NOTICE
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2012 IL App (5th) 110073-U

NO. 5-11-0073

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).

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| *In re* ESTATE OF NANCY ANN RANDALL, Deceased | ) | Appeal from the Circuit Court of Madison County. |
| (Jennifer Papin and Elisabeth Randall, | ) | |
| Petitioners-Appellants, | ) | |
| v. | ) | No. 09-P-464 |
| Gwyn Ryan, Executor, | ) | Honorable Clarence W. Harrison II, |
| Respondent-Appellee). | ) | Judge, presiding. |

JUSTICE WEXSTTEN delivered the judgment of the court.
Presiding Justice Donovan and Justice Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's determination that the executor of the decedent's estate was entitled to the remaining balance of a payable-upon-death account that the decedent opened after appointing the executor power of attorney was not against the manifest weight of the evidence, and the court did not abuse its discretion in awarding the executor attorney fees.

¶ 2 The appellants, Jennifer Papin and Elisabeth Randall, appeal from the trial court's order awarding the appellee, Gwyn Ryan, attorney fees and the remaining balance of a payable-upon-death-account that the deceased, Nancy Randall, opened after appointing Gwyn power of attorney. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 Duane and Nancy Randall of Alton were married for over 40 years and had three children together: the appellants and a son, Joseph Randall. In March 2009, Duane was

diagnosed with pancreatic cancer, and in April 2009, he and Nancy executed new wills. In her will, Nancy directed that if Duane predeceased her, then their children would inherit her estate in equal shares upon her death. Nancy's will named Duane primary executor and Jennifer, Joseph, and Elisabeth first, second, and third successor executor, respectively. In April 2009, Nancy also executed a power of attorney designating Jennifer as her agent for all property matters.

¶ 5 When Duane passed away on June 9, 2009, Nancy inherited his business ventures, which included ownership interests in several buildings in downtown Alton. Nancy also received $500,000 as the beneficiary of a life insurance policy that was payable upon Duane's death. After Duane's funeral, Nancy gave her three children $10,000 each and then traveled to Memphis to spend time with family.

¶ 6 On June 26, 2009, after returning to Alton, Nancy executed two new powers of attorney. One designated Jennifer as Nancy's agent with regard to two of Duane's businesses, and the other designated Nancy's younger sister, Gwyn, as Nancy's agent for all other matters.

¶ 7 On July 21, 2009, while conducting various banking transactions, Nancy transferred the proceeds of Duane's life insurance policy into a payable-upon-death account that named Gwyn sole beneficiary (the POD account). On August 4, 2009, Nancy executed a codicil to her will naming Gwyn primary executor and Jennifer, Joseph, and Elisabeth first, second, and third successor executor, respectively. With the exception of a few designated items, Nancy's codicil also reiterated that her children would inherit her estate in equal shares.

¶ 8 On August 28, 2009, Nancy died unexpectedly at age 62. After obtaining an order from the trial court admitting Nancy's will and codicil to probate, Gwyn opened an estate account as executor. Gwyn subsequently gave each of Nancy's children $26,000 from the POD account and later gave Joseph an additional $26,000 from the account. Gwyn also used money from the POD account to pay the taxes on those gifts.

¶ 9 In March 2010, the appellants filed a petition to remove Gwyn as executor of Nancy's estate. In their petition to remove, the appellants alleged, *inter alia*, that the POD account was presumed fraudulent because Gwyn and Nancy had been in a fiduciary relationship when the account was opened. The appellants alternatively alleged that the POD account had not been intended as a gift. Maintaining that the proceeds from Duane's life insurance policy were rightly part of Nancy's estate, the appellants argued that it was "necessary that the estate bring a citation action against the executor" and that such an action would create an obvious conflict of interest for Gwyn. In response, Gwyn filed a motion to dismiss the petition to remove her as executor pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)). The trial court subsequently denied Gwyn's motion to dismiss the petition to remove her as executor and as to the petition itself, ordered that "supervised administration" of Nancy's estate follow. The court also authorized the appellants to pursue the citation action referred to in their petition to remove.

¶ 10 In June 2010, seeking to recover the $500,000 that Nancy had used to open the POD account, the appellants, on behalf of Nancy's estate, filed a petition for citation of assets in which they realleged their previous contentions as to the account's validity. In September 2010, the cause proceeded to a bench trial, where the following evidence was adduced.

¶ 11 John Jehle testified that Duane was his brother-in-law, and he had known Duane and Nancy for over 40 years. Duane occasionally confided in Jehle regarding personal matters, and Jehle felt that they had been relatively close. Indicating that Nancy and Duane had an exemplary and meaningful husband-wife relationship, Jehle testified that after learning that Duane's cancer "wasn't survivable," Nancy had gone into a state of "deep grief." Jehle further testified that Nancy "was devastated" following Duane's death.

