2015 IL App (1st) 12-3620-U

SECOND DIVISION
September 8, 2015

Nos. 1-12-3620, 1-13-0602 & 1-14-0081 cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ESTATE OF GEORGE H. RUNNELS, Deceased	)	
RICK RUNNELS, SR., Petitioner-Appellee -vs- MARY T. STOCYNSKI and SHARON M. HOFFMAN, Respondents-Appellants	)	Appeal from the Circuit Court of Cook County. No. 06-P-8417 Honorable James G. Riley, Judge, Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment in favor of petitioner on his citation to recover assets was not against the manifest weight of the evidence. The trial court did not abuse its discretion in denying respondents' section 2-1401 petition. The trial judge did not abandon his role as judge and assume the role of petitioner's advocate. The trial court did not commit evidentiary errors when it excluded inadmissible hearsay and inadmissible evidence of petitioner's past criminal convictions. The trial court did not abuse its discretion when it granted petitioner's petition for prejudgment interest and attorney's fees.

¶ 2 Following a bench trial on petitioner Rick Runnels' citation to recover assests, the trial court entered judgment against respondents Mary Stocynski and Sharon Hoffman in the amounts of $37,212.59 and $140,273.34, respectively. Respondents appeal from the entry of three separate orders and argue that: (1) the judgment in favor of petitioner on his citation was against the manifest weight of the evidence; (2) the 1930 account was a joint tenancy account, and the remaining four accounts were co-trustee bank accounts; (3) the trial court abused its discretion in denying respondents section 2-1401 petition; (4) the trial judge abandoned his role as judge and acted as petitioner's advocate; (5) the trial court committed several evidentiary errors by excluding testimony regarding conversations between Attorney Gloria Natoli and George Runnels, by excluding evidence of Rick's criminal convictions, and by excluding evidence of an intimidating postcard allegedly sent by Rick to Sharon in 2011; (6) the trial court lacked jurisdiction to enter the December 5, 2013, order awarding petitioner interest and attorney's fees because respondents had already filed their notice of appeal; (7) the trial court erred when it awarded attorney's fees because the petition to recover did not request attorney's fees; (8) the trial court erred in awarding prejudgment interest because Sharon's and Mary's conduct was not unreasonable and vexatious; and (9) the trial court erred when it awarded attorney's fees to petitioner where petitioner did not give respondents notice of the filing of the motion for attorney's fees and did not call the motion for hearing. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On November 8, 2006, George Runnels, father of Rick, Mary and Sharon, passed away. On January 10, 2007, Sharon petitioned the circuit court to have a copy of George's 1988 will ("1988 will") admitted to probate. The will named Sharon as executor and gifted the residuary estate to four of the decedent's five children in equal shares. Rick Runnels, the fifth child, was specifically excluded. In her petition, Sharon stated that George had executed his will on October 12, 1988, at attorney Gloria Natoli's law office, leaving $450,000 in personal property and $200,000 in real property. The circuit court admitted the copy of the 1988 will to probate and issued letters of office to Sharon as independent executor.

¶ 5 On November 12, 2008, Attorney Natoli petitioned to have a May 2, 1994 will ("1994 will") admitted to probate. On that date, the court entered an order vacating the 1988 will, and admitted the 1994 will to probate. The 1994 will gifted the residuary estate in equal shares to all five children. On April 7, 2009, Rick filed an appearance through counsel, and timely filed objections to the inventory and accounting. Protracted motion practice ensued, and ultimately, Sharon was ordered to pay rent, taxes, insurance, and utilities on George's home in Harwood Heights. This order is not at issue in this appeal.

¶ 6 On April 28, 2011, Rick filed a citation to recover assets against Sharon and Mary that is the subject of this appeal. Rick alleged that on October 1, 1991, his father executed a power of attorney (POA) naming Sharon and Mary as his attorney in fact. On March 27, 1997, his father executed a second POA naming Mary as his agent and Sharon as his successor agent. On November 27, 2003, his father executed a third POA naming Mary as his agent and Sharon as his successor agent. Rick further alleged that Sharon and Mary, as George's POAs, had improperly

converted estate funds from various bank accounts and tortiously interfered with his expectancy. Rick sought an accounting from Sharon and Mary. Sharon and Mary's motion to quash the citation petition was denied, and their answers denied Rick's allegations, mainly because they alleged that they were entitled to the funds in George's bank accounts.

¶ 7 On June 11, 2012, the circuit court conducted a bench trial.

¶ 8 Mary testified that she was a supervisor with the Cook County social service department and was a certified addiction counselor. Mary testified that she has four siblings: Sharon Hoffman, Rex Runnels, Rick Runnels, and Lisa Riznicki.

¶ 9 Mary testified that her father George, a chronic alcoholic, was placed in a nursing home in March of 2003 after he had been hospitalized following a fall. Prior to his fall, her father needed frequent assistance with daily activities and personal hygiene upkeep.

¶ 10 When her father entered the nursing home in March 2003, her sister Sharon began paying their father's bills. Mary began paying her father's bills in November 2003. The monthly bill for the nursing home was about $3,300. From November 2003 until his death in 2006, Mary paid the nursing home and other medical bills out of LaSalle bank account xxxxxx1930 ("1930 account").

¶ 11 The 1930 account was opened while her father was in the nursing home. Mary, Sharon and the decedent opened the account as a joint account naming all three on the account. The account was opened with an initial deposit of roughly $238,165, which represented the proceeds from the November 2003 sale of the decedent's lot on Oriole Avenue. Using her POA, Mary signed some documents relating to the sale of the lot. It is unclear from the record whether she signed the contract for the sale of the lot or signed documents at the closing.

