

beneficiaries (a) of her bank accounts, and (b) under the provisions of the third amendment to the Jessica Smith Revocable Trust (Trust). Defendants also filed a motion to construe the third amendment to the Trust. In April 2011, the Ford County circuit court construed the third amendment to the Trust. After an August 2012 bench trial, the court found in favor of the Gardners on the counterclaim as to the bank accounts and Trust and in favor of defendants on the wedding rings.

¶ 5 Defendants appeal, asserting (1) the trial court erred in failing to find a confidential relationship existed between the decedent and Sherry that would require the imposition of a constructive trust, (2) the third amendment to the Trust was void for lack of a valid execution, and (3) the court failed to rule on the decedent's changes to her bank accounts. We affirm.

¶ 6 I. BACKGROUND

¶ 7 In October 2010, the Gardners filed a complaint against defendants and Trinity Schools, Inc. (Trinity), the income beneficiaries of the Trust. The complaint asserted that, under the Trust's language, defendants and Trinity were entitled to elect a successor trustee and had failed to do so. The complaint sought an order appointing a successor trustee. Without an objection, Trinity was renamed a plaintiff. In December 2010, the parties stipulated to the appointment of Sue Gibson as successor trustee, and the trial court entered an order appointing Gibson. The only issue remaining in the complaint was plaintiffs' request for reimbursement of their expenses.

¶ 8 In February 2011, the Gardners filed a motion to compel the successor trustee to distribute the decedent's former residence to them under the terms of the third amendment to the Trust and to pay the expenses expended by them to maintain that property. Defendants filed (1)

an answer to the complaint, (2) a motion to construe the third amendment to the Trust, and (3) a counterclaim. The motion to construe contended (1) the third amendment to the Trust was void because it was not properly executed and (2) paragraph 2.3.4.2 of the third amendment was "impossible of construction." The counterclaim asserted the following: (1) a constructive trust, (2) lack of capacity, (3) tortious interference with inheritance, (4) undue influence, (5) unjust enrichment, and (6) constructive fraud.

¶ 9 In March 2011, plaintiffs filed a response to the motion to construe and attached the affidavit of Ellen Lee, the attorney that prepared the third amendment to the Trust. She explained the typographical errors in the third amendment to the Trust. An April 20, 2011, docket entry indicates the trial court heard arguments on the motion to construe on that date. The docket entry also notes "2.3.4.2 intended to reference 2.3.4 not 2.3.3." The record on appeal does not contain a report of proceedings for the April 20, 2011, hearing. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005).

¶ 10 In August 2012, the trial court held a bench trial on the one matter remaining in the complaint and the entire counterclaim. Defendants presented the testimony of (1) defendant Lois, the decedent's sister; (2) defendant Larry, Lois's older son; (3) Cheri Cole, Larry's wife; (4) defendant Terry, Lois's younger son; and (5) Jeanette Cole, Terry's wife; and the deposition of Dr. Mark Spangler, the decedent's primary care physician. The Gardners presented the testimony of (1) Dean Kidd, former business manager of Sullivan-Parkhill Imports; (2) Susan Everett, former vice president and cashier at the Bank of Gibson City; (3) Lee; (4) Kathryn Link, former dietician at the Gibson Area Hospital; (5) Jana Turner, employee at the Gibson Area Hospital Annex nursing home (Annex); (6) Melinda Kisantear, weekend caregiver for the decedent; (7)

Nancy Davis, the decedent's next-door neighbor; (8) John Davis, the decedent's next-door neighbor; (9) Amy Hood, neighbor of the decedent; (10) Joyce Frye, nurse at the Annex; (11) Carol Johnson, Sherry's sister; and (12) Sherry. They also presented numerous exhibits and the depositions of (1) David Niswonger, the decedent's financial advisor; (2) Cathy Packard, Niswonger's assistant; and (3) Leola Henry, Lee's legal secretary. Lois and Larry gave rebuttal testimony. The following is a brief summary of the evidence presented at the bench trial.

