

NOTICE

Decision filed 08/11/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140571-U

NO. 5-14-0571

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

<i>In re</i> ESTATE OF JOHN TATE, Deceased)	Appeal from the
)	Circuit Court of
(Sandrea White, Appellant).)	St. Clair County.
)	
)	No. 14-P-179
)	
)	Honorable Brian Babka,
)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Cates and Justice Schwarm concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in finding that primary caregiver had a fiduciary relationship with decedent and did not overcome the presumption that gifts and transactions benefitting caregiver were fraudulent. However, evidence was insufficient to support finding that certain debit and credit transactions were for benefit of caregiver and amount awarded for such transactions was against the manifest weight of the evidence. In addition, there was insufficient evidence supporting order for caregiver to return certain items to the estate for which attorney for estate signed receipt. Accordingly, judgment affirmed as modified.

¶ 2 The appellant, Sandrea White, appeals the August 21, 2014, order of the circuit court of St. Clair County, which ordered her to return certain items to the estate of John Tate, deceased (the Estate), and to repay the Estate the sums of \$2,464.56 and \$8,595.71. On appeal, Ms. White argues that the circuit court erred in: (1) finding that she owed a

fiduciary duty to the decedent based on a power of attorney; (2) ordering her to return items for which the Estate's counsel signed an acknowledgment of receipt; and (3) ordering her to reimburse the Estate for her use of the decedent's debit and credit cards for expenditures related to the decedent's household. For the following reasons, we affirm as modified herein.

¶ 3

FACTS

¶ 4 On March 11, 2014, Quinn Tate, the son of the decedent, filed a petition for letters of administration in the circuit court of St. Clair County, requesting that he be appointed administrator for the Estate. The petition alleged that the decedent passed away on February 28, 2014, leaving no will. On the same date the petition was filed, the circuit court entered an order appointing Mr. Tate as independent administrator of the Estate and an order declaring heirship, naming Mr. Tate, along with his sister, Karjuan Tate, and brother, Sean Tate, as the sole heirs. On March 12, 2014, Mr. Tate filed, on behalf of the Estate, a petition for a citation to recover property and discover information, requesting that the circuit court order Ms. White to appear before the court. See 755 ILCS 5/16-1 (West 2012). According to the petition, Mr. Tate believed that Ms. White had certain assets of the Estate in her possession and control. That same date, the circuit court entered an order granting the citation, and commanding Ms. White to appear in court on March 25, 2014.

¶ 5 On March 25, 2014, the circuit court entered an order, by agreement of the parties, stating that Ms. White's counsel had been provided a list of items which Ms. White was required to turn over to counsel for the Estate within two weeks. The order

further required Ms. White to pay the sum of \$20,000 to the Estate within seven days. The citation hearing was set to continue on a later date in case any other contested issues remained regarding property belonging to the Estate.

¶ 6 On June 18, 2014, a hearing was held on remaining issues. Evidence relevant to the issues on appeal is outlined as follows. Ms. White testified as an adverse witness. She testified that she was a caregiver to the decedent, who passed away on February 28, 2014. Following the decedent's death, Ms. White and the decedent's disabled adult daughter, Karjuan, had access to the decedent's home and the decedent's debit card. Karjuan lived with the decedent at the time of his passing. The decedent's bank statement for the period ending February 28, 2014, as well as for the first 10 days of March 2014, were admitted into evidence as Petitioner's Exhibit 1. A group of receipts for various purchases that Ms. White had provided to the Estate in discovery were admitted into evidence as Petitioner's Exhibit 2.

¶ 7 The Estate questioned Ms. White about the facts and circumstances surrounding several of the transactions reflected on Petitioner's Exhibits 1 and 2. Ms. White testified that she took Karjuan to Sam's Club on March 2, 2014, and March 3, 2014. On March 2, 2014, the two of them made a purchase of \$39.98 for postage and \$365.04 for groceries and a home security camera. On March 3, 2014, the two of them purchased groceries and a second home security camera, spending \$354.95.¹ On clarification, Ms. White testified

¹We note that the transcript reflects that this transaction took place on March 3, 2014, but the corresponding receipt is dated March 1, 2014.

that these items were purchased for Karjuan and the security cameras remained at the decedent's home and were purchased for Karjuan's safety.