¶ 12 Jehle stated that when Nancy returned from Memphis in the summer of 2009, she had called him advising that the appellants had been "spreading horrible rumors about her" and

that she had decided to execute new powers of attorney. Jehle testified that when he suggested that Nancy's concerns regarding the appellants were possibly "ill-founded," she had indicated that she would make an attempt at reconciliation. A week or so later, however, Nancy called Jehle again, stating that Gwyn had "told her there was no way that [Nancy] could reconcile with either [appellant]." Shortly before she died, in what would be their last conversation, Nancy told Jehle that she wanted to "rectify things" and "put the family back together."

¶ 13 Jehle testified that Nancy "was a heavy drinker," who would often consume a 750-milliliter bottle of whiskey over the course of an evening. Jehle opined that Nancy had been unable to make competent financial decisions following Duane's death and had not "intended to leave $500,000 to her sister[,] Gwyn."

¶ 14 When cross-examined, Jehle acknowledged that Nancy had never suggested that Gwyn had influenced her decision to execute the new powers of attorney. Jehle further acknowledged that Nancy's expressed desire to "rectify the estrangement between her and her daughters" demonstrated her ability to make rational decisions in the months preceding her death.

¶ 15 Barbara Admire testified that she had known Duane and Nancy since high school and that her husband and Duane had been close friends ever since Duane and Nancy had "moved back" to Alton in 1986. As a result, they all "started doing things as couples," such as vacationing together. Admire opined that she had known Nancy as well as any of Nancy's friends would have known her.

¶ 16 Admire indicated that Nancy had battled alcoholism over the years and had become anxious and reclusive toward the end of her life. Nancy was devastated by Duane's death, and after he died, she began "drinking more than she normally did." After Duane passed, Nancy had also gone through some "major issues with Jennifer," but in the months preceding

her death, Nancy stated that she wanted Jennifer "back in her life." Admire suggested that in the summer of 2009, Nancy's emotional state was such that it would have impaired her ability to exercise good judgment. Admire also opined that Nancy had not intended to give Gwyn $500,000 as a gift and would have wanted Joseph and the appellants to have the money instead. Admire questioned Nancy's decision to execute new powers of attorney in June 2009.

¶ 17 When cross-examined, Admire admitted that Nancy's behavior following Duane's death was not abnormal for someone grieving the death of a spouse. She further admitted that she could not provide an example of an incompetent business decision that Nancy had made in the months immediately preceding her death.

¶ 18 Lynne Selby testified that she had known Duane and Nancy for several years prior to their deaths, and Nancy had been a close friend of hers. Selby indicated that after Duane had been diagnosed with pancreatic cancer, Nancy, who had always been "outgoing" and socially active, began exhibiting agoraphobic tendencies and "became very hesitant to leave her home." Selby opined that feeling "devastated" and "overwhelmed," Nancy had allowed Jennifer to assume many of the responsibilities associated with Duane's care, which caused Nancy to sometimes feel misplaced resentment toward Jennifer. A few years before she died, Nancy acknowledged that she had a problem with alcohol, and after seeking help for the problem, she started taking Xanax. Nancy sometimes took her Xanax with alcohol, which she was not supposed to do. Selby indicated that Nancy was "perfectly lucid" at times but tended to drink excessively when "overwrought and emotional." Selby thus questioned Nancy's ability to make prudent financial decisions toward the end of her life. Selby testified that Nancy had never stated that she "intended to leave a substantial amount of money *** to her sister[,] Gwyn." When cross-examined, Selby acknowledged that many of the business transactions that Nancy had executed in the year before her death were rational and did not

indicate "bad judgment" on Nancy's part.

¶ 19 Elisabeth testified that after Duane's death, Nancy was extremely grief-stricken. As a result, Nancy "drank very heavily," and her emotional state deteriorated. Elisabeth testified that she would not have entrusted Nancy to make sound decisions over business matters in the months immediately preceding her death.

¶ 20 Elisabeth indicated that when Duane and Nancy had advised her, Jennifer, and Joseph that Duane had pancreatic cancer, Jennifer and Joseph "had a disagreement" that had turned slightly physical. Elisabeth testified that Joe had grabbed Jennifer by the arm, and "[w]hen she pulled away, she scratched his face with her ring." Elisabeth indicated that prior to Nancy's untimely death, Nancy had told her that she "still loved [Jennifer] and that she wanted to make up with her." When cross-examined, Elisabeth acknowledged that although she was "very often drunk," Nancy had not been mentally incompetent at all times during the months immediately preceding her death. Elisabeth further acknowledged that Nancy "may have understood" what she was doing when she opened the POD account and that there was no evidence that Gwyn had forced Nancy to name her as the beneficiary. Elisabeth indicated that it would have nevertheless been "fairer" for Nancy to have bequeathed the account's money to the estate and that Nancy's decision was therefore unreasonable.