¶ 12 At the time these funds were deposited in 2003 into the 1930 account, her father owned the home in Harwood Heights, had investments in stocks and bonds, other bank accounts and was receiving social security and pension payments. Mary also withdrew cash from the 1930 account but stated that she always sought permission to take cash withdrawals out of that account. Mary never contributed any of her money to this account.

¶ 13 Mary testified that after her father passed away she contacted Natoli and asked her what to do with the money remaining in the 1930 account. Mary testified that Natoli told her that she and Sharon were to have that money because they were both named on the joint tenancy account.

¶ 14 Sharon testified that she was the assistant director of the Cook County Social Service Department and was a certified substance abuse counselor. She testified that although he was a working man, her father was an alcoholic for most of his life and often needed help with basic tasks. She testified that her father was found wandering outside in February 2003 and was hospitalized for a few weeks before he entered a nursing home in March 2003.

¶ 15 Sharon testified that she was named in three POAs executed by her father. On the first, executed in 1991, she was co-agent with Mary. On the remaining two, executed in 1997 and 2003, she was the successor agent. Sharon never used the POA to transfer assets belonging to her father or to create a joint bank account with her father.

¶ 16 In February 2003, Sharon was added by way of signature card to several of her father's accounts at LaSalle Bank: xxxxxx4534 (“4534 account”), which was a savings account opened by her father in 2001; xxxxxx5858 (“5858 account”), a checking account opened in 2001 in trust for her brothers; and xxxxxx7281 (“7281 account”) and xxxxxxx1156 ("1156 account") which were $10,000 and $20,000 certificates of deposit (CDs) respectively.

¶ 17 While her father was in the nursing home from March 2003 through November 2006, she paid his nursing home bills and the mortgage on his house from the 4354 account, which was opened in 2001. While her father was living, she withdrew $3,000 a month for herself with her father's permission. When her father died, she withdrew the money from this account on the advice of Natoli.

¶ 18 Sharon was added to the 5858 account pursuant to a signature page. That account was opened in 2001 in trust for her brothers. There was no evidence presented that a trust existed or that the account was held in trust. The 5858 account was used to pay some nursing home bills and some bills for her father's house. Sharon's daughter was living in her father's house.

¶ 19 In November 2003, Sharon went with her father and Mary to LaSalle Bank to open the 1930 account. It was a joint account and all three were named on the account. The funds from the 1930 account were derived from a $275,000 sale of her father's real estate lot on Oriole Avenue. The initial deposit into the 1930 account came from the sale of the Oriole lot in the amount of $184,165. An additional deposit of $54,000 was made after escrow closed.

¶ 20 When their father passed away, Sharon and Mary split the funds from the 1930 account, about $71,000, between themselves. Sharon also took $49,751.40 from the 4354 account, $23,309.35 from the 5858 account and two CDs totaling $30,000 from the 1156 and 7281 accounts. Sharon testified that she never deposited money in any of these accounts.

¶ 21 Attorney Gloria Natoli testified that she has been a licensed attorney since 1981, and that she represented George in tax matters, wills, and real estate since the mid-1980s. Natoli testified that Sharon and Mary came to her office to inform her of George’s death, and asked her if she had his original will. Natoli testified that she could not locate the original 1988 will, so she filed

a copy of it. Natoli stated that the 1988 will was admitted on a petition to admit a copy of a lost will. Natoli testified that because the 1988 will was not an original, it was presumed to have been revoked. To overcome the presumption that the 1988 will had been revoked, one of the witnesses testified that the reason George prepared the 1988 will was because Rick had shot his dog and wanted to cut him out of his will. Natoli also stated that she had drafted the 1994 will, which actually revoked the 1988 will, but did not tell Sharon and Mary that the 1988 will was revoked by the 1994 will because she didn't remember drafting the 1994 will. Natoli admitted that she was the executor of the 1994 will but did not remember drafting it. Natoli testified that several months to a year after a copy of the 1988 will was filed, she discovered the 1994 will in a box with other documents. She knew that she had prepared the 1994 will and thought she had given the original to her clients. As soon as she discovered the 1994 will and saw that petitioner was an heir, she told Sharon and Mary and had the second will admitted to probate.

¶ 22 Natoli also testified that she was George's attorney for the sale of the Oriole property on November 7, 2003. Prior to the sale she asked Mary to sign a power of attorney. Mary, George and Natoli were present at the closing. Natoli signed the RESPA closing document although Mary had the POA because George's "hand was a little shaky" and he asked her to sign.

¶ 23 Petitioner testified that while his father was in the nursing home he questioned Natoli and Sharon concerning the accounts being used to pay his father's bills. Petitioner testified that Natoli told him that it was none of his business because he was not in the will. Prior to the discovery of the second will, Sharon and Mary offered him $10,000 not to dispute the 1988 will. Sharon and Natoli contacted him numerous times and told him that they wanted to settle the will. Natoli discovered the 1994 will after petitioner complained to her and obtained an attorney. It

was then that petitioner discovered that he was to get a $10,000 bequest to take care of his father's dogs. He also then discovered that Natoli was the executor of the 1994 will. Sharon and Natoli contacted petitioner numerous times in one week to settle the 1994 will.