¶ 8 Ms. White testified that she paid the decedent's phone bill at Verizon Wireless, in the amount of \$162.65, on March 1, 2014. On March 2, 2014, she purchased gasoline at Flying J with the decedent's debit card in the amount of \$55.65. Ms. White testified that she took Karjuan to Ann's Bra Shop and Lingerie on March 1, 2014, and March 3, 2014, and that Karjuan made purchases of \$150.88 and \$191.97, respectively, for undergarments for herself. The customer name reflected on the receipts is "Karjuan Tate." Ms. White testified that she accompanied Karjuan to Dillard's on March 3, 2014, as well, and that Karjuan used the decedent's debit card to make a purchase there in the amount of \$22.75. Ms. White testified to a \$200 ATM withdrawal she made on the decedent's account on March 4, 2014. Finally, Ms. White testified to purchases she made at Home Depot in the week following the decedent's passing, in the amounts of \$392.40 and \$61.96. According to Ms. White, these were for items needed for maintenance and upkeep on the decedent's residence, such as changing the locks and installing the security cameras, and all items remained at that residence. Several of the receipts contained within Petitioner's Exhibit 2 were purchases Ms. White testified she made from her own accounts for the benefit of Karjuan. The debit/credit transactions from the decedent's account that the Estate questioned Ms. White about totaled \$1,798.23.

¶ 9 Ms. White also testified about transfers of money that she made to her account from the decedent's account immediately preceding and following his death. On January 16, 2014, approximately six weeks prior to the death of the decedent, Ms. White

completed a check to herself from the decedent's account in the amount of \$1,325. According to Ms. White, the check was signed in blank by the decedent, who authorized the amount as payment for electrical work that Ms. White completed on the decedent's home. The words "All Day Excavating" were contained on the memo line of the check because Ms. White used the funds to pay All Day Excavating for repairs to her own home. One day prior to the decedent's passing, Ms. White transferred \$4,000 from the decedent's account to her own account. On March 4, 2014, Ms. White transferred \$20,000 from the decedent's account to her own account. Ms. White testified that the decedent instructed her to do this in order to secure the house for Karjuan and to give Karjuan living expenses as she deemed necessary. Ms. White had returned the \$20,000 to the Estate by the time of the hearing.

¶ 10 Ms. White testified that on March 4, 2014, she wrote a check from the decedent's account in the amount of \$810.35 to purchase the headstone for the decedent's burial. She testified that before the decedent passed away, he ordered a portable building. On March 3, 2014, the decedent's account was charged \$2,264.56 for the building, which is located on Ms. White's property. According to Ms. White's testimony, the decedent instructed her to change the delivery of the building to her property in anticipation of his death.

¶ 11 Respondent's Exhibit 10 was admitted into evidence during the hearing. This document, entitled "Items John Tate requested to be removed from his home," contains an extensive list of items that Ms. White claims to have delivered to the office of the Estate's attorney. The document bears the signature of the Estate's attorney at the end of

the last page. A listing of "Loose Coins" and "Coins Sealed or Coins in Books" sets forth in detail the number of specific coins in a year, and whether there were coins missing in each book. Many of the coins are described as silver, but a "Wooden Case of 50 Gold Layered United States Quarters-Full-None Missing" is included in the listing as well.

¶ 12 Although the Estate's attorney did not testify herself, she elicited testimony from Ms. White that the attorney did not do a thorough inventory of the boxes before signing the receipt, and that the attorney signed the receipt within five minutes of receiving the boxes from Ms. White. The decedent's brother's wife, Mary Tate, testified that she "looked through" the boxes received by the attorney and that "there was a bag of quarters" in the boxes, but that 100% of "the silver" was not returned, "just empty books." The Estate's attorney's examination of Ms. White also suggested that titles to the decedent's vehicles, which are also contained on the receipt, are claimed to have not been returned, although no one testified about whether they were found in the boxes that Ms. White delivered to the Estate's attorney.

