NOTICE
Decision filed 06/27/11. 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.

NO. 5-09-0646

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).

In re ESTATE OF CLYDE MITCHELL, Deceased	)	Appeal from the
	)	Circuit Court of
(Amy Hemrich, Special Administrator,	)	Jasper County.
	)	
Plaintiff-Appellant,	)	No. 03-P-36
	)	
v.	)	
	)	
Marion Edward Mitchell, Executor,	)	Honorable
	)	Michael D. McHaney,
Defendant-Appellee).	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Chapman and Justice Goldenhersh concurred in the judgment.

R U L E 2 3 O R D E R

Held: In a citation proceeding to recover assets from an estate, the circuit court's finding that the special administrator failed to prove that the deceased was incompetent when he signed powers of attorney and transferred assets during his lifetime was not against the manifest weight of the evidence. The circuit court's finding that the agent under the powers of attorney proved by clear and convincing evidence that transactions that benefited him were not procured by fraud was not against the manifest weight of the evidence. The agent under a power of attorney exceeded his authority by placing his name on the principal's bank accounts with rights of survivorship when the power of attorney form did not expressly grant the agent that power. The antilapse statute provided that the granddaughter would take under the deceased's will. The motion to strike brief and dismiss appeal is denied.

Amy Hemrich, as the special administrator of the estate of Clyde Mitchell, deceased, filed a citation to recover property from Clyde's son, Marion Edward Mitchell (Edward). Prior to his death and while he was a patient at the Center for Mood Disorders at the Doctors Hospital in Springfield, Illinois, Clyde executed a power of attorney pursuant to the Statutory Short Form Power of Attorney for Property Law (755 ILCS 45/3-1 *et seq.* (West 1996)) that

named Edward as Clyde's agent. Between that date and Clyde's death in October 2003, several transactions occurred that benefited Edward. The transactions included a transfer of bank stocks from Clyde to Edward and Edward adding his name to certain certificates of deposit (CDs) and bank accounts. The special administrator asked the circuit court to void the transfer of these financial assets. She appeals the judgment of the circuit court entered in favor of Edward. On appeal, the special administrator argues that the following findings by the circuit court were against the manifest weight of the evidence: (1) that she failed to prove that Clyde was incapable of managing his person and estate when he signed powers of attorney and transferred assets and (2) that Edward proved by clear and convincing evidence that the financial transactions that benefited him were not fraudulent. In addition, the special administrator argues that the circuit court erred in holding that Edward did not exceed his authority granted by the powers of attorney. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

Clyde was born on October 28, 1912. Clyde and his first wife, Marie, had four sons, Homer, James, Edward, and Clyde Kenneth (Ken). The special administrator is Homer's daughter/Clyde's granddaughter. Clyde's first wife, Marie, died in June 1973, and he subsequently married his second wife, Mabel. On August 7, 1981, Clyde executed a will that named Mabel as the executor of his estate and named Homer and Edward as the successor coexecutors. The will devised certain parcels of real property to Edward, James, Homer, and Ken. The will devised the remainder of Clyde's estate to each of his sons in equal shares. Prior to Clyde's death, his son Homer passed away on June 27, 1995. His son James passed away on November 12, 1999, and his wife Mabel passed away on November 10, 2001. Clyde died on October 23, 2003. When he died, Clyde had two surviving sons, Edward and Ken, and 13 surviving grandchildren, including the special administrator. Before the circuit

court conducted a hearing on the special administrator's citation to recover assets, the circuit court ruled that the children of Clyde's deceased sons (Homer and James) would receive their father's share of Clyde's estate *per stirpes* pursuant to the antilapse statute (755 ILCS 5/4-11 (West 2002)).

Prior to his death, on April 10, 1997, Clyde executed a power of attorney for health care in which he designated Edward as his agent to make any and all decisions concerning his personal care, medical treatment, hospitalization, and health care. On the same day, Clyde also signed a power of attorney for property pursuant to the Statutory Short Form Power of Attorney for Property Law (755 ILCS 45/3-1 *et seq*. (West 1996)). The power of attorney for property designated Edward as Clyde's agent to make financial decisions. Each of the powers of attorney stated that they were effective beginning on April 10, 1997, and terminated on Clyde's death.

At the hearing on the special administrator's citation, Edward testified about the circumstances that brought about the signing of the powers of attorney. Edward testified that in 1997, Clyde began having problems with depression. One of Edward's cousins convinced Clyde to see Dr. Coughlin at Doctors Hospital in Springfield, Illinois. On March 8, 1997, Edward, Mabel, and two of Edward's cousins took Clyde to see Dr. Coughlin. Clyde was admitted into the Center for Mood Disorders at the hospital. Someone on the hospital staff asked if Clyde had a power of attorney, which he did not. Edward, therefore, contacted an attorney and had a power of attorney for health care and a power of attorney for property prepared. On the day that Clyde signed the powers of attorney, April 10, 1997, Mabel and Edward took the documents to the hospital, and Edward's brother, James, came to the hospital from his home in Peoria. James read the document to Clyde, and two hospital staff members witnessed Clyde sign the documents.

