

decedent and in contravention of decedent's estate plan. Alberta's husband and daughter were not joined as parties to the citation proceeding.

¶ 3 After a hearing in which the trial court found inadmissible under the Dead-Man's Act much of the evidence the executor attempted to present, the court ruled in favor of Howard. The executor appealed. We reversed the circuit court's judgment and remanded the cause for a proper application of the Dead-Man's Act. *In re Estate of Ledbetter*, No. 5-07-0635 (2009) (unpublished order under Supreme Court Rule 23 (eff. May 30, 2008)). Upon remand, the executor and Howard stipulated that the existing record would serve as the record. The judge who had first heard the case, however, had been reassigned. Both sides, therefore, submitted briefs and proposed orders to the new judge who had been assigned to their case. On July 6, 2010, the new judge signed the executor's proposed order. Howard subsequently filed a motion to set aside the order on the ground that it was entered without a review of the record, briefs, or argument. The judge decided to hear oral argument from both parties and granted Howard's motion to set aside the order. At the hearing for oral argument, however, Howard's attorney informed the court that his client had authorized him to go no further in the case and that the court already had everything it needed to reach a decision. As a result, only the executor's attorney gave oral argument. This time, the trial court awarded \$10,000 in favor of Howard against Alberta, ordered the executor to retrieve 13 of the listed items of personal property from Alberta and her family, and gave Howard priority over two other residuary legacies made by the will with respect to the distribution of one-third of the net proceeds realized from the sale of the retrieved items. The executor appeals arguing that the citation proceeding should not have been used to seek and obtain damages from Alberta, payable directly to Howard, rather than to the estate; that the awards against those parties not joined in the citation proceeding were void; that the priority given to Howard over the other residuary legatees should be reversed; and that the finding that Alberta breached her fiduciary

relationship to decedent was in error. We reverse yet again.

¶ 4 On October 9, 2004, decedent, Euleda V. Ledbetter, died at the age of 91. Her husband had predeceased her in December of 1982, but their three adult children, Alberta, Howard, and Norma Jean (Jean), survived her passing. Shortly after her husband died in 1982, decedent divided the family farm, south of Walsh, Illinois, equally between the three children. One portion, however, also included the family residence which was given to Alberta. Interestingly, the deeds dividing the farm were not recorded until May of 2004.

¶ 5 Alberta, a licensed practical nurse, lived with her family across the road from decedent. During her later years, decedent began suffering from various ailments of old age including poor vision. Alberta helped decedent with daily tasks such as taking medications and paying bills. Decedent also stayed at Alberta's home on several occasions upon returning from hospital stays. Howard lived nearby as well and claimed to regularly stop by and visit with his mother. The third sibling, Jean, lived farther away but only by a few miles.

¶ 6 Decedent collected antiques during her lifetime. Throughout her later years, she distributed some of these antiques to her children. Those that were remaining in the house upon her passing were sold at auction. The siblings had attempted to divide some of the remaining items between themselves and other family members, but they could not reach a complete agreement. The executor, hoping that they would come to an agreement, did not include these items in the sale.

¶ 7 Decedent's last will was dated May 28, 2003. Under this will, each sibling was to receive \$10,000, primarily through certificates of deposit (CDs). The \$10,000 CD held jointly in the name of decedent and Howard, however, was cashed on July 28, 2003, for \$9,798.93 and deposited into a new account in decedent and Alberta's names. According to Alberta, the money was used for and by decedent. Any remaining funds from this CD were used to help pay for decedent's funeral. Alberta further testified that the CD was cashed in