¶ 11 Defendants and their spouses testified about the decedent's later years. In 2000, the decedent moved from South Bend, Indiana, to Gibson City, Illinois, where most of her family lived. While she still lived in Indiana, the decedent had executed a will, the Trust, a first amendment to the Trust, and a power of attorney for health care that named Larry as her power of attorney. Lois and Larry had both received copies of the aforementioned documents in the mail. They did not mention receiving the second amendment to the Trust, which was executed in January 2000. In 2002, the decedent had her first stroke. After the first stroke, the decedent did not require assistance with the housework and her health needs. In 2005, the decedent moved back to South Bend. In February 2007, the decedent suffered her second stroke. In March 2007, the decedent returned to Gibson City. After the second stroke, the decedent needed assistance with housework and personal care. She usually needed a walker to get around and had impaired speech. Larry inquired about hiring someone to assist the decedent and was given Sherry's name. Sherry was hired around March 2007 to work part-time (three to four hours a day). Sherry cleaned the decedent's house, took her out to eat, and cared for the decedent's dog. In 2007, Larry testified his name was on the decedent's checking account so he could sign her checks if she could not. In early 2008, the decedent traded in her 2005 Volvo with 30,000 miles for a new

2008 Volvo. On April 30, 2008, the decedent executed her third amendment to the Trust that added Sherry and Sean as beneficiaries of the decedent's home. The decedent's family members did not learn of the third amendment until after the decedent's death.

¶ 12 In May 2008, the decedent had her third stroke. After the third stroke, the decedent was in a wheelchair and required full-time care. Cheri testified the decedent's speech was worse and "sometimes she would just blank out." Terry noted the decedent also had vision and hearing problems. The decedent spent her nights at the Annex, and Sherry cared for her during the day at the decedent's home. Another caregiver was hired to care for the decedent at her home on the weekends. A few weeks before the decedent's death in February 2010, Larry felt the decedent could no longer sign her own checks and informed Sherry he would sign any necessary checks. Sherry informed him he was no longer on the decedent's bank account. After the decedent's death, Larry learned from Lee that Sherry and her husband were included in the Trust. Larry went to Sherry's home to discuss the change in the Trust, and Larry testified Sherry denied knowing she was included in the Trust.

¶ 13 Dr. Spangler testified he was the decedent's primary care physician from 2000 to her death, except for the period she lived in Indiana. In his opinion, the decedent could no longer understand his questions about her medical needs and formulate a response to the questions after her second stroke. However, Dr. Spangler never had to communicate with the decedent's agent for health-care purposes during her lifetime. He also admitted his medical records for the decedent do not contain any comments about the decedent's mental capacity.

¶ 14 Kidd testified he was the person that sold the 2008 Volvo to the decedent in February 2008. He described the decedent as intelligent, articulate, and firm. She did not use a

wheelchair, and he believed she could still drive a car. The decedent had an assistant that was present in the building but not at the desk. The assistant was not involved in the transaction. Kidd testified the dealership only made \$50 or \$100 on the sale of the \$40,000 automobile to the decedent.

¶ 15 Niswonger testified he had been the decedent's financial advisor for more than 20 years and had a personal relationship with her as well. He stated the decedent was always pretty definite and strong in her thoughts. In his opinion, she recovered pretty well from the second stroke and had reasonable movement. The decedent had the ability to sell her home and did all of her own negotiations. She continued to communicate with him up until the last few months before her death. He always felt the decedent understood what she was requesting. The decedent had mentioned to him about adding Sherry as a beneficiary to a part of her estate, and he told her to take it slow and sleep on it. Niswonger felt the decedent understood what she was doing and was very capable of formulating an estate plan. Niswonger's assistant, Packard, described the decedent as a very strong-willed person. She too communicated with the decedent regularly until late 2009 and felt the decedent always knew what she was doing. Both Niswonger and Packard never had any concerns about Sherry, whom the decedent had introduced to them over the telephone.

¶ 16 Everett testified the decedent opened an account at the Bank of Gibson City in March 2007. Everett knew the decedent as a bank customer and described her as "[v]ery matter of fact." On February 28, 2008, the decedent came to the bank and wanted to add two "pay on death beneficiaries" to her bank account. Everett handled the change and noted the decedent clearly expressed her wishes and understood what she was doing. Everett did not believe the

decedent was acting under another's influence. Everett also testified Sherry drove the decedent to the bank that day.