Clyde was released from the hospital to return home on May 8, 1997. Edward

testified that Clyde returned to the Center for Mood Disorders in September 1997 because he was not taking his prescribed medications. Edward had been preparing Clyde's pills to take every day, but Clyde was flushing them down the toilet. Edward testified that he took Clyde back to the hospital for a week to 10 days so the doctors could get him back on his medications. After he was discharged from Doctors Hospital, Clyde spent time at St. Anthony's hospital for various medical reasons, at his own home, at Edward's home, and at Lakeland nursing home.

Edward testified that Clyde and Mabel had a number of CDs with People's State Bank in Effingham. Some of the CDs were held in Mabel's name alone, some were owned by Clyde and Mabel jointly, some were held by Clyde and Edward, and some were held by Clyde and Ken. Edward testified that in January 2002, the CDs started to mature and had to be reissued. Mabel had passed away, and he discussed with Clyde what to do with the CDs that were held in Mabel's name. The record indicates that there were 24 $5,000 CDs, 1 $3,000 CD, and 1 $1,500 CD. Clyde told Edward to put his (Edward's) name jointly with Clyde's on half of all of the CDs and Ken's name jointly with Clyde's on the other half of the CDs. Edward, however, suggested to Clyde that he add his grandchildren to some of the CDs, and Clyde agreed.

Edward prepared a document that directed the bank to divide the CDs between Edward, Ken, and Clyde's grandchildren and to leave Clyde's name on all of the CDs. The document included the following statement:

> "I, Clyde Mitchell, a legal resident of Jasper County, Illinois, being of sound mind and memory, do hereby direct that the old Certificates of Deposits listed above be replaced with new Certificates as they mature. The new certificates shall include my name and/or my designates as the new owners, as reflected above."

The document bears Clyde's signature dated January 3, 2002, and the signature of Ray Diel

as a witness. The document directed the bank to add Edward's name to three $5,000 CDs and one $3,000 CD and to add his brother, Ken, to three $5,000 CDs and a $1,500 CD. The document directed the bank to add the name of each of Clyde's grandchildren, including the special administrator, to a $5,000 CD. Using his power of attorney, Edward subsequently signed Clyde's name on the documents at the bank that changed the ownership of the CDs.

With respect to the bank stock at issue, on January 19, 2002, Clyde transferred 48 shares of capital stock in People's State Bank to Edward and his wife. The stock certificate was signed by Clyde at the Lakeland nursing home and was witnessed by Ray Diel. Edward testified that Clyde had previously stated that he and Mabel had wanted Edward to have the stock. Edward testified that the bank stock was kept in a lock box, along with some of Clyde's CDs mentioned above, and that he brought the stock certificate to Clyde around the time when he was changing the names on the CDs. Edward testified that Clyde looked over the stock certificate and signed it.

Edward testified that on March 22, 2002, he was scheduled to have "major surgery" at Barnes Hospital and that he was concerned that he would be unable to serve as Clyde's agent if something were to happen to him during the surgery. Edward's brother, James, had been named as the successor agent in Clyde's powers of attorney, but James had passed away. Therefore, Edward had new powers of attorney prepared for Clyde. Clyde executed a new power of attorney for health care and a new power of attorney for property on March 21, 2002. Edward was present when Clyde signed the new powers of attorney at Lakeland nursing home in Effingham, Illinois. Clyde again appointed Edward as his agent for health care and for property and named Edward's two sons as successor agents should Edward be unable to serve as his agent. Diel witnessed and notarized the signing of the powers of attorney.

Clyde and Mabel had a savings account at Sainte Marie State Bank, in Sainte Marie,

Illinois. On January 9, 2003, Edward exercised his power of attorney to sign documents on Clyde's behalf to remove Mabel's name from the account and add his name as a joint owner with a right to survivorship. Clyde also had a savings account and a checking account at People's State Bank in Newton, Illinois. On January 17, 2002, Edward used his power of attorney to add his name as a joint owner of those accounts with a right of survivorship. Edward testified that he followed the "directives" of his father when he put his name on the accounts; he did not suggest to Clyde that he do so.

With respect to Clyde's mental competence, Edward testified that Clyde was competent to understand his business affairs when he went to Doctors Hospital and when he got out. Clyde transacted business, did his own banking, paid his bills, wrote checks, and conducted his own business. Edward started signing Clyde's checks in the summer of 2000. In asking Edward to sign his checks, Clyde stated: "You go ahead and sign 'em. You can sign those checks. Look at my penmanship." Clyde was 87 years old at that time. Edward believed that Clyde always knew who his children were, and he was not aware of any time that Clyde was disoriented as to time and place. He testified that he never did anything with Clyde's funds or property that Clyde did not ask him to do and that he never took any money out of Clyde's accounts that he used for his own personal benefit.