¶ 13 Respondent's Exhibit 4, entitled "Bill of Sale," and dated January 25, 2014, was admitted into evidence. The bill of sale evidences the sale of a number of guns with the decedent as the seller and Ms. White as the buyer. The consideration listed for the purchase is \$1. Ms. White testified that the guns were in her possession, with the exception of two.

¶ 14 Finally, Respondent's Exhibit 6, entitled "Power of Attorney Delegation Parental/Custodial Authority," was admitted into evidence. This document, dated January 25, 2014, purports to grant custody of Karjuan to Ms. White as primary

custodian, and to authorize Ms. White to "undertake all acts as are reasonable and necessary to protect the best interest and welfare" of Karjuan. During the hearing, the parties stipulated that this document did not amount to a legal power of attorney, but was simply a documentation of the decedent's wishes that Ms. White care for Karjuan.

¶ 15 At the conclusion of the hearing, the circuit court instructed the parties to submit proposed orders with findings of fact and conclusions of law in lieu of closing arguments. However, no such proposed orders are contained in the record on appeal. On August 21, 2014, the circuit court entered a detailed order, in which it found that Ms. White was the primary caregiver for the decedent during the end of his life, and owed a fiduciary duty to the decedent "pursuant to their confidential relationship and a Power of Attorney executed by the [d]ecedent." The circuit court further found that Ms. White's testimony as to the wishes and desires of the decedent was not credible, and that Ms. White had not overcome the presumption of fraud as to any of the items in her possession that she claimed were gifts.

¶ 16 As to many of the items the Estate claimed were missing, the circuit court found that the Estate had not offered any proof that Ms. White was in possession of them. The circuit court further found as follows:

"[Ms. White] admits having possession of the remaining items [the Estate] seeks, with the exception of the silver and gold coin collection, rare quarter collection, and titles to the decedent's vehicles, which she claims she gave to [the Estate's] attorney, which is not only not credible, but also totally incredible. Why would

counsel for [the Estate] come to court seeking items that she already had? [Ms. White] is ordered to return those items to the Estate within 30 days."

¶ 17 Next, finding the decedent's purported sale of the guns to be supported by inadequate consideration and presumptively fraudulent, the circuit court ordered Ms. White to return them to the Estate within 30 days. Making a similar finding with regard to the portable warehouse, the circuit court ordered Ms. White to pay the purchase price of the warehouse, \$2,464.56, to the Estate within 30 days. Finally, the circuit court ordered Ms. White to repay the Estate \$8,595.71, representing the \$1,325 check purporting to be for electrical work, the \$4,000 transfer, and \$3,270.71, which the circuit court found to be the amount of debit and credit card charges Ms. White made, for her own benefit, from the decedent's account prior to and after his death.

¶ 18 Ms. White's motion to reconsider was file-stamped in the circuit court on September 22, 2014. A proof of service appended to the motion to reconsider certifies that a copy was "served on all parties" by placing same in a mailbox on September 19, 2014, to the Honorable Brian Babka at #10 Public Square, Belleville, as well as to the attorneys of record. On October 28, 2014, the circuit court entered an order dismissing Ms. White's motion to reconsider for a lack of jurisdiction, finding that it was not timely filed. On November 19, 2014, Ms. White filed a notice of appeal.

¶ 19 ANALYSIS

¶ 20 As a threshold matter, we must address the Estate's claim that this court lacks jurisdiction to hear this appeal because Ms. White's posttrial motion was untimely filed. If, as the circuit court concluded, Ms. White's motion to reconsider was untimely, then it

did not toll the 30-day period within which Ms. White was required to file her notice of appeal pursuant to Illinois Supreme Court Rule 303(a) (eff. May 30, 2008). In order to be timely, Ms. White's posttrial motion was required to be filed within 30 days of the entry of the order on August 21, 2014. 735 ILCS 5/2-1203 (West 2014). However, Ms. White's motion to reconsider was file-stamped on September 22, 2014, more than 30 days after the entry of the order. Our court has found a posttrial motion to be timely when there is proof of mailing such motion within the 30-day period. *A.S. Schmulman Electric Co. v. Village of Fox Lake*, 115 Ill. App. 3d 746, 749-50 (1983). However, in *Shatku v. Wal-Mart Stores, Inc.*, 2013 IL App (2d) 120412, ¶ 10, which was cited by the circuit court in its order dismissing the motion to reconsider, the court held that proof of mailing to the circuit clerk is required and proof of mailing to the attorneys is insufficient.