¶ 24 At the conclusion of the evidence, the trial court remarked that “this case is full of inconsistencies.” The trial court stated that it appeared that in the months before and after George’s admission to the nursing home, he was a chronic alcoholic with “significant medical problems,” and questioned his ability to make decisions for himself due to testimony about his hygiene. The court further found Natoli's testimony "alarming because she prepared most of the documents at issue here." The court also found that Mary used the power of attorney to execute the contract, "which is a significant assets of this estate." The court concluded that with respect to the 1930 account:

> "They treated this as Dad's money; that – that is, Sharon and Mary treated it as Dad's money. They used it to support Dad; they used it to pay his bills. I believe that it was not a true joint tenancy account, that, in fact, was a convenience account. And when Dad died, that money should have gone into Dad's estate, and his bills should have been paid."
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> "The testimony was they thought there was about $71,000 left in that account when those final bills got paid. That money, that account, belongs to the estate of George H. Runnels, Junior."

¶ 25 The court also concluded that the remaining four accounts were "troublesome" because they were "never at any time joint tenancy accounts" but "appear[ed] to be some type of trust

account but none of the parties ever produced any trust documents or documentation showing that that the two brothers were beneficiaries." The court found that the four remaining accounts should be part of the estate, because "no trust agreement [was] put into evidence, I'm ruling that these accounts belong to the estate, as no formal proof of a trust was ever produced." The trial court then continued the case to allow Rick's attorney time to prepare a judgment order. The court made no finding that any fraud or conversion occurred.

¶ 26 On July 12, 2012, the trial court entered a judgment against Mary in the amount of $37,212, representing 50 percent of the 1930 account. The trial court also entered judgment against Sharon in the amount of $49,751 from the 4534 account, $37,212 or 50 percent from the 1930 account, $23,309 from the 5858 account, and $30,000 from the 7281 and 1156 accounts, for a total judgment of $140,273 against Sharon.

¶ 27 On August 8, 2012, Sharon and Mary filed a posttrial motion, arguing that the court lacked jurisdiction regarding George's accounts where Sharon was a co-trustee, that the trial court committed several evidentiary errors, that brothers Rick and Rex were beneficiaries of accounts 5858 and 4534, and that the trial court erred in finding that Sharon and Mary were fiduciaries in fact, and even if Mary was a fiduciary, the court erred in finding that Mary breached her fiduciary duty as POA.

¶ 28 On August 13, 2012, petitioner filed a petition for interest, attorney's fees and punitive damages. A notice of filing of the petition was not filed with the clerk of the Circuit Court, nor was notice sent to the attorney for respondents. On November 1, 2012, the trial court denied respondents' posttrial motion after hearing argument. On November 30, 2012, Sharon and Mary filed their notice of appeal from the order denying their August 8, 2012 posttrial motion.

¶ 29 On November 21, 2012, Sharon filed a section 2-1401 petition to vacate judgment, based on "new evidence," claiming that on November 14, 2012, her attorney found a title change account signature card, dated February 15, 2003, which stated that George and Sharon were co-trustees for the benefit of Rick and Rex of account 5858. Sharon's counsel blamed George's poor management and senility for not making the discovery before the time of trial. On January 17, 2013, the trial court denied Sharon's section 2-1401 petition to vacate, and Sharon filed her notice of appeal from that order on February 14, 2013.

¶ 30 On December 3, 2012, petitioner filed a motion for an award of interest, attorney's fees and costs. In his motion, petitioner argued for a fee of one-third of the benefit provided to the respondents. On December 5, 2013, the court entered additional judgments against Sharon and Mary for prejudgment interest in the amount of $39,795.35 and $10,557.16, respectively. The court also entered an additional judgment against Sharon and Mary in the amount of $59,161.98 for attorney's fees. Sharon and Mary filed an appeal from this order on January 3, 2014.

¶ 31 We consolidated these three appeals.

¶ 32 ANALYSIS

¶ 33 Respondents first argue that the trial court erred in entering judgment in favor of the estate and against Sharon for the money in the 5858, 4534, 1156 and 7281 accounts because the beneficiaries of these accounts would be entitled to these funds, not the estate.

¶ 34 A reviewing court will reverse a trial court's judgment following a bench trial only if it is against the manifest weight of the evidence. *C. Szabo Contracting Inc. v. Lorig Const. Co.*, 2014 IL App (2d) 131328, ¶ 23. The trial court is in a superior position to observe the demeanor of the witnesses while testifying, to judge their credibility, and to determine the weight their testimony

and the other trial evidence should receive. *In re Estate of Bennoon,* 2014 IL App (1st) 122224, ¶ 72. To be against the manifest weight of the evidence, the opposite conclusion must be clearly evident or the trial court's finding must be unreasonable, arbitrary or not based on the evidence presented. *Id.*, ¶ 70. We will not overturn a judgment merely because we might disagree with it or might have reached a different conclusion as the trier of fact. *Id.* ¶ 84.

¶ 35 In awarding these accounts to the estate, the court stated:

> "That raises the issue of these other four accounts. These other four accounts were very troublesome. They are not and, apparently, never were at any time joint tenancy accounts. They appear to be some type of trust account. I only use the word 'appear' because nobody's given me any trust documents. Nobody—they keep telling me the boys were the beneficiaries, but I don't have any documents that tell me that.
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> This is an '06 case. I assume all discovery has been done. I assume that [if] those documents are in existence, that in fact, I would have them in front of me today. I do not. All the proofs have been closed. Nobody's put into evidence any proofs whatsoever regarding the existence of the trust, but, yet, the documents clearly indicate the relationship here is co-trustee.
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> There being no trust agreement put into evidence, I'm ruling that these accounts belong to the estate, as no formal proof of a trust was ever produced. Those four accounts would come into the estate."