¶ 17 Lee testified she first represented the decedent in a real estate transaction in 2005. She had also prepared a deed for Sean when he wanted to put his house in both his and Sherry's name. In early 2008, the decedent brought all of her estate-planning documents to Lee's office and wanted to change the terms of the Trust. The decedent was able to identify her relatives. In Lee's opinion, the decedent had the capacity to change the Trust and was not under any influence. Sherry was not part of any of the conversations between Lee and the decedent, and Lee had no concerns Sherry influenced the decedent. The decedent made changes to Lee's initial draft of the third amendment to the Trust. On April 28, 2008, Lee opined the decedent had the requisite capacity to sign the third amendment to the Trust. Lee videotaped the signing but later accidentally taped over it. It was the first time Lee had taped a trust or will signing. Lee's secretary, Henry, testified she met Sherry when she brought the decedent to the office. Henry witnessed the decedent sign the third amendment to the Trust, and Sherry was not in the room. Lee read the amendment to the decedent before the decedent signed it. Henry also opined the decedent was coherent when she signed the amendment and agreed with it. According to Henry, the decedent was not pressured to sign the third amendment to the Trust.

¶ 18 Link, a dietician, testified the decedent was a family friend and a patient of hers. Link said the decedent directed her own care and was always alert, aware, and oriented. The decedent was persistent when things were not going the way she wanted them to go. When the decedent lost some weight, Link tried to get the decedent to eat more, but the decedent refused. Turner, a floor nurse at the Annex, also testified she could not persuade the decedent to do

something she did not want to do. Turner described the decedent as "[d]omineering" and very independent. Frye, another nurse at the Annex, also testified the decedent was not easily persuaded to change her mind. Link, Turner, and Frye did not observe anything inappropriate in Sherry's care of the decedent.

¶ 19 After the 2007 move to Gibson City, the decedent was neighbors with Nancy, John, and Hood. They all testified the decedent had landscape work done on her yard and the decedent was outside watching the work and telling the workers what to do. John testified the decedent was very adamant about what she wanted. Hood noted the decedent was a very smart woman and "pretty domineering." Hood's sons occasionally helped the decedent, and the decedent made them do a task over until things were how she wanted them.

¶ 20 Johnson, Sherry's sister, testified she helped the decedent for a week in 2007 and then on an as-needed basis. She described the decedent as "very alert" and noted the decedent had no difficulty expressing her will. Kisantear, the decedent's weekend caregiver, described the decedent as a strong-willed woman. Kisantear testified the decedent always knew her family and loved Sherry.

¶ 21 At the close of evidence, the trial court gave the parties two weeks to submit written closing arguments. The parties written arguments focused on the confidential-relationship issue. Defendants did not raise the issue of the invalidity of the third amendment to the Trust based on the language of the document.

¶ 22 On October 11, 2012, the trial court entered a written order, denying plaintiffs' complaint for fees and expenses, denying defendants' counterclaim with respect to the decedent's home and bank accounts, and granting defendants' counterclaim as to the decedent's rings. The

order did not address the argument the third amendment to the Trust was void due to a lack of valid execution. Both the Gardners and defendants filed posttrial motions. At a November 30, 2012, hearing, the court denied both posttrial motions. On December 28, 2012, defendants filed a timely notice of appeal from the trial court's October 11, and November 30, 2012, orders in sufficient compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008), and thus this court has jurisdiction over defendants' counterclaim under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 23

II. ANALYSIS

¶ 24

A. Constructive Trust

¶ 25 Defendants first assert the trial court erred by not imposing a constructive trust on the assets obtained by Sherry because Sherry and the decedent were in a confidential relationship at the time the decedent executed the third amendment to the Trust and made changes to her bank accounts. A reviewing court will not reverse a trial court's determination on the existence of a confidential relationship unless it is against the manifest weight of the evidence. See *In re Estate of Martino*, 99 Ill. App. 3d 907, 910, 425 N.E.2d 1308, 1311 (1981). "A trial court's ruling is against the manifest weight of the evidence only if it is unreasonable, arbitrary and not based on evidence, or when the opposite conclusion is clearly evident from the record." *In re Estate of Savio*, 388 Ill. App. 3d 242, 249, 902 N.E.2d 1113, 1120 (2009).