Edward testified that Clyde had more than 200 acres of farmland and that he had helped Clyde with farming his land since he was eight years old. Beginning in 1978, he and his brother James planted and harvested the crops, and Clyde helped "a little bit." Clyde supervised and helped haul and dump grain. Edward testified that after he retired in 1994, he lived about three miles from Clyde and saw him every day. Clyde did his own mowing until 1996, when Edward and his sons began mowing Clyde's property without charge. Sometime in the fall of 1998 or spring of 1999, Clyde stopped driving and relied primarily on Edward for transportation. Edward drove him to the grocery store, drug store, Wal-Mart,

and his medical appointments. Again, Edward did not charge his father for providing him with transportation. Although they did not discuss his reasons, Edward believed that Clyde directed him to put his name on the bank accounts as compensation for all of the work he had done for Clyde over the years. The special administrator acknowledged at the trial that Edward was Clyde's primary caretaker when Clyde became older.

Edward's younger brother, Ken, testified that he earned a Ph.D. in nuclear physics and that, since 1968, he spent his career working in Los Alamos, New Mexico, and Las Vegas, Nevada, in nuclear weapons research. Although he moved away in the 1960s, he stayed close to his family, including his father Clyde and his brother Edward. He returned home to visit with his father and brothers a minimum of once per year. Ken testified that Clyde had farm ground and that he lived too far away to help Clyde with any farming operations. He helped out on occasion, however, when he had enough vacation time. Ken testified that his brother Edward helped with Clyde's farming "quite a lot."

Ken described his father as an honorable man who "did his own thing." He believed that Clyde would "do what he wanted to do despite influences through the end of his life." In describing his father, he testified, "Headstrong comes to mind." He saw his father several times after he was discharged from Doctors Hospital, and Ken felt that during those visits Clyde was lucid and competent. He testified that he did not notice anything about Clyde that was strange, peculiar, or different than what he had seen his whole life, and he did not believe that Edward exerted undue influence over Clyde.

He testified that he had not been aware that Clyde had transferred certain assets to joint tenancy with Edward until after the fact. He did not believe that the transfers were unusual, however, because of Edward's contribution toward helping Clyde. Ken testified, "[I]f you look at that time value of the estate, [Edward] had put in about 50 percent of that." He added, "I think that Dad being a fair and honest man of integrity that [*sic*] he would want

to see the people who put in the effort be rewarded for their effort." He felt, therefore, that Clyde purposefully directed Edward to add his (Edward's) name to his bank accounts. He testified that Clyde was "competent enough to run [his business affairs] as he saw fit." He wanted Clyde to "be able to direct what happened to [his] assets," and he felt that was what Clyde did.

Ray Diel testified that he got to know Clyde and Edward closely during the summer of 1986 when he first ran for county clerk. Diel testified that Clyde "was very well respected in both his work ethic and the way *** he conducted himself." Clyde often came by his office at the courthouse to visit, and he was impressed with Clyde's memory and knowledge. He testified that Clyde was "one of the most bull-headed men" he knew. Clyde had his own ideas and was very committed to what he believed was right and wrong. He testified that he did not believe that he could have ever changed Clyde's mind and that this characteristic remained with Clyde until the day he died.

Diel became closer to Edward when Edward ran for the county board. When Edward became the chairman of the county board, his desk was in Diel's office, and they sat near each other when they "conducted county business." Diel testified that during this time, he learned that Edward was "bull-headed" like his father but that he was also well respected like his father. He testified, "In his part of the world, Ed is very, very highly thought of, and *** [s]ince Ed has been chairman of the board, it's the same way county-wide." He testified that he did not believe that Edward would take advantage of anyone, "especially his father." According to Diel, Edward had a great love for his father and a great sense of responsibility with respect to caring for his father.

Diel recalled when Clyde was admitted to Doctors Hospital in Springfield. Diel visited Clyde when he returned from the hospital. Diel observed that, at that time, Clyde was physically "not as good" and was "a little depressed maybe." He testified that "some of his

old fire was gone." However, Diel testified that Clyde could carry on a conversation and understood who Edward was. He did not believe that Clyde was incapacitated or incompetent.

He testified about witnessing Clyde's signature on "some documents." He did not know what the documents were because he made a conscious effort not to pay attention to the content of documents that were not his business. He testified that when he notarized a document, he just wanted to witness the signature and had no need to pay attention to the purpose of the document. He testified that he remembered witnessing Clyde sign certain documents and that he did not believe that Edward was exerting any influence, force, or pressure on Clyde to execute the documents. Because he was friends with Clyde, he visited with him before witnessing each document. He would not have witnessed the signatures of any documents if he thought someone was being coercive, and he never saw Edward being coercive towards Clyde. According to Diel, Clyde knew exactly what he was doing when he signed the documents. Diel remembered when Clyde signed the stock certificate because his signature did not follow the signature line. He testified: "And when he got done, he looked at that, and he looked at me. And I said, 'Clyde, that's all right.' And he said, 'That's pitiful.' Clyde was embarrassed that his signature had fell below the line. He was a proud man." He believed that Clyde knew what he was doing when he signed the stock certificate and the other documents he witnessed. He testified, "Clyde was Clyde that day."

Diel testified that there were times when he talked to Clyde when Clyde did not seem like his "old self," but he never thought that Clyde did not know what he was doing. Diel testified that although Clyde depended on Edward "in some physical issues," Clyde "never gave up his fierce independence in his mind." During the last few years of Clyde's life, he was weaker and did not move as fast, but "his mind was always as fast."