We cannot find that the trial court's holding that the 5858, 4354, 1156 and 7281 accounts belong to the estate to be against the manifest weight of the evidence given the lack of evidence of the existence of a trust.

¶ 36 In a related argument, respondents suggest that it was improper for the court to enter judgment against Sharon for the amounts she withdrew from the 4354, 1156 and 7281 accounts because the citation to recover assets did not seek recovery of these assets.

¶ 37 We disagree. There was testimony at trial about Sharon being added to her father's accounts at LaSalle Bank, including accounts 4354, 1156 and 7281, amongs others. Respondents allowed these accounts to be put at issue by not objecting to the testimony regarding these accounts or to information about these accounts being admitted into evidence. A party cannot complain of an error which he or she induced or to which he or she consented. *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000).

¶ 38 Respondents next argue that the trial court erred in entering judgment against them for the amount withdrawn from the 1930 account because neither Sharon nor Mary had a fiduciary relationship with respect to the 1930 account, and alternatively, that George intended the funds in the 1930 account to go to Sharon and Mary. We disagree.

¶ 39 Illinois law provides two avenues for finding that a fiduciary or confidential relationship exists. A fiduciary relationship may be found to exist as a matter of law from the relationship of the parties, such as an attorney-client relationship, or may be found to exist by the facts of a particular situation, such as a relationship where trust is reposed on one side and results in superiority and influence on the other side. *In re Estate of Long*, 311 Ill. App. 3d 959, 963 (2000). Where a fiduciary relationship is alleged on the basis of evidence showing trust and

confidence has been reposed by one person in another, the existence of the relationship must be proved by clear and convincing evidence. *In re Estate of DeJarnette,* 286 Ill. App. 3d 1082, 1088 (1997). The relevant factors in determining whether a fiduciary relationship exists are: (1) the degree of kinship; (2) disparity of age; (3) health and mental condition, and; (4) the extent to which the allegedly servient party entrusted the handling of his business and financial affairs to, and reposed faith and confidence in, the dominant party. *Long*, 311 Ill. App. 3d at 964. Where a fiduciary relationship exists, the law presumes that any transaction between the parties in which the dominant party has profited is fraudulent, and this presumption may be rebutted only by clear and convincing proof. *Id*. A fiduciary may rebut the presumption of fraud or undue influence by clear and convincing proof that she has exercised good faith and has not betrayed the confidence reposed in her. Significant factors in meeting this burden include a showing that the fiduciary made a frank disclosure of the information she had, she paid adequate consideration, and the principal had competent and independent advice. *DeJarnette,* 286 Ill. App. 3d at 1088. A trial court's determination that a fiduciary relationship did not exist and no undue influence was present will not be overturned unless the trial court's finding was against the manifest weight of the evidence. *In re Estate of Henke,* 203 Ill. App. 3d 975, 984 (1990).

¶ 40 In the present case, there was ample evidence from which the trial court could conclude that a fiduciary relationship existed between respondents and George regarding the 1930 account, the degree of kinship, disparity of age, George's health and mental condition, and the extent to which George entrusted the handling of his business and financial affairs to respondents weighs heavily in favor of the existence of a fiduciary relationship. Thus, any transaction for the benefit of respondents is presumed fraudulent, subject to rebuttal by clear and convincing proof.

Long, 311 Ill. App. 3d at 964. This court has defined clear and convincing evidence as a quantum of proof that leaves no reasonable doubt in the mind of the fact finder about the truth of the proposition in question. *First National Bank of Chicago v. King,* 263 Ill. App. 3d 813, 819 (1994). We reiterate that it was the trial court's province to resolve the conflict in the evidence. *O'Leary v. America Online, Inc.*, 2014 IL App (5th) 130050, ¶ 7. The trial court is in a superior position to observe the conduct of the witnesses while testifying to determine their credibility. *Eychaner*, 202 Ill. 2d at 270-71. We cannot reweigh the evidence or substitute our judgment for that of the trier of fact under such circumstances. *Id*. at 251-52. Accordingly, the trial court's determination that Sharon was a fiduciary with respect to the 1930 account was not against the manifest weight of the evidence.

¶ 41 Alternatively, respondents argue that George's donative intent to give respondents the remaining proceeds from the sale of the Oriole lot after his death was established by clear and convincing evidence. "At the creation of a statutory joint tenancy, a presumption of donative intent arises and a party claiming adversely to the instrument creating the joint account has the burden of proving by clear and convincing evidence that a gift was not intended." *Harms*, 236 Ill. App. 3d at 634. The intent of the owner of the funds at the time the joint account was created is decisive on whether the account is a convenience account or a true joint tenancy account; however, in construing the creator's intent, the finder of fact may properly consider events occurring after the creation of the account. *Vitacco v. Eckberg,* 271 Ill. App. 3d 408, 412 (1995). "Convenience accounts are joint accounts created for the purpose of allowing another person to withdraw funds from the account at the original account holder's direction and for the purpose of that original account holder." *Id.*; see also *Harms,* 236 Ill. 2d at 634. In

determining whether an account was created for convenience, courts look to the intent of the owner of the funds at the time the joint account was created. *Vitacco*, 271 Ill. App. 3d at 412. In determining the creator's intent, the finder of fact may properly consider events occurring after the creation of the account. *Id.* "A lack of knowledge as to the purpose for creation of a survivorship account is insufficient as a matter of law to overcome the presumption of donative intent." *Harms,* 236 Ill. App. 3d at 635.