¶ 26

Courts will impose the equitable remedy of a constructive trust " 'against one who, by some form of wrongdoing such as actual or constructive fraud, breach of a fiduciary duty, duress, coercion, or mistake, has been unjustly enriched.' " *Kaiser v. Fleming*, 315 Ill. App. 3d 921, 926, 735 N.E.2d 144, 148 (2000) (quoting *Schultz v. Schultz*, 297 Ill. App. 3d 102, 106-07,

696 N.E.2d 1169, 1173 (1998)). "To establish a constructive trust based on the existence of a *confidential or fiduciary relationship*, the party seeking the constructive trust must prove such a relationship by clear and convincing evidence." (Emphasis added.) *Kaiser*, 315 Ill. App. 3d at 926, 735 N.E.2d at 148. Illinois courts have described the clear-and-convincing evidence burden as " 'the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the veracity of the proposition in question' " and "higher than a preponderance of the evidence, but fall[ing] short of the reasonable doubt standard applied in criminal proceedings." *In re Nicholas L.*, 407 Ill. App. 3d 1061, 1075, 944 N.E.2d 384, 396 (2011) (quoting *In re Suzette D.*, 388 Ill. App. 3d 978, 984, 904 N.E.2d 1064, 1070 (2009)). When determining whether a fiduciary or confidential relationship exists, Illinois courts consider the following factors: "(1) the degree of kinship; (2) the disparity in age, health, mental condition, education, and business experience between the parties; and (3) the extent to which the allegedly servient party entrusted the handling of her business and financial affairs to the 'dominant' party and placed trust and confidence in him." *Kaiser*, 315 Ill. App. 3d at 926, 735 N.E.2d at 148 (using the language "confidential or fiduciary relationship"); *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 17, 975 N.E.2d 651 (using the term "fiduciary relationship"). Thus, we note the trial court's use of the term "fiduciary relationship" instead of the term "confidential relationship" did not mean the trial court engaged in the wrong analysis because the two terms are often used interchangeably and the factors to be considered are the same.

¶ 27 Ample evidence was presented at the trial about the aforementioned factors that support the trial court's decision defendants failed to prove by clear and convincing evidence a confidential-fiduciary relationship between Sherry and the decedent at the time decedent changed

her estate plan to include the Gardners. The evidence at trial showed the decedent added the Gardners as beneficiaries to her bank account at the Bank of Gibson City in February 2008 and signed the third amendment to the Trust in April 2008. At that time, the decedent was 90 years old and had not yet suffered her third stroke. Sherry had been working three to four hours a day for the decedent since around March 2007. According to Lois, Sherry's tasks included taking the decedent out to eat, cleaning the decedent's home, and caring for the decedent's dog. Sherry was unrelated to the decedent, and her age was not disclosed at trial. Beyond Sherry's employment at the Annex, little evidence was presented about her business experience. On the other hand, the decedent had been a successful realtor in her younger days and had done her own negotiating in several real estate transactions between 2000 and 2007. Larry testified that, after her second stroke in February 2007, the decedent needed a walker but did not use it all of the time. Cheri testified the decedent also had some speech impairment. Testimony was also presented that, in early 2008, the decedent still occasionally drove a car.

¶ 28 As to the decedent's business affairs, the decedent had a financial advisor, Niswonger. Niswonger testified the decedent had continued to communicate with him up until the last few months of her life. While her speech had gotten slower, her mind was clear about what she wanted. According to Niswonger, once the decedent set her mind on something, there was no deterring her. Packard, Niswonger's assistant, testified she talked with the decedent every six to eight weeks between 2007 and the end of 2009 and noted the decedent was the only person authorized to request distributions. Several witnesses, including neighbors and health-care providers at the Annex, described the decedent as strong-willed and domineering. Moreover, around the time of the estate changes in February 2007, the decedent, on her own, had negotiated

a deal on a new car purchase that gave the car dealership a profit of around \$100. Kidd, the dealership employee involved in the deal, described the decedent as intelligent, articulate, and firm. Kidd noted the decedent's caregiver was in the building but not at the desk. The caregiver was not involved in the transaction. Additionally, while Sherry drove the decedent to the April 2008 trust signing, Lee testified Sherry was not a part of Lee's conversations with the decedent about the changes to the Trust. The decedent had made changes to Lee's initial draft of the third amendment to the Trust. Lee had previously represented the decedent in a 2005 real estate transaction. Sherry had also not been at the bank desk with the decedent when the decedent made the beneficiary change to her bank account at the Bank of Gibson City. Everett, the Bank of Gibson City employee that added the beneficiaries, testified the decedent clearly expressed her wishes and knew what she was doing. Everett believed the decedent was acting on her own.

