and in the light most favorable to the petitioners, generally describe a husband relying on his wife during poor health during their later years. Because a fiduciary relationship is not presumed, facts that constitute the existence of a fiduciary relationship must be clearly and explicitly alleged. [Citation.] When stripped of unsupported conclusions, the petitioners fail to allege any facts supporting their assertion that because Robert relied on Marlene, a fiduciary relationship existed between them such that Marlene managed money that was not her own, or for her own benefit, but was for the benefit of Robert alone. Petitioners' conclusion that a fiduciary relationship existed is belied by their failure to offer any precedent supporting their position that a husband who relies on his wife during poor health satisfies the fiduciary relationship element of an undue influence cause of action.” *Id.* ¶ 20.

¶ 25 Similar to *Baumgarten*, Christine alleged nothing more than a husband relying on his wife of nearly 25 years for support during his declining health. Christine alleged that Kenneth was suffering from a terminable disease when he amended his will and trust in November 2014 and transferred the \$19 million account into joint tenancy with Jane and that the disease and treatment “ravaged his body and spirit significantly.” The complaint alleged that Jane helped Kenneth understand complex financial matters and concluded that Jane allegedly influenced

Kenneth to amend the will and trust and transfer monies into joint tenancy, which benefited Jane and limited shares to the six children from his first marriage. While the complaint alleged Jane is an attorney, it did not allege she was Kenneth's attorney or that she drafted Kenneth's estate planning documents or the joint tenancy transfer.

¶ 26 As in *Baumgarten*, the allegations of the complaint, when taken as true and in the light most favorable to Christine, generally describe a husband relying on his wife during poor health during their later years to help him make joint financial decisions. *Baumgarten* held that the fiduciary relationship element of an undue influence cause of action is not satisfied by a husband who relies on his wife of many years during poor health to make financial decisions for them, even where some of the financial decisions benefit the wife. Accordingly, Christine's cause of action against Jane for undue influence failed to state a cause of action and was properly dismissed.

¶ 27 Even if Christine had successfully pleaded the existence of a fiduciary relationship between Kenneth and Jane, she failed to sufficiently plead facts supporting the second element of a *prima facie* claim for undue influence: a testator who is in a dependent situation where the beneficiary is in the dominant role.

¶ 28 *Baumgarten* is again informative. In *Baumgarten*, the petitioners argued that Marlene's dominant role was demonstrated by her providing Robert with transportation, preparing his meals, administering medical procedures, verbally abusing him when he forgot to take his medicine and when he knocked over a lamp in public, and making belittling comments about the loss in value of their finances. *Id.* ¶ 25.

¶ 29 The appellate court disagreed, stating:

“If these alleged facts were enough to satisfy the required element that Robert was in a dependent situation where Marlene was in a dominant role, then any marriage where a wife or husband takes care of his or her spouse in bad health or becomes verbally upset with his or her spouse would also meet this requirement. *** Instead of alleging specific facts that indicate Marlene gained an *undue* influence over Robert, petitioners’ petition contains mere conclusions that Robert was influenced by Marlene’s dominant nature during the last years of Robert’s life. This does not meet the requirement for pleading undue influence in Illinois.” (Emphasis in the original.) *Id.* ¶ 26.

¶ 30 The instant case contains even *less* facts that would indicate Kenneth was in a dependent situation where Jane was in the dominant role for purposes of pleading undue influence. The facts pleaded in Christine’s complaint merely shows a marriage of long duration where Jane took care of Kenneth in bad health and assisted him in making joint financial decisions, and there was *no* allegation of any verbal abuse. Pursuant to *Baumgarten*, the facts pleaded in Christine’s complaint do not meet the requirement for pleading undue influence.

¶ 31 Christine argues that *DeHart v. DeHart*, 2013 IL 114137, compels a different result. In *DeHart*, the plaintiff filed a complaint contesting Donald DeHart’s will and claiming in pertinent part that it was the product of undue influence by his wife, Blanca. *Id.* ¶ 1. The complaint alleged that Donald met Blanca in the spring of 2005 and they were married a few months later in December 2005. *Id.* ¶ 8. Donald was 83 years old and Blanca was 54 years old. *Id.* The complaint further alleged that in the months between the wedding and the execution of the contested will, Blanca “developed and maintained a position of trust and confidence, amounting to a fiduciary relationship with Donald. Despite the fact that she had only been married to Donald a short time and he had amassed his wealth over 84 years of his life, she became joint

tenants with Donald on real estate, bank accounts and brokerage accounts worth millions of dollars. She also obtained a power of attorney to act on Donald's behalf, and exercised significant control over Donald's real estate dealings, including the sale of the family farm." *Id.* ¶ 10.