¶ 42 This is undoubtedly a very disjointed case. There are large gaps in the questioning of witnesses and the presentation of evidence is not easily followed. The parties often go unseemingly astray of the actual issues. Nevertheless, we have carefully reviewed the record and conclude that the trial court's finding that the 1930 account is a convenience account was not against the manifest weight of the evidence. At the time the 1930 account was opened, George, described as a "chronic alcoholic," had spent a significant amount of time in a nursing home, after two lengthy stays in the hospital. It was opened with funds from the sale of the Oriole lot. At the closing on the lot, Attorney Natoli signed the RESPA and Mary used her POA to execute another closing document because George's hand was too shaky. Moreover, it was undisputed that the money in the 1930 account was George's money used to pay his bills and support him, and that neither Sharon nor Mary contributed any of their own funds to that account. There is sufficient evidence to conclude that the 1930 account was clearly a convenience account because it was apparent that the funds from the 1930 account were withdrawn at George's direction and for the purpose of supporting George. *Harms*, 236 Ill. App. 3d at 635. Given these facts, a presumption of donative intent was rebutted. Therefore, we cannot say that the trial court's

determination that the 1930 account was a convenience account and part of the estate was against the manifest weight of the evidence.

¶ 43 The trial court concluded that the opening of the 1930 account did not create a statutory joint tenancy, but rather, a convenience account. The trial court reached this conclusion largely because Sharon testified that George wanted to open the account in his name, but she convinced him to do otherwise. This finding, in conjunction with the fact that the account was used for the purpose of paying George's bills, allowed the court to conclude that the 1930 account was a convenience account.

¶ 44 Respondents argue next that the trial court erred by denying their section 2-1401 petition to vacate its earlier judgment. Respondents argue that on November 14, 2012, their attorney discovered an "account signature card" titled "George H. Runnels, Jr., and Sharon M. Hoffman as Trustee for Rex G. Runnels and Rick R. Runnels, Sr." dated February 15, 2003, and that this discovery was conclusive in establishing that George and Sharon were trustees for Rex and Rick.

¶ 45 Section 2–1401 of the Illinois Code of Civil Procedure (Code) establishes the appropriate procedure that allows for the vacature of a final judgment after 30 days. 735 ILCS 5/2–1401(a) (West 2010); *S.I. Securities v. Powless*, 403 Ill. App. 3d 426, 430 (2010). The statute requires the petitioner to support her petition with affidavits or other appropriate showing as to matters not of record. 735 ILCS 5/2–1401(b) (West 2010). To obtain relief under section 2–1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: "(1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-

21(1986). We apply a two-tiered review of a section 2-1401 petition: "(1) the issue of a meritorious defense is a question of law and subject to *de novo* review; and (2) if a meritorious defense exists, then the issue of due diligence is subject to abuse of discretion review." *West Bend Mutual Insurance Co. v. 3RC Mechanical and Contracting Services, LLC*, 2014 IL App (1st) 123213, ¶ 11.

¶ 46 We note initially that with respect to the third element for section 2-1401 relief, the parties do not dispute that respondents filed their 2-1401 petition within the requisite two-year statutory period. See 735 ILCS 5/2-1401(c) (West 2010). The two remaining issues involve whether respondents had a meritorious defense and acted with due diligence.

¶ 47 "A meritorious and substantial defense *** is one that raises questions of law deserving investigation or a real controversy as to the essential facts." *West Bend*, 2014 IL App (1st), ¶ 13. Here, the central issue throughout the trial was the nature of George's five LaSalle bank accounts. Respondents argued throughout that George's accounts were created in trust, however, the trial court ruled that because "[t]here being no trust agreement put into evidence, I'm ruling that these accounts belong to the estate." While the language of the "account signature card," as stated in respondents' brief, suggests that George's accounts were created in trust, the trial court had the opportunity to examine respondents' "new evidence" and concluded that the "account signature card" was illegible. Therefore, because the trial court could not read the account signature card, the trial court could not consider whether respondents' new evidence presented a meritorious and substantial defense or claim under section 2-1401.

¶ 48 Regardless of whether respondents' section 2-1401 petition presented a meritorious and substantial defense or claim, the record is clear that respondents failed to act with due diligence.

Due diligence requires that the section 2-1401 petitioner have a reasonable excuse for failing to act within the appropriate time but does not afford a litigant a remedy whereby she may be relieved of the consequences of her own mistake or negligence. *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 110 (2009). Specifically, the petitioner must show that her failure to defend against the claim was the result of an excusable mistake and that under the circumstances she acted reasonably, and not negligently, when she failed to initially resist the judgment. *West Bend*, 2014 IL App (1st), ¶ 14. "In determining the reasonableness of the excuse offered by the petitioner, all of the circumstances attendant upon entry of the judgment must be considered, including the conduct of the litigants and their attorneys." *Id*. A party is generally bound by the negligence of her legal counsel, however, a circuit court may decline to impute counsel's negligence to a litigant in the existence of mitigating circumstances. *Id*. This court has observed that relaxation of the due diligence requirement under section 2-1401 is "justified only under extraordinary circumstances." *Prenam No. 2, Inc. v. Village of Schiller Park*, 367 Ill. App. 3d 62, 66 (2006).