because decedent became upset with Howard over his attempt to have her sign a deed to the farm. According to Alberta, Howard had not been happy with the division of the family farm and thought he should get all of it since he was the only one left with the family name. The CD held in joint tenancy with the second daughter, Jean, had also been liquidated prior to the 2003 will. The will, however, made a specific bequest of \$10,000 to her. Additional testimony revealed that all remaining monies in decedent's bank accounts at the time of her death were used to help pay for decedent's funeral. Alberta and Jean also used their own funds to help cover the cost of the funeral; Howard refused to contribute anything. After Howard filed his petition for citation to recover assets of the estate, Alberta filed a claim against the estate for payment of the funeral bills on the grounds that monies paid out of those accounts belonged to the surviving individuals whose names were on the accounts. The executor claimed that the total value of the estate of the deceased, including both real and personal property owned by decedent either individually or in joint tenancy at the time of her death, did not exceed \$12,000. Howard believed the value of her estate exceeded \$100,000.

¶ 8 At the citation hearing, the circuit court determined that much of the testimony that the executor and Alberta wished to present was inadmissible under the Dead-Man's Act. Alberta tried to explain that she had not made decedent do anything she did not want to do. According to her offer of proof, decedent "did what she wanted, when she wanted, and if she wanted. That was it." The court ultimately granted Howard's petition finding that Alberta had exercised undue influence over decedent and breached her fiduciary duty with respect to several items of personal property as well as the \$10,000 CD held in joint name with Howard. The court also determined that the executor had neglected to collect on behalf of the estate 11 items of personal property such as a washstand, a brass lamp, and a Coca-Cola tray. The executor appealed the decision, which we reversed, finding that the court

improperly excluded the testimony of Alberta and the executor. According to our ruling, the Dead-Man's Act did not prohibit testimony from witnesses called by the representative, and the representative had the right to waive any objection to otherwise inadmissible evidence from interested persons. On remand, all of the previous offers of proof were to be considered; consequently the parties elected not to have a new hearing. The newly assigned judge initially determined that neither Alberta nor the executor had done anything improper and only required that two items which were part of the siblings' attempted division be returned to the estate. Upon reconsideration, however, the court changed its mind and found in favor of Howard. The executor appeals once again.

¶ 9 We first note that when the evidence before a trial court consists only of depositions, transcripts, or other documentary evidence, we as a reviewing court are not bound by the lower court's findings and may review the record *de novo*. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453, 905 N.E.2d 747, 752 (2009). We also note that persons who have possession or control of property alleged to belong to an estate are necessary parties to a citation proceeding (see *In re Estate of Weisberg*, 62 Ill. App. 3d 578, 586-87, 378 N.E.2d 1152, 1158 (1978)), and an order entered without jurisdiction over a necessary party is null and void (see *Emalfarb v. Krater*, 266 Ill. App. 3d 243, 247, 640 N.E.2d 325, 327-28 (1994)). Here, two people who had possession of certain items included in the citation petition were not joined to the citation proceeding as respondents. Therefore, that portion of the court's judgement ordering the executor to retrieve those items for the estate is void and must be vacated. We are also troubled by the fact that Howard was allowed to use a citation proceeding to seek and obtain damages from his sister payable directly to him rather than to the estate. The purpose of a citation proceeding is to enhance the estate only. See *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1068-69, 890 N.E.2d 964, 969-70 (2008). The trial court had no authority to award damages against Alberta and directly to Howard, and

therefore such awards must also be vacated. But see *In re Estate of Miller*, 334 Ill. App. 3d 692, 778 N.E.2d 262 (2002). Likewise, the citation proceeding did not authorize the court to give Howard priority over specific legatees or other residuary legatees. Under the Probate Act of 1975, valid claims must be paid in full before any distribution of specific bequests or residuary legacies from an estate can occur. Then, specific legacies must be paid in full before any general legacies are paid, and general legacies must be paid in full before any residuary legacies are paid. See 755 ILCS 5/18-14, 18-13, 24-3 (West 2004). See also *Hopper v. Beavers*, 362 Ill. App. 3d 913, 923-24, 841 N.E.2d 1019, 1027-28 (2005). Again, the trial court had no authority to change the priorities under the circumstances presented.