¶ 29 As the reviewing court noted in *Freiders v. Dayton*, 61 Ill. App. 3d 873, 881, 378 N.E.2d 1191, 1197 (1978), the providing of occasional assistance to an elderly person does not by itself establish a fiduciary relationship. The relationship " 'must result in one party gaining influence and superiority over the other.' " *Freiders*, 61 Ill. App. 3d at 881, 378 N.E.2d at 1197 (quoting *Whewell v. Cox*, 54 Ill. App. 3d 179, 184, 369 N.E.2d 330, 334 (1977)). In this case, much of the evidence showed the decedent, even in her later years, was not the type of person who would be influenced or would allow another to gain superiority over her.

¶ 30 Accordingly, we find the trial court's decision defendants failed to prove by clear and convincing evidence a confidential-fiduciary relationship between Sherry and the decedent was not against the manifest weight of the evidence. Since the defendants based their constructive-trust claim on the existence of a confidential relationship, defendants have failed to

prove their constructive-trust claim, and thus we do not address their other arguments on this issue.

¶ 31

B. Failure of Execution

¶ 32 Defendants next assert the third amendment to the Trust is void for lack of valid execution. Defendants raised that claim in their February 28, 2011, motion to construe the third amendment to the Trust, not in their counterclaim filed the same day. The trial court decided that motion on April 20, 2011, well before the August 2012 trial on defendant's counterclaims. The notice of appeal lists only the trial court's October 11, 2012, order on the counterclaim and the November 30, 2012, order denying the posttrial motions that address the counterclaim.

¶ 33

Our supreme court has emphasized a reviewing court's duty to ascertain its jurisdiction before considering the appeal's merits. See *People v. Lewis*, 234 Ill. 2d 32, 36-37, 912 N.E.2d 1220, 1223 (2009); *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213, 902 N.E.2d 662, 664 (2009); *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008). Illinois Supreme Court Rule 303(b)(2) (eff. May 30, 2008) requires the notice of appeal "specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Our supreme court has stated "[a] notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal." *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176, 950 N.E.2d 1136, 1144 (2011). The notice of appeal serves to inform the prevailing party that the other party seeks review of the circuit court's decision. *Pappas*, 242 Ill. 2d at 176, 950 N.E.2d at 1144. The notice should be considered as a whole, and where it fairly and adequately sets forth the judgment complained of and the relief sought so as to advise the prevailing party of the nature of the

appeal, the notice will be deemed sufficient. *Pappas*, 242 Ill. 2d at 176, 950 N.E.2d at 1144.

¶ 34 The motion to construe the trust was a separate basis for relief in this case as it addressed only the third amendment to the Trust. The notice of appeal in no way indicates the trial court's ruling on the motion to construe is being appealed as the orders listed addressed only the counterclaim. Accordingly, defendants' notice of appeal did not confer jurisdiction on this court for the court's April 20, 2011, ruling on the motion to construe, and thus we do not address the merits of defendants' argument.

¶ 35 C. Bank-Account Changes

¶ 36 Defendants last assert the trial court erred by failing to rule on the changes in the bank accounts that resulted in the Gardners receiving them. One of the findings the trial court made in its October 11, 2012, written order was "[t]he third amendment to decedent's trust refers to all bank accounts in decedent's name but there is no evidence any accounts held in the trust." A reading of the order as a whole clearly indicates the court was merely making a fact notation and not a ruling. The court continued to treat the bank-account changes separate from the Trust amendment as it expressly found defendants had failed to prove a fiduciary relationship at the time of the third amendment to the Trust and the bank-account changes. Thus, contrary to defendants' assertion, the trial court did rule on the changes to the bank accounts.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the Ford County circuit court's judgment.

¶ 39 Affirmed.