¶ 49 Here, respondents' attorney admitted before the trial court that the "account signature card" was not introduced at trial due to his own ineptitude. Respondents stated in their section 2-1401 petition that the "account signature card" was misfiled in a file for "unimportant or duplicate documents" and that it should have been filed in the "core documents file." Respondents further admit on appeal that the "account signature card" was not introduced at trial due to "poor file management, senility[,] or a combination of both." As stated in *Smith*, "the petitioner must show that his failure to defend against the lawsuit was the result of an excusable mistake and that under the circumstances he acted reasonably, and not negligently." *Smith*, 114 Ill. 2d at 222-23. We cannot say that the conduct of respondents' attorney was the result of an

excusable mistake. To the contrary, as respondents' attorney stated, her conduct was inexcusable "poor file management," and we cannot conclude that the trial court abused its discretion in this regard.

¶ 50 Further, respondents' section 2-1401 petition does not allege, nor does the record contain, any mitigating circumstances that would reasonably justify the relaxation of the due diligence requirements. See *Id*. at 224-25 (concluding "[w]hen all of the circumstances of this case are viewed in their entirety, there is no doubt that [the litigant's] dilemma is the result of its own negligence and indifference to or disregard of the circuit court's process.") Therefore, because respondents' "new evidence" was illegible to the trial court, and because respondents failed to act with due diligence, we conclude that the trial court neither erred nor abused its discretion in denying respondents' section 2-1401 petition.

¶ 51 Respondents argue next that the trial court disregarded his role as a judge and impermissibly assumed the role of petitioner's advocate. We find this argument to be meritless. As a preliminary matter, respondents have waived this issue for appellate review because respondents did not raise an objection before the trial court, nor did they raise the issue in a posttrial motion. See *Webber v. Wight & Company* 368 Ill. App. 3d 1007, 1027 (2006) (to preserve issue for review, party must both object at trial and in written posttrial motion).

¶ 52 Waiver aside, we find no merit to respondents' claim that the trial court judge abandoned his role as a judge and assumed the role of petitioner's advocate. "A trial court may, in its discretion, question witnesses to elicit the truth or clarify material issues that seem obscure as long as it does so in a fair and impartial manner." *In re Maher*, 314 Ill. App. 3d 1088, 1097 (2000). A trial judge has an obligation to assure the public that justice is administered fairly and

must avoid the appearance of impropriety. *Id*. The propriety of an examination of a witness by the trial court must be determined by the circumstances of each case and is reviewed for an abuse of discretion. *Id*.

¶ 53 We have reviewed the record and conclude that the trial court judge's line of questioning was not an abuse of discretion. This case involved many parties, numerous allegations, and multiple inconsistencies. We find that the trial court judge remained fair and impartial in his questioning, and that his examination of the witnesses was aimed at clarifying conflicts in evidence. In sum, the trial court judge's examination of witnesses was appropriate given the facts, circumstances, and the presentation of evidence.

¶ 54 Respondents also argue that the trial court committed several evidentiary errors, specifically: (1) that the trial court improperly applied the Dead Man's Act by not allowing Attorney Natoli to testify about the preparation of the decedent's will; (2) by excluding respondents from introducing evidence of Rick's criminal convictions; and (3) by excluding the introduction of an intimidating note sent by Rick to Sharon in May 2011. We address each argument in turn.

¶ 55 Respondents, citing *In re Estate of Henke*, 203 Ill. App. 3d, 975 (1990), argue first that the trial court erred by barring Natoli's testimony because the testimony of an attorney who prepared a will is not barred by the Dead Man's Act in a will contest where the attorney was not a party and did not testify on her own behalf. Respondents argue that, but for the trial court's exclusion of testimony, Attorney Natoli would have testified that George told her that (1) she was directed by George Runnels to change the beneficiary of a land trust from Rick Runnels to Sharon Hoffman shortly after Rick shot his father's dog; (2) that George wanted Sharon to have

the proceeds from the closing and; (3) that George stated that the proceeds from the sale of the Oriole lot was Sharon's money.

¶ 56 The Dead Man's Act provides, in pertinent part: "[i]n the trial of any action in which any party …defends as the representative of a deceased person…no…person directly interested in the action shall be allowed to testify on his…own behalf ...." 735 ILCS 5/8-201 (West 2012). Petitioner does not address whether the Dead Man's Act applies, but argues that its application is inconsequential because Attorney Natoli's testimony was offered only to prove that George omitted Rick from his 1988 will, a fact that petitioner argues is meaningless because George ultimately included Rick in his 1994 will.

¶ 57 We need not address either parties' arguments because the trial court properly excluded Natoli's testimony as inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). A "statement" is "an oral or written assertion" or "nonverbal conduct of a person, if it is intended by the person as an assertion." Ill. R. Evid. 801(a) (eff. Jan. 1, 2011). Hearsay statements are inadmissible unless they fall within an exception to the rule against hearsay. Ill. R. Evid. 802 to 804 (eff. Jan. 1, 2011).

¶ 58 We reach this conclusion because the testimony that respondents argue should have been admitted was offered solely to prove the truth of the matters asserted. In other words, respondents' only basis for admission of Natoli's testimony is that each part of the excluded testimony did in fact happen or was enunciated. This is a classic example of inadmissible hearsay because the excluded testimony was only being offered to prove that (1) George did in

fact direct Sharon to change the beneficiary of a land trust from Rick Runnels to Sharon Hoffman shortly after Rick shot his father's dog; (2) that George wanted Sharon to have the proceeds from the closing and; (3) that George stated that the proceeds from the sale of the Oriole lot was Sharon's money. Because respondents do not contend that any hearsay exception applies, we deem any hearsay exception argument as waived.