The special administrator testified that she was the daughter of one of Clyde's

deceased sons, Homer. She testified that she believed that Clyde's transfer of his CDs, bank stock, and bank accounts should be voided and placed into his estate. She testified that although she wanted all of Clyde's grandchildren to return the $5,000 they received from the CDs, she had not filed a citation against any of them, only Edward, and she admitted that she cashed the $5,000 CD that was issued to her. She admitted on cross-examination that she never visited Clyde when he was at Doctors Hospital or at Lakeland nursing home and that during the last three years of Clyde's life, she never visited him at his home. She had no knowledge of who mowed and took care of Clyde's farm.

The special administrator did not offer any evidence concerning her personal observations of Clyde during the period of time in which the disputed transfers were made and documents signed. Instead, she presented the evidence deposition testimony of two doctors, Dr. Richard Alexander and Dr. Narinder S. Arora. Dr. Alexander was Clyde's psychiatrist while he was hospitalized at Doctors Hospital. Dr. Arora was Clyde's treating physician from May 1997 up to the time of his death, when Clyde was a patient at St. Anthony's Hospital in Effingham, Illinois.

The evidence deposition of Dr. Alexander was taken on May 23, 2007. Dr. Alexander testified that Clyde first became his patient on March 22, 1997, for a psychiatric consultation. Dr. Alexander admitted Clyde to the hospital's Center for Mood Disorders. He testified that Clyde suffered from a "probable bipolar affective disorder." He testified that when Clyde was first admitted to Doctors Hospital, he exhibited grandiose and delusional thinking and his judgment was grossly impaired. Clyde was "hypertalkative and rambling, and seemed to be quite manic." Dr. Alexander prescribed Depakote, which is "a mood stabilizing agent for symptoms such as bipolar disorder with manic symptoms." He also prescribed Wellbutrin, which is an antidepressant medication.

At his evidence deposition, Dr. Alexander opined that Clyde "probably was too

impaired to fully understand what [a power of attorney] would involve." He testified: "On April 10th, I was suggesting he needed a guardian. If he was impaired enough to need a guardian, I'm not sure how he could fully comprehend the nuances of a power of attorney commitment." He testified, "[A]t no point during [Clyde's] stay [at Doctors Hospital] did he seem capable of [managing his ordinary affairs and looking after his possessions]."

However, Dr. Alexander admitted that he had no independent recollection of Clyde and his treatment at Doctors Hospital. His testimony was based upon his review of Clyde's medical records. The records themselves did not bring back any memories of any conversations he had with Clyde. Dr. Alexander testified that his notes indicated that Clyde's mental capacity fluctuated and "that when he was not clearly delusional his memory was only mildly impaired." He questioned Clyde's ability to comprehend on May 5, 1997, based on the indications in his notes that Clyde was going to require assistance to function outside the hospital. Dr. Alexander testified that by the time of Clyde's discharge on May 8, 1997, Clyde's symptoms had stabilized and were "clearly better." Clyde was resistant to the medications that Dr. Alexander had prescribed, and he thought that there was a risk of relapse because Clyde failed to see the importance of his medications.

Dr. Alexander admitted that a person's psychotic episodes can come and go, and in order to know a person's status at any particular moment, it is important is to observe whether they are under the influence of a psychotic episode. He testified, "[A]t times when Clyde was not grossly psychotic, he seemed to retain information and details that suggested his baseline cognition may not have been grossly impaired; while he seemed from day to day terribly impaired by his psychosis, at times when he was more lucid he seemed to retain details that suggested if he had a dementia it was a milder stage rather than more advanced and, therefore, explaining his disorganization and impaired insight and judgment."

On the day Clyde signed the powers of attorney, April 10, 1997, Dr. Alexander was

concerned with Clyde's white blood cell count, but Clyde was refusing certain lab work. Dr. Alexander's notes stated that Clyde said he would consent to the lab work if his primary physician, Dr. Coughlin, wanted him to have it done. Dr. Alexander admitted that on this day, Clyde showed "some awareness and some degree of understanding to the extent that Doctor Coughlin was involved in his care and *** he was willing to consider Doctor Coughlin's input in his decision." Dr. Alexander's notes from April 10, 1997, did not include any personal observations that indicated that Clyde was incompetent that day. Dr. Alexander's notes only indicated that he discussed a guardianship with Clyde's family because he was refusing the laboratory work. He testified that he might have discussed a guardianship because, at that time, he thought a guardian had more authority than a person with a power of attorney.

Dr. Alexander's notes for May 5, 1997, indicated that Clyde was refusing antidepressant medications and that there was consideration of a convalescent unit. Dr. Alexander's notes from May 5, 1997, did not include any personal observations of impaired cognition. Instead, he testified that, at the time of his discharge, which occurred three days later, May 8, 1997, Clyde's "psychotic symptoms had cleared significantly." Dr. Alexander's testimony established that Clyde initially presented with manic symptoms but that as his stay progressed and his medical issues were addressed, he seemed to cycle into a depressive illness.