¶ 10 Turning to the remainder of the court's decision, we conclude that the court erred in finding that a fiduciary relationship existed between decedent and Alberta with respect to decedent's property and financial matters. A fiduciary relation exists if, in fact, one person reposes confidence in the other person and the other person exercises domination and influence over the first person. See *Landau v. Landau*, 20 Ill. 2d 381, 386, 170 N.E.2d 1, 4 (1960). If the other person has not exercised domination and influence over the first person, then no fiduciary relation will be found to exist between the two persons. The party who asserts the existence of a fiduciary relation has the burden of proving it by clear and convincing evidence. *In re Estate of Nelson*, 132 Ill. App. 2d 544, 551, 270 N.E.2d 65, 70 (1971). The mere fact of blood relationship does not establish a confidential or fiduciary relation between two people. *In re Estate of Nelson*, 132 Ill. App. 2d at 551, 270 N.E.2d at 70. Nor does a principal giving a healthcare power of attorney to an agent create a fiduciary relation between the principal and agent as a matter of law with respect to the principal's property and financial matters. See *Apple v. Apple*, 407 Ill. 464, 469, 95 N.E.2d 334, 337 (1950). It is true that decedent gave Alberta a healthcare power of attorney, using a standard hospital form, when Alberta took decedent to the hospital after one of her falls. Decedent

did not give her a power of attorney for property, however. Again, a principal, by giving a healthcare power of attorney, does not confer upon the agent the authority to handle property and financial matters for the principal. Moreover, a person's advanced age at the time of a transaction is not sufficient, by itself, to show that decedent was incapable of transacting her own business. See *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1103, 920 N.E.2d 1254, 1261 (2009). While decedent did have Alberta's assistance, she otherwise managed her own accounts and finances. In fact, the evidence revealed the inability of anyone to dominate or influence decedent concerning property and financial matters. When Howard attempted to have decedent execute a deed, she demanded that he leave her house, threatening to hit him with a pipe that stood by her door, and shortly thereafter cashed in the CD she formerly had put in her and Howard's name. The fact that Alberta helped decedent write checks and pay bills does not change that fact. See *In re Estate of Shedrick*, 122 Ill. App. 3d 861, 866, 462 N.E.2d 581, 585-86 (1984). Howard did not meet his burden of proving that a fiduciary relation existed between Alberta and decedent or that Alberta breached her fiduciary duty to decedent. The court erred in concluding otherwise.

¶ 11 We also find fault with the court's ruling that certain items, *i.e.*, a corner cabinet, hanging lamps, and reflective lamps, which were fixtures of decedent's house should have been taken from the house and sold at a public sale. Decedent attached these items to her house during her lifetime; therefore they were fixtures that should be considered part of the house. See *A&A Market, Inc. v. Pekin Insurance Co.*, 306 Ill. App. 3d 485, 488, 713 N.E.2d 1199, 1202 (1999) (a fixture is real property because it is incorporated in or attached to realty).

¶ 12 Finally, we note that the executor and Alberta conceded that two items not included in the sale as part of the attempted agreement between the siblings, specifically a tin pie cupboard and great-grandmother's cupboard, were assets of the estate that should be sold at

auction. We find no error with respect to the court's order requiring such items be returned to the estate. We further conclude all other specifically named items included in the citation list not already discussed were either valid gifts made during decedent's lifetime or included in those items sold at auction. Accordingly, the executor has no duty to seek their return to the estate.

¶ 13 It is unfortunate that the dispute between decedent's children has evolved to the point it has. The remaining estate has little financial value, and the parties involved have far exceeded that value in defending their positions. For the foregoing reasons, we vacate and reverse the court's judgment in all respects except for that portion of the decision pertaining to the two items the executor and Alberta concede should be returned to the estate. We further remand this cause to the circuit court for the executor to complete his administration of the estate.

¶ 14 Reversed and remanded.