¶ 59 With respect to respondents' arguments that the trial court erred by excluding evidence of Rick's criminal conviction, we find this argument to be of no merit. Evidence is admissible if relevant to a disputed issue and its prejudicial effect does not substantially outweigh its probative value, with relevancy defined as having any tendency to make the existence of a fact consequential to deciding the case more or less probable than without the evidence, and with probability "tested in the light of logic, experience, and accepted assumptions as to human behavior." *People v. Patterson*, 192 Ill. 2d 93, 114-15 (2000).

¶ 60 "The decision to admit or exclude evidence rests within the sound discretion of the trial court, and that decision will not be disturbed in the absence of an abuse of that discretion." *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 28. "An abuse of discretion occurs in the admission of evidence when no reasonable person would take the view adopted by the trial court." *Id*. (citing *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 45 (2009) (citing *Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 912 (2007))). Evidence of a conviction under an abuse of discretion standard is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date. *People v. Montgomery*, 47 Ill. 2d, 510, 516 (1971).

¶ 61 Here, the offered convictions, as shown by copies of certified judgments, were more than 10 years old at the time of trial on that basis alone, the trial court did not abuse its discretion in excluding evidence of Rick's convictions. However, even if the offered convictions were within the requisite time period, we find them to be entirely irrelevant. The main issue throughout trial was the nature of George's accounts. To that end, evidence of Rick's convictions would not have furthered the trial court's analysis into whether the accounts were created in trust, were joint accounts, or convenience accounts. Therefore, the trial court's exclusion of Rick's convictions was appropriate and not an abuse of discretion.

¶ 62 Finally, addressing respondents' argument regarding the trial court's refusal to consider a postcard allegedly sent by Rick to Sharon in 2011, we hold that the trial court did not abuse its discretion. The note states "Sharon: The day of judgment is coming for you and John. I suggest you do the right thing. I will not stop until justice has been served." First, respondents' argument lacks merit because the trial court did consider the postcard, and admitted it into evidence. The trial court examined the note, questioned whether it was threatening, and ultimately concluded that it was irrelevant to the issue at hand: the nature of George's accounts. We agree with the trial court's assessment. The postcard did not have "any tendency to make the existence of a fact consequential to deciding the case more or less probable than without [it.]" *Patterson*, 192 Ill. 2d at 114-15 (2000). Moreover, respondents' argument that the trial court "refused to consider evidence of an act of intimidation" is foreclosed by the fact that the trial court admitted the postcard into evidence and gave it the weight the court deemed appropriate.

¶ 63 Respondents next argue that the trial court did not have jurisdiction to enter the December 5, 2012 order awarding petitioner interest and attorney fees because respondents had filed a notice of appeal on November 30, 2012.

¶ 64 It is well established that a trial court loses jurisdiction over a case and the authority to vacate or modify its judgment 30 days after the entry of judgment, unless a timely post judgment motion is filed. *Gegenhuber v. Hystopolis Production, Inc*., 277 Ill. App. 3d 429, 431 (1995) When a timely post judgment motion is filed, the circuit court's and the appellate court's jurisdiction is extended until 30 days after the motion is decided. *Chen Ying Yang v. Chen*, 283 Ill. App. 3d 80, 85 (1996); *Sears v. Sears*, 85 Ill. 2d 253, 258 (1981).

¶ 65 In the case at bar, judgment was entered against Sharon and Mary on July 12, 2012. However, " '[i]f an order does not resolve every right, liability or matter raised, it must contain an express finding that there is no just reason for delaying an appeal' " in accordance with Illinois Supreme Court Rule 304(a) (155 Ill. 2d R. 304(a)). *Brown & Kerr Inc. v. American Stores Properties, Inc*., 306 Ill. App. 3d 1023, 1028 (1999) (quoting *F.H. Prince & Co. v. Towers Financial Corp*., 266 Ill. App. 3d 977, 983 (1994). A request for attorney fees is a claim within the meaning of Illinois Supreme Court Rule 304(a) (155 Ill.2d R. 304(a)). *Brown*, 306 Ill. App. 3d at 1028. Petitioner's posttrial motion was filed August 8, 2012 and dismissed November 1, 2012.

¶ 66 While the court's November 1, 2012 order did not specifically cite Illinois Supreme Court Rule 304(a) (155 Ill.2d R. 304(a)), the order contained language indicating that the court believed the judgment did not resolve every right, liability or matter raised. Specifically the order states, "This order is a final order for purposes of appeal. The court finds no just reason to

delay enforcement or appeal." The court then set an appeal bond for respondents. Because the order contained Rule 304(a) language, respondents could properly file an appeal as to that judgment while awaiting the outcome of the other pending motions, including a petition for interest and attorney's fees. *Habitat Co. v. McClure*, 301 Ill.App.3d 425, 433 (1998) (a party may seek to modify judgment order to include requisite Rule 304(a) language, so that the party may appeal the order without awaiting the outcome of the attorney's fee petition). Accordingly, we find that the trial court had the jurisdiction to entertain petitioner's motion for interest and attorney's fees after respondents filed an appeal from the judgment.