The evidence deposition of Dr. Arora was taken on May 8, 2008. Dr. Arora testified that he was Clyde's family physician at St. Anthony's Hospital in Effingham, Illinois, beginning in 1997 and continuing until Clyde's death in October 2003. He testified that between January 1, 2000, and the date of his death, Clyde was an "elderly, sick man" who had multiple physical and psychological issues, including lung cancer and frequent pneumonia. Dr. Arora's notes from September 2000 stated that Clyde had "cognitive loss of

his functions," dementia, manic depressive psychosis, and depression. In addition, Dr. Arora testified that Clyde developed Alzheimer's disease and organic brain syndrome. He testified that organic brain syndrome meant that Clyde's mental faculties were compromised. He described Alzheimer's disease as a progressive, disabling loss of cognitive functions of the brain. Clyde's manic depressive psychosis meant that he had high days and low days. Dr. Arora explained: "Some days you are very active; some days you are very depressed."

Dr. Arora's records from January 14, 2002, state that Clyde was confused that day and brought to the hospital for the possibility of dehydration and pneumonia. His records indicate that Clyde lived in a nursing home and that Edward was very attentive to Clyde's care. He testified that Edward consistently provided for Clyde, visited him at the hospital, and provided him transportation to and from the hospital.

He testified that in May 1997, shortly after being released from Doctors Hospital, Clyde came to St. Anthony's Hospital because of difficulty urinating. Clyde's medical records indicated that on May 9, 1997, Clyde was "alert and oriented in all three planes" at 3:45 p.m. Clyde's records for May 10, 1997, state that he was alert with no confusion at 8:15 a.m. but was confused later in the day. A May 10, 1997, nurse's note stated that Clyde was "awake, alert, no confusion" at 8:15 a.m. Dr. Arora testified that according to these records, there were times when Clyde was confused and times when he was alert and oriented.

Dr. Arora believed that Clyde did not have sufficient mind and memory on January 14, 2002, or February 12, 2002, to be able to comprehend the nature of signing stock certificates. However, he did not offer an opinion concerning Clyde's ability to comprehend on January 19, 2002, the day he signed the stock certificate. Dr. Arora did not observe Clyde on January 19, 2002, and he did not offer an opinion concerning Clyde's mind and memory on that day or any other day that Clyde signed financial documents. On cross-examination, he testified that Clyde's confusion seemed to "wane and wax" and that he medically treated

Clyde's confusion "based on lithium toxicity and dehydration." Clyde normally came to the hospital in conjunction with other problems, such as a urinary tract infection or pneumonia. Dr. Arora agreed that, on any given day, the people who would best know what Clyde's condition had been were the people who talked to him and observed him. He testified that he had a lot of interaction with Clyde and that "he was always very collegial as long as he could understand something." Dr. Arora agreed that Clyde's manic depressive psychosis did not mean that he was unaware of who his children were or what assets he owned and that a diagnosis of organic brain syndrome does not necessarily mean that the person is incompetent.

At the conclusion of the bench trial, the circuit court ruled that Clyde had the mental capacity to execute the powers of attorney, that the powers of attorney created a fiduciary relationship between Clyde and Edward, and that the relationship created a legal presumption that the transactions between Clyde and Edward were procured by fraud. The court ruled further as follows:

> "[The special administrator] admitted that the sole reason for her citation proceeding against EDWARD is the opinion of Dr. Alexander and Dr. Arora. *** [N]either Dr. Arora nor Alexander were present when CLYDE signed the two separate powers of attorney, or any other financial document. Further, it can be inferred from the entirety of their evidence depositions that CLYDE could have experienced prolonged periods of lucidity when he was fully capable of managing his own affairs. Moreover, *** these doctors' observations were not corroborated by anyone, including [the special administrator]. To the contrary, [the special administrator] asks this court to completely discount the testimony of Kenny Mitchell, CLYDE's other surviving son, who stated that EDWARD did not exert undue influence over CLYDE, and that CLYDE was lucid when he last saw him at Lakeland

nursing home. This was corroborated by witness Ray Diel, who notarized some documents with CLYDE's signature and stated that when he saw CLYDE sign them CLYDE knew fully what he was doing."

The circuit court found that Edward, Ken, and Diel were credible witnesses and that Ken had "every motivation" to support the special administrator since he would inherit more of Clyde's estate if she prevailed. The court concluded as follows: "Any presumption of fraud has been overcome by clear and convincing evidence that all of the disputed financial transactions were done at the direction of CLYDE without undue influence and in good faith by EDWARD. Accordingly, [the special administrator's] citation against EDWARD is denied, as is [the special administrator's] request for her attorney fees to be paid from the proceeds of the estate."

DISCUSSION

Edward filed a motion to strike the special administrator's brief and dismiss this appeal pursuant to Illinois Supreme Court Rule 341 (eff. June 4, 2008). He argues that the special administrator's brief does not contain a fair and comment-free statement of facts, does not contain a concise statement of the standard of review for each issue, does not list the statutes involved in the appeal, and does not contain a precise conclusion requesting the relief sought on appeal. Although the special administrator's brief is not a model example of Rule 341 compliance, the brief, nonetheless, is sufficient for us to address the merits of the appeal. We will disregard those portions of the brief that we deem to violate Rule 341. Accordingly, Edward's motion to strike the special administrator's brief and to dismiss this appeal is denied.