¶ 21 Jennifer testified that since moving back to Alton in 2005 or 2006, she had helped Duane manage and operate two of his businesses, but she had been paid "little, if any, money" for her time. Jennifer stated that Nancy had a "drinking problem" and that the problem had affected Nancy's ability to make sound financial decisions. While Duane "was sick," Nancy's "anxiety was horrible," and she would tend to either drink too much and become "very argumentative" or take so much Xanax that she would be unable to "comprehend *** what was going on." Jennifer indicated that when Nancy had made efforts to control her alcohol consumption, she had experienced unpleasant withdrawal symptoms.

Jennifer further indicated that Nancy had often been drunk while visiting Duane in the hospital during the weeks preceding his death and had once "defecated herself and had to leave." Nancy had also become generally "lax on her hygiene" and "more of a hermit." Stating that she "would not enable [Nancy's] drinking," Jennifer indicated that she and Nancy had had multiple "alcohol-related disagreements" toward the end of Nancy's life. Jennifer also testified that she had refused to purchase liquor for Nancy, so Nancy hired Marcia Venardos to do so.

¶ 22 Jennifer testified that although they had been on "good terms" when Nancy left for Memphis following Duane's funeral, soon after she returned, Nancy had advised Jennifer of the changes she had made with respect to her powers of attorney. Jennifer testified that Nancy had told her that she had executed the new powers of attorney because Jennifer had "tried to break up [Nancy and Duane's] marriage," had "meddled in [Nancy's] personal bank accounts," and had been "trying to steal [Nancy's] friends away from her." According to Jennifer, Nancy's claims were not only false, they demonstrated that Nancy was "paranoid" rather than competent. Nancy's accusations also left Jennifer feeling "hurt and furious." Jennifer testified that she had decided to subsequently limit her contact with Nancy because she felt that Nancy needed to make a "change" and get "sober." Jennifer stated, "The drinking was a battle every day," and she was "tired of being the bad guy." Jennifer also suggested that she and Nancy had not been irreparably estranged at the time of Nancy's unexpected death and that their final conversation had been a pleasant one.

¶ 23 Jennifer testified that Nancy was supposed to "live off" the proceeds of Duane's life insurance policy, and Nancy had never expressed any intention of leaving that money to Gwyn. Jennifer indicated that Gwyn had once complained about the economy, her and her husband's jobs in Memphis, and her "financial status."

¶ 24 When cross-examined, Jennifer acknowledged that she was unemployed and that her

husband's job in sales was her family's sole source of income. She further acknowledged that Duane and Nancy had given her $5,000 in April 2009, that Nancy had given her $10,000 in June 2009, and that she had received proceeds from Nancy's life insurance policy in September 2009. Jennifer maintained that although she had not seen Nancy in the months immediately preceding her death, she knew that Nancy was in no condition to make decisions for herself. Jennifer acknowledged that a few weeks before Nancy's death, she had sent Nancy an e-mail telling her to "do whatever she thought was best regarding her personal estate." The e-mail further advised that Jennifer would not "interfere."

¶ 25 Jennifer indicated that in June 2009, she would not have been upset if Nancy had simply told her that Gwyn had been appointed power of attorney, but Nancy's stated reasons for the change had been based on "paranoia and lies," which "shocked" Jennifer and revealed to her that Nancy "needed help." Jennifer acknowledged that Nancy's decision to appoint Gwyn power of attorney had also angered her and that she had verbally expressed her anger to Nancy. Jennifer acknowledged that she had sent an e-mail to two business acquaintances a few weeks before Nancy's death intimating that Nancy was "doing great" and could handle her own affairs. Jennifer believed that Nancy had been competent when executing the codicil to her will. Jennifer explained that Nancy had "very good days" and "very bad days" in the months immediately preceding her death and that Nancy's lucidity depended on "what time you caught her during the day."

¶ 26 Jennifer denied physically assaulting Joseph when Nancy and Duane had advised them that Duane had been diagnosed with pancreatic cancer. Jennifer admitted that she had no evidence that Gwyn had forced Nancy to set up the POD account.