¶ 67 Respondents also argue that the trial court erred in awarding petitioner attorney's fees when his petition for citation to recover assets did not seek an award of attorney's fees. However, defendant has provided no case law, nor has this court discovered any, that stands for the proposition that a party may not seek to recover attorney's fees and costs that the party incurred with respect to a citation to recover assets, by separate motion. Consequently, we reject this argument.

¶ 68 Next, respondents argue the trial court erred in awarding prejudgment interest because Sharon's and Mary's conduct was not unreasonable and vexatious. The court awarded prejudgment interest in the amount of $39,795.35 against Sharon and $10,557.16 against Mary after finding that they had breached their fiduciary duty.

¶ 69 An award of prejudgment interest is appropriate where it is "authorized by statute, agreement of the parties[,] or warranted by equitable considerations." *Tully v. McLean*, 409 Ill.App.3d 659, 684–85 (2011). Section 2 of the Illinois Interest Act (the Act) provides in pertinent part that:

> "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment." 815 ILCS 205/2 (West 2010).

¶ 70 Illinois Courts have long recognized that prejudgment interest may be awarded even though it is not within the precise terms of the Act (815 ILCS 205/2 (West 2012)) where, in the discretion of the trial court, interest is warranted by equitable considerations. *City of Springfield v. Allphin*, 82 Ill. 2d 571, 579 (1980); *Tri–G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 257 (2006). A trial court's determination that equitable considerations support an award of prejudgment interest is reviewed for an abuse of discretion. *Prignano v. Prignano*, 405 Ill. App. 3d 801, 821 (2010). Our supreme court recently explained the basis for an equitable award of prejudgment interest:

> "The goal of proceedings sounding in equity is to make the injured party whole. The current trend being employed to accomplish this goal is to allow an award of interest on funds owing so that justice might be accomplished in each particular case. * * * In Illinois, prejudgment interest may be recovered when warranted by equitable considerations, and disallowed if such an award would not comport with justice and equity. * * *

> The rationale underlying an equitable award of prejudgment interest in a case involving a breach of fiduciary duty is to make the injured party complete by forcing the fiduciary to account for profits and interest he gained by the use of the injured party's money. [Citations.] The injured party is thus compensated for any economic loss occasioned by the inability to use his money. Prejudgment interest in this context acts as a concept of fairness and equity and not as a sanction against the defendant. [Citation.] Fundamental principles of damages and compensation dictate that when money has been wrongfully withheld the victim receives interest for the wrongdoer's retention of his money." *In re Estate of Wernick*, 127 Ill. 2d 61, 86-87 (1989).

In terms of an equitable award of prejudgment interest, there is no requirement that the court make a finding that Sharon's and Mary's conduct was unreasonable or vexatious. As stated, our supreme court has made it clear in *Wernick* that equitable awards of interest are not sanctions. *Id*. at 87.

¶ 71 Our review of the record shows that the trial court did not make a finding that Sharon or Mary acted unreasonably or vexatiously. The evidence showed that respondents acted on advice of counsel when they removed funds from the accounts on which they were named. Cleary then, the award of prejudgment interest against Sharon and Mary represented an equitable award. The court awarded prejudgment interest in the amount of $39,795.35 against Sharon and $10,557.16 against Mary to compensate the estate for the use of money that was in the various bank accounts after George's death.

¶ 72 The money that Sharon and Mary withdrew from the various accounts belonged to the estate and the loss was to the estate. Accordingly, the trial court was within its sound discretion

in awarding prejudgment interest. Prejudgment interest may be awarded "on money received to the use of another and retained without the owner's knowledge." 815 ILCS 205/2 (West 2010).

¶ 73 Finally, respondents argue that the trial court erred when it awarded attorney's fees to petitioner on his motion for interest and attorney's fees where petitioner did not give respondent notice of the filing of the motion on August 13, 2012, and did not timely call the motion for hearing. Respondents claim that because petitioner filed what counsel for petitioner termed an "amended" motion for interest and attorney's fees on December 13, 2012, while the first motion was unresolved, the first motion should have been denied. Respondent claims that the doctrine of *res judicata* should have prevented the trial court from considering the December 13, 2012, motion. We note that respondents do not challenge the entry of the attorney's fee award or the reasonableness of the award made under the common fund doctrine. Therefore, we need not address those issues.

¶ 74 Rule 2.3 of the circuit court of Cook County rules places "[t]he burden of calling for hearing any motion previously filed * * * on the party making the motion. If any such motion is not called for hearing within 90 days from the date it is filed, the court *may* enter an order overruling or denying the motion by reason of the delay." (Emphasis added.) Cook Co. Cir. Ct. R. 2.3 (eff. July 1, 1976)."It is apparent from the wording of Rule 2.3 that its application is permissive, at the court's discretion." *Bielaga v. Mozdzeniak*, 328 Ill. App. 3d 291, 299 (2002). Here, the trial court exercised its discretion when it chose to hear the motion for interest and attorney's fees. We will not disturb that decision.

¶ 75 CONCLUSION

¶ 76 Accordingly, for the reasons set forth above, we affirm the judgment of the circuit court of Cook County with respect to the July 12, 2012 order entering judgment against Sharon Hoffman for $140,273.34 and against Mary Stoczynski for $37,212.59, the January 17, 2013 order denying Sharon's section 2-1401 petition, as well as the December 5, 2013 order awarding prejudgment interest and attorney's fees.

¶ 77 Affirmed.