Turning to the merits of the appeal, in a citation proceeding, the probate court is empowered to determine the title and right to property and enter such order as the case requires. *In re Estate of Kolbinger*, 175 Ill. App. 3d 315, 322, 529 N.E.2d 823, 827 (1988).

The objectives of a citation proceeding are to obtain the return of personal property belonging to the estate but in the possession of others. *In re Estate of Kolbinger*, 175 Ill. App. 3d at 322, 529 N.E.2d at 827. The circuit court's determination on the issue of whether certain property belongs to the estate will not be disturbed on appeal unless it is against the manifest weight of the evidence, "as the trial court in such proceedings is authorized to determine all questions of title, claims of adverse title and the right of property." *In re Estate of Joutsen*, 100 Ill. App. 3d 376, 380, 426 N.E.2d 942, 946 (1981). Under the manifest-weight standard, we give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and the witnesses. *In re D.F.*, 201 Ill. 2d 476, 498-99, 777 N.E.2d 930, 943 (2002). "A reviewing court, therefore, must not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn." *In re D.F.*, 201 Ill. 2d at 499, 777 N.E.2d at 943.

The first issue we address is the circuit court's finding that the special administrator failed to prove that Clyde was mentally incompetent to sign the powers of attorney, the bank stock certificate, and the document directing the bank to change the names on his CDs. We do not believe that the circuit court's finding that Clyde was capable of managing his own affairs when he signed the documents was against the manifest weight of the evidence.

The special administrator did not present any evidence concerning her personal observations of Clyde on any of the days on which he signed documents. Dr. Arora testified that Clyde's mental condition "waxed and waned" and that the best people to attest to his mental condition on any given day were the people who personally observed him on the day in question. Dr. Arora did not offer any personal observations of Clyde on any of the transaction dates. Likewise, Dr. Alexander admitted that some days Clyde was more lucid than other days.

Dr. Alexander had no independent recollection of treating Clyde, of Clyde's condition, or of any conversations with him. His testimony was based solely on what was contained in his records, and he testified that Clyde was "probably" incompetent during his stay at Doctors Hospital because his notes indicated that he had discussed a guardianship with Clyde's family. He also testified, however, that Clyde was refusing laboratory tests and that he might have discussed a guardianship because he thought a guardian had more authority than a person with a power of attorney. When he discharged Clyde on May 8, 1997, Clyde's "psychotic symptoms had cleared significantly." Dr. Arora's records from May 1997 indicated that Clyde was confused on occasions and was alert and oriented on occasions, sometimes during periods of the same day. Neither doctor observed Clyde sign any of the documents at issue.

Diel testified that he witnessed or notarized some of the documents that Clyde signed, that he had known Clyde for many years, and that Clyde was not mentally incompetent when he signed the documents. He visited with Clyde before witnessing or notarizing his signature and concluded that Clyde was competent. The trial court found the testimony of Ken to be particularly compelling because he was close to his father and stood to benefit financially from a ruling against Edward. Ken testified that his father was not mentally incompetent when he visited.

There is nothing in the record to persuade us to alter the trial court's decision on this issue. The witnesses who knew Clyde, who had specific memory of him, and who observed him on the day he signed the documents contradicted the special administrator's claim that he lacked the mental capacity to manage his own affairs on those days. Accordingly, we affirm the circuit court's finding with respect to Clyde's competence.

We next turn to the fiduciary relationship and the presumption of fraud. The powers of attorney that Clyde signed created a fiduciary relationship, as a matter of law, between

Clyde and Edward, beginning on April 10, 1997, and continuing until Clyde's death. Where a fiduciary relationship is alleged simply on the basis of evidence showing that trust and confidence have been placed by one person in another, the existence of the relationship must be proved by clear and convincing evidence; one who holds a power of attorney, however, is a fiduciary as a matter of law. *Pottinger v. Pottinger*, 238 Ill. App. 3d 908, 917, 605 N.E.2d 1130, 1137-38 (1992). A power of attorney gives rise to a general fiduciary relationship between the grantor and the grantee as a matter of law. *White v. Raines*, 215 Ill. App. 3d 49, 59, 574 N.E.2d 272, 279 (1991).

Once a fiduciary relationship is established, the presumption is that a transaction between the dominant and servient parties which profits the dominant party is fraudulent. *White*, 215 Ill. App. 3d at 59, 574 N.E.2d at 279. The dominant party then has the burden of proving by clear and convincing evidence that the transaction was fair and equitable and did not result from undue influence over the servient party. *White*, 215 Ill. App. 3d at 59, 574 N.E.2d at 279. In addition, when a gift is made by one person to another who owes a fiduciary duty to the donor, that gift is presumptively fraudulent, and that presumption can be overcome only by clear and convincing evidence. *In re Estate of Martin*, 201 Ill. App. 3d 1061, 1064, 559 N.E.2d 1112, 1114 (1990). "There is no rule of law, however, prohibiting a grantor from making a gift to one standing in a fiduciary relation to him, provided the gift is voluntary and not the result of undue influence." *Stone v. Stone*, 407 Ill. 66, 79, 94 N.E.2d 855, 862 (1950).