¶ 27 Gwyn testified that she and Nancy had grown up together in Alton and had always been close. Before Nancy's death, they periodically visited in Alton, where Nancy still lived, and in Memphis, where Gwyn lived. Gwyn testified that she had not asked Nancy to appoint

her executor or power of attorney and that she had not taken "any action at all" as Nancy's power of attorney. Explaining that she had first learned of the POD account's existence when she had gone to Nancy's bank to open an estate account after Nancy's death, Gwyn further testified that she had no idea that Nancy had named her sole beneficiary of the account. Gwyn stated that after learning of the POD account's existence, she had given each of Nancy's children $26,000 from the account because "[t]heir parents had just died, it was a hard year, and [she] thought they could use it." She later gave Joseph an additional $26,000 from the account after he called saying "he needed it." Gwyn denied that the additional gift to Joseph was meant to "compensate him for taking [her] side in this case." Gwyn testified that other than the $104,000 that she has given to Nancy's children, she still had "the rest of the money" from the POD account. Gwyn indicated that she and her husband both worked, that they were not financially dependent on anyone, and that their adult children were also self-supporting. Gwyn stated that she did not need the money Nancy left her.

¶ 28 Gwyn testified that after Duane's death, Nancy had gone to Memphis to visit her and their mother, who also lived there. Gwyn indicated that Nancy had wanted to "get away for a little bit" and that she had not persuaded Nancy to come. Gwyn stated that although Nancy had consumed alcohol during the visit, Nancy had not gotten "drunk while she was in Memphis." Gwyn stated that she and her husband had visited Nancy in Alton on multiple occasions before Nancy unexpectedly passed away.

¶ 29 Referencing an e-mail from Nancy that was admitted into evidence, Gwyn indicated that after years of "a lot of ups and a lot of downs," Jennifer and Nancy had experienced a final falling-out in the months immediately preceding Nancy's death. Jennifer had advised Nancy that their relationship was "irrevocably broken" and that she was " 'done with [her] permanently.' " Jennifer had further advised Nancy that she was not to contact Jennifer's children and that all further communications should be for "business and by e-mail only."

Thereafter, Nancy sent Gwyn a list of detailed instructions regarding how to deal with her financial and personal matters in the event of her death. Stating that Nancy had also given them to her friend and real estate agent, Marcia Venardos, Gwyn opined that Nancy had been mentally competent when she provided the instructions. Referencing additional e-mails from Nancy, Gwyn indicated that at the time of her death, Nancy believed that Jennifer did not care about her and that their estrangement was a " 'a major disappointment in life.' " Gwyn described Nancy as a wonderful, loving person who was happy, giving, and "very strong." Gwyn stated that Nancy and Duane had been "high school sweethearts."

¶ 30 When cross-examined, Gwyn testified that although she had never spoken to Nancy about the money in the POD account, because Nancy had left the money in her name, it was apparent to her that Nancy had intended to give her the money as a gift. Gwyn indicated that although Nancy had executed powers of attorneys prior to her death, she had died fully capable of handling her own affairs and finances. Gwyn testified that Nancy had made Jennifer power of attorney with regard to two of Duane's businesses because Jennifer had helped run those particular businesses, and Nancy thus felt that Jennifer "could help finish up with those." Gwyn acknowledged that Nancy "probably drank a little more than the normal person" and had been "trying to slow down her drinking" in what proved to be the last years of her life. Gwyn further acknowledged that Nancy had been prescribed various medications, including Xanax. Gwyn indicated that she had "no idea" what had prompted Nancy to send Duane an e-mail, in September 2008, advising that Gwyn was " 'going through a really bad financial time.' "

¶ 31 John Keller, senior vice-president and regional president of Carrollton Bank in Alton, testified that he had known Duane and Nancy through their various business dealings with the bank and had twice spoken with Nancy on July 21, 2009, when she opened the POD account with the $500,000 she received as the beneficiary of Duane's life insurance policy.

Keller opined that Nancy had undoubtedly "understood the effect of putting her money in the POD account" and that the account had not been opened "against her will or against her better judgment." Keller also stated that on the day Nancy opened the account, she had conducted several other banking transactions and had not appeared intoxicated. Keller indicated that he had not discussed the POD account with Gwyn until she came to the bank to open an estate account after Nancy's death. When cross-examined, Keller acknowledged that before putting the life insurance proceeds into the POD account, Nancy had indicated that she "wanted to park the money," and they had discussed opening a joint account for her and Gwyn.

¶ 32 Michael Russell, general manager of the Lockhaven Country Club, testified that he had known Duane and Nancy since 1987 and was a family friend. Russell testified that after Duane's death, he had helped Nancy organize an honorary golf tournament to raise money for pancreatic cancer research. While planning the event, Russell and Nancy were in contact several times a week for several months. During that time, Nancy "made sound decisions," "had ideas of her own," and demonstrated "very capable" organizational skills. Russell opined that Nancy also "understood business and money" and "was very competent in making decisions."