¶ 21 Here, although the proof of mailing does not reflect that the motion to reconsider was mailed to the circuit clerk, it does attest that it was mailed to the judge at the St. Clair County courthouse. This court has found such a proof of mailing to the judge at the courthouse to be sufficient. *In re Marriage of Morse*, 143 Ill. App. 3d 849, 852-53 (1986). Accordingly, we find that we have jurisdiction to consider the merits of Ms. White's appeal.

¶ 22 A citation proceeding under section 16-1 of the Probate Act of 1975 (755 ILCS 5/16-1 (West 2012)) is the statutory mechanism to recover assets that belong to the estate for purposes of paying estate expenses. *In re Estate of Zagaria*, 2013 IL App (1st) 122879, ¶ 24. " 'In a citation proceeding, the probate court is empowered to determine the title and right of property and enter such order as the case requires.' " *Id.* ¶ 25

(quoting *In re Estate of Elias*, 408 Ill. App. 3d 301, 315 (2011)). "The proceeding may be merely for the purpose of obtaining information with no adversary aspects, or it may develop into an out and out suit for the recovery of money." *Id.* (quoting *Keshner v. Keshner*, 376 Ill. 354, 359-60 (1941)). "A finding of the trial court that certain property belonged to the estate will not be disturbed on appeal unless it is against the manifest weight of the evidence, [citation], as the trial court in such proceedings is authorized to determine all questions of title, claims of adverse title and the right of property." *Id.* ¶ 26 (quoting *In re Estate of Joutsen*, 100 Ill. App. 3d 376, 380 (1981)). "A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 41 (quoting *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002)). With these standards in mind, we turn to the issues Ms. White raises on appeal.

¶ 23 The first issue Ms. White raises on appeal concerns the circuit court's finding that Ms. White had a fiduciary relationship with the decedent. This finding is of particular importance to the merits of the Estate's claims because such a finding prompts the application of a presumption that all transactions and gifts benefitting Ms. White were fraudulent. See *In re Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (1997). Ms. White argues that because the "Power of Attorney Delegation Parental/Custodial Authority" was not a true power of attorney, she did not have a fiduciary duty to the decedent such that the presumption would apply. We disagree. Our reading of the circuit court's order reveals that the circuit court found that Ms. White owed the decedent a

fiduciary "pursuant to their confidential relationship *and* a Power of Attorney executed by the [d]ecedent." (Emphasis added.)

¶ 24 "A fiduciary relationship arises when 'one party has reposed trust and confidence in another who thereby gains an influence and superiority over the other. [Citation.]' " *Lecrone v. Leckrone*, 220 Ill. App. 3d 372, 387-88 (1991) (McMorrow, J., dissenting) (quoting *Taino v. Sanchez*, 147 Ill. App. 3d 871, 874 (1986)). "Thus, a 'fiduciary relationship exists where there is a special confidence reposed on one side and a resulting superior knowledge and influence on the other. [Citation.]' " *Id.* (quoting *A.T. Kearney, Inc. v. INCA International, Inc.*, 132 Ill. App. 3d 655, 661 (1985)). "The source of the relationship may be moral, social, domestic, or personal." *Id.* Here, there is ample evidence in the record that Ms. White was the decedent's caretaker in the final months of his terminal illness. The decedent trusted Ms. White with blank checks and debit cards linked to his personal bank accounts. These facts alone are sufficient to support the circuit court's finding that Ms. White and the decedent had a fiduciary relationship. The circuit court's finding in this regard is not against the manifest weight of the evidence. Thus, the circuit court was correct in applying the presumption of fraud to all transactions and gifts benefitting Ms. White. See *Estate of DeJarnette*, 286 Ill. App. 3d at 1088.