¶ 32 The complaint alleged that Blanca lied to Donald by telling him that plaintiff was not his son and by not telling Donald that plaintiff and other family members had called him and sent him cards and letters, and that she had intercepted and destroyed those cards and letters. *Id.* ¶ 11. Blanca's lies were made to persuade Donald to alter his will by providing exclusively for her as opposed to plaintiff. *Id.* Succumbing to Blanca's influence, Donald executed the will, stating he had "no children," when in fact he did. *Id.*

¶ 33 The circuit court dismissed plaintiff's complaint alleging undue influence and the appellate court reversed, finding that plaintiff alleged sufficient facts to allege a presumption of undue influence. *Id.* ¶¶ 14, 29. Our supreme court affirmed the appellate court, holding in pertinent part that the complaint sufficiently alleged the existence of a fiduciary relationship between Donald and Blanca as a matter of law where Blanca held Donald's power of attorney. *Id.* ¶ 31. Our supreme court further held that the complaint sufficiently pleaded that Blanca gained a position of trust and confidence and was the dominant party such that she was in a position to control Donald's will, where: (1) Donald was an elderly man in his mid-80's while Blanca was 29 years younger; (2) Blanca made misrepresentations to Donald that plaintiff was not his son; (3) prior to their one-year wedding anniversary, Blanca demanded that Donald execute the will stating he had no children; and (4) Donald placed considerable assets in joint tenancy with Blanca less than one year after they had been married. *Id.* ¶¶ 31-32.

¶ 34 *DeHart* is factually inapposite, as Christine pleaded no facts in her complaint indicating that Jane held Kenneth's power of attorney such that a fiduciary relationship existed between them as a matter of law. Also in contrast to *DeHart*, Christine pleaded no facts indicating Jane was the dominant party such that she was in a position to control Kenneth's will, where Christine never pleaded that there was a significant age gap between Kenneth and Jane, or that Jane secured changes to the will and trust within months of the marriage by making material misrepresentations about Kenneth's children from his previous marriage. Accordingly, Christine's claim against Jane for undue influence failed to state a cause of action and was properly dismissed.

¶ 35 Next, we address the dismissal of count III of Christine's complaint against Jane for tortious interference with her testamentary expectancy to inherit from Kenneth. To recover for tortious interference with a testamentary expectancy, Christine must plead and prove: (1) the existence of an expectancy; (2) Jane's intentional interference therewith; (3) tortious conduct by Jane, such as undue influence; (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). As we discussed earlier in this order, Christine failed to adequately plead tortious conduct, such as undue influence, by Jane. Therefore, Christine's claim against Jane for tortious interference with her testamentary expectancy to inherit from Kenneth failed to state a cause of action and was properly dismissed.

¶ 36 Count III was also properly dismissed for failure to state a cause of action because Christine failed to allege facts showing a reasonable certainty that her expectancy would have been realized but for Jane's interference. To adequately plead such a reasonable certainty, a plaintiff must allege that the testator "has actually taken steps toward perfecting the gift, or

devise, or benefit, so that if left alone the right of the donee, devisee, or beneficiary will cease to be inchoate and become perfect.” (Internal quotation marks and citation omitted.) *Greene v. First National Bank of Chicago*, 162 Ill. App. 3d 914, 924 (1987). Christine here pleaded that she had an expectancy that Kenneth would bequeath 50% of his estate in the amount of \$30 million dollars to the six children from his first marriage to Donna, and that she would receive a 1/6 share of \$5 million. However, Christine failed to allege that Kenneth ever took any steps of perfecting such a devise to Christine that if, left alone, would have resulted in her receipt of \$5 million. Accordingly, Christine’s claim against Jane for tortious interference with her testamentary expectancy failed to state a cause of action.

¶ 37 Also, Christine pleaded no facts indicating that Kenneth’s prior estate plan left her a larger share of his estate than that actually bequeathed to her after the will and trust was amended and the joint tenancy established and, thus, she failed to show that she suffered any damages by Jane’s alleged interference with her testamentary expectancy. In the absence of any damages, Christine’s cause of action failed.

¶ 38 Finally, we address the dismissal of count IV of Christine’s complaint against Jane for tortious interference with contract. The elements of the claim are: “(1) the existence of a valid, enforceable contract between the plaintiff and a third party; (2) defendant’s knowledge of that contract; (3) defendant’s intentional and unjustified inducement of the third party to breach the contract; (4) occurrence of a breach resulting from defendant’s conduct; and (5) damages suffered by the plaintiff as a result of the breach.” *Guice v. Sentinel Technologies, Inc.*, 294 Ill. App. 3d 97, 102 (1997).

¶ 39 Christine alleged that Jane was aware of the provision in the marital settlement agreement requiring Kenneth to bequeath at least 50% of his net estate to his six children from his first

marriage to Donna. Jane intentionally and tortiously interfered with the contract obligations Kenneth owed his six children under the marital settlement agreement when she convinced him to make the November 2014 amendments to the will and trust and transfer the \$19 million account into joint tenancy with her. As a result of Jane's tortious interference, less than 50% of Kenneth's net estate was bequeathed to the six children, and Jane received less than her 1/6 share of \$5 million.

¶ 40 As discussed, the existence of a valid, enforceable contract "between plaintiff and a third party" is a necessary element of a claim for tortious interference with a contract. *Id.* Christine's complaint did not allege that she was a party to the marital settlement agreement; rather, she asserted that she was a third party beneficiary to that agreement. Christine's appellant's brief cites no cases holding that a third-party beneficiary to a contract may sue for recovery under a theory of tortious interference with contract; accordingly, the issue is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 41 Also, as discussed earlier in this order, Christine failed to plead any facts showing damages suffered by her as a result of the alleged breach, where she made no allegation that Kenneth's prior estate plan provided a larger share to Christine than the share bequeathed to her following the November amendments and following the transfer of the \$19 million account into joint tenancy with Jane. In the absence of any damages, Christine failed to state a cause of action for tortious interference with contract.

¶ 42 For the foregoing reasons, we affirm the circuit court.

¶ 43 Affirmed.