The circuit court concluded that Edward overcame the presumption that Clyde's transfers were fraudulent, and we cannot conclude that the circuit court's findings were against the manifest weight of the evidence. The circuit court considered Diel and Ken to be credible witnesses. Diel testified that when he witnessed Clyde sign documents, he did not believe that Edward was exercising coercion or undue influence over Clyde. He had

known Clyde for many years, and he testified that he would not have witnessed the signing if Edward was coercing Clyde into signing. Although Ken was unaware of the transactions that occurred that benefited Edward, he was not surprised that Clyde had transferred assets to Edward. Ken described his father as an "honorable" man who would have wanted Edward to be compensated for his dedicated efforts in helping Clyde over the years. His wish for Clyde was for him to "be able to direct what happened to [his] assets," and he believed that was what Clyde did in transferring assets to Edward as compensation for his efforts. Edward, likewise, testified that everything he did with Clyde's assets was done according to Clyde's direction. We defer to the trial court's evaluation of the credibility of the witnesses because it had the opportunity to view them and hear their testimony. *Matthews v. Dorn*, 192 Ill. App. 3d 1051, 1056, 549 N.E.2d 892, 895 (1989).

The trial court's finding that Clyde was capable of managing his person and estate and its finding that Edward proved by clear and convincing evidence that the financial transactions were not procured by fraud were not against the manifest weight of the evidence. Therefore, we affirm the circuit court's denial of the special administrator's request to void the transactions based on Clyde's lack of competence and, alternatively, based on the presumption of fraud stemming from the fiduciary relationship. As a result, we affirm the circuit court's finding that Clyde's transfer of the bank stock to Edward was a valid *inter vivos* transfer.

This conclusion, however, does not end our analysis with respect to the CDs and the bank accounts, because they were transferred by Edward signing the financial documents pursuant to his power of attorney. The special administrator argues that Edward exceeded his authority when he used his power of attorney to sign documents that changed the ownership of Clyde's financial assets. The special administrator raised this issue at the citation hearing and on appeal. The circuit court, however, did not specifically address this

issue in its ruling but implicitly rejected the argument by ruling in favor of Edward.

With respect to the bank accounts, we agree with the special administrator that Edward exceeded his power of attorney authority under the Statutory Short Form Power of Attorney for Property Law (755 ILCS 45/3-1 *et seq.* (West 1996)) when he signed bank documents that placed his name on Clyde's bank accounts, because the power of attorney form that Clyde signed did not grant Edward that authority. With respect to the CDs, however, we do not believe that Edward exceeded his power of attorney authority because Clyde signed a separate written document that contained specific directions to the bank concerning how he wanted the bank to reissue the CDs and Edward signed the CD transfers on Clyde's behalf using his power of attorney in accordance with Clyde's express, written directions.

The statutory short form for a power of attorney was created because "the public interest requires a standardized form of power of attorney that individuals may use to authorize an agent to act for them in dealing with their property and financial affairs." 755 ILCS 45/3-1 (West 2010). The statute further provides, "A short statutory form offering a set of optional powers is necessary so that the individual may design the power of attorney best suited to his or her needs in a simple fashion and be assured that the agent's authority will be honored by third parties with whom the agent deals, regardless of the physical or mental condition of the principal at the time the power is exercised." 755 ILCS 45/3-1 (West 2010).

The short form for a power of attorney for property lists 15 categories of powers the agent may exercise, (a) through (o), unless the principal strikes out any one or more of the categories on the form. 755 ILCS 45/3-3 (West 2010). The categories of powers include "[f]inancial institution transactions" and "[a]ll other property powers and transactions." 755 ILCS 45/3-3 (West 2010). Section 3-4 of the statute provides that, with respect to "financial

institution transactions," the agent is authorized to "control all accounts and deposits in any type of financial institution" and, "in general, exercise all powers with respect to financial institution transactions which the principal could if present and under no disability." 755 ILCS 45/3-4(b) (West 2010). With respect to "all other property powers and transactions," section 3-4 provides that the agent has authority to "exercise all possible powers of the principal with respect to all possible types of property and interests in property, except to the extent the principal limits the generality of this category (o) by striking out one or more categories (a) through (n) or by specifying other limitations in the statutory property power form." 755 ILCS 45/3-4(o) (West 2010).

Despite these broad grants of power, the act expressly limits the agent's power with respect to gifts and the ability to change the principal's beneficiaries under joint tenancy. Specifically, section 3-4 provides, "[T]he agent will not have power under any of the statutory categories (a) through (o) to make gifts of the principal's property, to exercise powers to appoint others or to change any beneficiary whom the principal has designated to take the principal's interests at death under any will, trust, joint tenancy, beneficiary form or contractual arrangement ***." 755 ILCS 45/3-4 (West 2010). Paragraph 3 of the statutory short form contains a blank section where the principal can grant these powers to his agent. 755 ILCS 45/3-3 (West 2010). In the present case, however, Clyde left paragraph 3 blank. Clyde did not specify under paragraph 3 that Edward could make a gift or "exercise powers to appoint *** others *** to take [his] interests at death under *** joint tenancy" (755 ILCS 45/3-4 (West 2010)).