¶ 25 The second issue on appeal concerns that portion of the order which commands Ms. White to return the silver and gold coin collection, rare coin collection, and titles to the decedent's vehicles. Ms. White testified that she returned these items to the attorney for the Estate and produced Respondent's Exhibit 10, which she testified was a listing of all those items she had returned. This document contains the Estate's attorney's signature

on the bottom, and set forth in minute detail each and every coin in the decedent's collection, whether the coin was silver or gold, the state, and the year. The Estate's attorney did not testify at the hearing, but did elicit testimony from Ms. White to the effect that the attorney made a cursory review of the boxes lasting less than five minutes prior to signing the receipt. The only other evidence regarding the coins and the vehicle titles was the testimony of Mary Tate, who testified that she looked through the boxes and found a bag of quarters, and that all of the silver quarters were missing from the books. She provided no testimony about the gold coins or vehicle titles. The Estate produced no testimony or other evidence detailing what coins were in the box compared to the itemized receipt.

¶ 26 In its order commanding Ms. White to return the silver and gold coin collection, rare coin collection, and titles to the decedent's vehicles, the circuit court found Ms. White's testimony that she returned those items to be incredible based on the simple fact that the Estate was still demanding return of those items. We find this aspect of the circuit court's order to be against the manifest weight of the evidence. Ms. White provided a receipt signed by the attorney for the Estate as evidence that these items were returned. Although we recognize that this evidence is not conclusive, and may be rebutted (see *O'Bannon v. Vigus*, 32 Ill. App. 473, 482 (1890)), we find the parol evidence offered by the Estate to be inadequate. No witness for the Estate provided an inventory of the items returned in comparison to the receipt signed by the attorney. Although Mary Tate testified some quarters were in the boxes when she looked through them, "but the silver ones were not," there was no evidence regarding the chain of

custody of the boxes in the interim, and there was no detail provided as to what coins were there and what coins were not. For these reasons, we modify the order to remove the requirement that Ms. White return the silver and gold coin collection, rare coin collection, and titles to the decedent's vehicles. See Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994).

¶ 27 Finally, we consider Ms. White's argument on appeal regarding that aspect of the circuit court's order that commands her to repay \$3,270.71, which the circuit court found to be the amount of debit and credit card charges Ms. White made from the decedent's account prior to and after his death. First, we find no evidence in the record supporting a finding that these debit and credit charges amounted to \$3,270.71. As we outlined in the facts, Ms. White was only questioned regarding transactions totaling \$1,798.23. Second, the only evidence in the record regarding the nature of these transactions was derived from the testimony of Ms. White, who testified that all charges were either made for the decedent's disabled adult daughter Karjuan or the decedent's house. Ms. White testified that none of these transactions were made for her benefit. Although the circuit court did not find Ms. White to be credible, a finder of fact may not simply reject un rebutted testimony. *Sweilem v. Department of Revenue*, 372 Ill. App. 3d 475, 485 (2007). "[A]lthough 'the credibility of witnesses and the weight to be accorded their testimony are typically [finder of fact] considerations [citations], a [finder of fact] cannot arbitrarily or capriciously reject the testimony of an unimpeached witness [citations].' " *Id.* (quoting *People ex rel. Brown v. Baker*, 88 Ill. 2d 81, 85 (1981)). Because there is no evidence that the transactions at issue benefitted Ms. White, these transactions were not

presumptively fraudulent, and the Estate did not meet its initial burden to prove the Estate was entitled to a return of the funds from Ms. White. Accordingly, we modify the order to remove the requirement that Ms. White repay the Estate \$3,270.71. As a result, we reduce the order for Ms. White to repay \$8,595.71 to \$5,325, representing the \$4,000 transfer and the \$1,325 check for electrical work.

¶ 28

CONCLUSION

¶ 29 For the foregoing reasons, the August 21, 2014, order of the circuit court of St. Clair County is affirmed as modified herein. For the sake of clarity, the order as modified removes the requirement that Ms. White return the silver and gold coin collection, rare coin collection, and titles to the decedent's vehicles. That portion of the order that requires Ms. White to return the guns set forth therein and to repay the Estate \$2,464.56 for the portable warehouse remains intact. That portion of the order that requires Ms. White to pay the Estate \$8,595.71 is reduced by \$3,270.71, requiring Ms. White to pay \$5,325.

¶ 30 Affirmed as modified.