In *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 779, 771 N.E.2d 966, 974 (2002), the court held that for an agent to possess the power to name or change contingent beneficiaries under the statute, the power of attorney form must specifically state that the agent has those powers. In that case, the principal had left the space in paragraph 3 of the

form blank. The court strictly construed the power of attorney and concluded that the principal did not reflect a clear intent to grant the agent the authority to change contingent beneficiaries. *In re Estate of Romanowski*, 329 Ill. App. 3d at 779, 771 N.E.2d at 974. The principal's failure to specify that additional power under paragraph 3 "evidenced an intent" that the agent was not granted the power to name or change beneficiaries to a trust. *In re Estate of Romanowski*, 329 Ill. App. 3d at 779, 771 N.E.2d at 974.

Applying this analysis and the language of the statute in the present case, we conclude that Clyde's failure to specifically enumerate any additional powers under paragraph 3 of the power of attorney form evidences his intent that Edward not be granted the power to name the owners or change the beneficiaries of his joint tenancy bank accounts. Edward, however, used the power of attorney to transfer Clyde's bank accounts into joint tenancy accounts, designating himself as a co-owner of the accounts with the right of survivorship. This transfer would constitute either a gift or an appointment of a contingent beneficiary of the accounts. Accordingly, we must reverse the circuit court's denial of the special administrator's citation with respect to the savings account at Sainte Marie State Bank in Sainte Marie, Illinois, and the savings and checking accounts at People's State Bank in Newton, Illinois. Edward exceeded his power of attorney authority when he signed the financial documents changing the ownership to those accounts. We reverse that portion of the circuit court's judgment that denied the special administrator's citation to recover the proceeds contained in these bank accounts.

With respect to the CDs, however, Edward presented sufficient evidence concerning Clyde's intent. Clyde signed a written document that contained explicit instructions for his bank to reissue his CDs to add his grandchildren to certain specified CDs, to add Edward's name to specified CDs, and to add Ken's name to specified CDs. Although Edward signed the reissuing financial documents on Clyde's behalf pursuant to his power of attorney, he did

so in accordance with Clyde's written directions. Unlike the bank accounts, Edward presented evidence of Clyde's express intent with respect to the CDs. Accordingly, we hold that Edward did not exceed his power of attorney authority when he signed Clyde's name on the CDs, and we affirm the circuit court's ruling with respect to the CDs.

Edward argues that the entire judgment of the circuit court should be affirmed because the special administrator lacks standing to bring her citation to recover estate assets. Edward argues that under Clyde's will, the "residue and remainder" of Clyde's estate passed to him and his three brothers, Ken, Homer, and James. He maintains that the language of the will indicates that Clyde wanted only his surviving sons to take under the will should one or more of his sons predecease him. The special administrator is the daughter of Homer, and because Homer predeceased Clyde, Edward concludes that the special administrator does not have standing to take under Clyde's will.

Edward challenged the special administrator's standing during the trial court proceedings, and the special administrator cited the antilapse statute (755 ILCS 5/4-11 (West 2002)) in support of her standing to take under Clyde's will. The circuit court agreed with the special administrator and ruled that Homer's children would receive his share of Clyde's estate *per stirpes*. We agree with the circuit court's application of the antilapse statute to the facts of the present case.

The antilapse statute provides as follows: "Unless the testator expressly provides otherwise in his will, *** if a legacy of a present or future interest is to a descendant of the testator who dies before or after the testator, the descendants of the legatee living when the legacy is to take effect in possession or enjoyment[] take per stirpes of the estate so bequeathed ***." 755 ILCS 5/4-11 (West 2002)). To avoid the antilapse statute, a will must clearly manifest the testator's intention to disinherit any grandchildren whose parents predeceased the testator. *In re Estate of Bulger*, 224 Ill. App. 3d 456, 586 N.E.2d 673

(1991). In the present case, nothing in Clyde's will clearly stated that the children of his deceased sons could not take under the will. Accordingly, the surviving children of Clyde's deceased sons inherit *per stirpes* the share of the estate that their fathers would have taken had they survived.

The final argument that the special administrator raises on appeal concerns her attorney fees. The circuit court denied the special administrator's request for attorney fees, presumably because she did not recover any assets for the estate. Because we reverse a part of the circuit court's judgment in favor of Edward, we also reverse the circuit court's denial of the special administrator's request for attorney fees to be paid by proceeds from the estate. We remand with directions for the circuit court to reconsider the amount of attorney fees, if any, that the special administrator is entitled to recover from the estate's proceeds.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is affirmed in part and reversed in part, and we remand this matter for further proceedings on the issue of the amount of attorney fees, if any, that the special administrator is entitled to recover from the estate's proceeds. The appellee's motion to strike the appellant's brief and dismiss this appeal is hereby denied.

Motion denied; judgment affirmed in part and reversed in part; cause remanded with directions.