¶ 33 Russell testified that shortly after Duane's death, Nancy had gone to Memphis to "get away from everything." When she returned, Russell spoke with her about the visit, and she had indicated that she was "very upset" about a telephone conversation that she had had with Jennifer. Russell recalled that Nancy had said that "Jennifer [had] talked to her in a very mean way and *** was evil." Russell testified that Jennifer had later confronted him about Nancy's remark that "she was evil."

¶ 34 Venardos testified that she and Nancy had been friends since early childhood and that in 2003 she had lived with Nancy and Duane for several months while going through a

divorce. Venardos indicated that since 2004, she had lived a few blocks away from Nancy and Duane, and they had thus socialized frequently. Venardos further indicated that since 2004, she had, with the exception of "about six or seven months" in 2009, worked as Nancy's part-time assistant. Venardos explained that the 2009 hiatus commenced after Jennifer had stated that she "had a problem" with Venardos running errands for Nancy. During the hiatus, Jennifer assumed Venardos's duties, but as a friend, Venardos would still do things for Nancy whenever Jennifer was "too busy" or complained. Venardos testified that Nancy had later told her that Jennifer had been verbally abusive and "intimidating" during Venardos's absence. Venardos stated that Nancy had once called her crying and complaining after having had a particularly "awful" day with Jennifer. When Nancy returned from Memphis, Venardos "started helping her again," and things between Nancy and Jennifer really "fell apart."

¶ 35 Venardos indicated that Jennifer and Nancy had a "love-hate" relationship that only worsened after Duane's death. Venardos recalled an instance where Nancy had referred to Jennifer as "the bitch." Venardos testified that when Nancy executed the documents making Gwyn power of attorney for all matters other than the two businesses that Jennifer had been assisting with, Nancy had said that the "shit [was] going to hit the fan," but there was "no way in hell" that Jennifer would ever be responsible for Nancy's "personal affairs." Concerned about how Jennifer might react to the news, Nancy had changed the locks on her doors.

¶ 36 Venardos testified that when she assisted Nancy with her various business and financial matters in the months immediately preceding her death, Nancy knew exactly what she was doing and had not been "confused" about anything. Venardos opined that when Nancy died, she was fully competent to handle her own affairs and had never been "easily swayed by other people." Venardos testified that she had also known Gwyn since childhood,

and she had never heard or seen anything that would lead her to believe that Gwyn had ever tried to influence Nancy. Venardos indicated that although Nancy liked to drink, she never got drunk when she conducted business because she knew that she "needed to be with it."

¶ 37 When cross-examined, Venardos testified that she was a licensed realtor whose listings included properties that were being sold by Nancy's estate. Venardos admitted that she thus had a "business relationship with Gwyn Ryan as administrator." Venardos further admitted that she had sometimes purchased alcohol for Nancy and that Nancy had also used the services of a liquor store that delivered alcohol. Venardos testified that she had earned $500 per month working as Nancy's assistant.

¶ 38 Julie Harper testified that she was an attorney from Alton and had prepared the power-of-attorney documents that Nancy had requested and signed in June 2009. Harper opined that Nancy was sober and legally competent when she signed the documents and had not acted under any undue influence when doing so. Stating that she had also witnessed Nancy sign the August 2009 codicil to her will, Harper indicated that Nancy was equally competent and sober when she executed that document.

¶ 39 Joseph testified that Duane had been a successful businessman all his life. Joseph testified that in March 2009, when Duane and Nancy had advised him and the appellants that Duane had been diagnosed with pancreatic cancer, Jennifer kept interrupting Nancy, so Joseph had told her to let Nancy speak. When Jennifer then "tried to storm out of the room," Joseph "touched her shoulder" in an attempt to keep her from leaving upset. Joseph testified that in response, Jennifer became "enraged" and had "lunged at [him] and scratched at [his] eye," leaving a large scratch with her fingernail.

¶ 40 Joseph testified that after Duane's funeral, Nancy had gone to Memphis to visit her mother and her sister, Gwyn. Joseph indicated that Gwyn had always been very supportive of the family, and he had never seen or heard anything that would lead him to believe that

Gwyn had ever tried to exert undue influence over Nancy. According to Joseph, Nancy had always been very independent when it came to making decisions. Joseph stated that during Duane's final days, Gwyn had cared for Jennifer's children so that Jennifer "could spend time with her father."

¶ 41 Joseph testified that in June 2009, when Nancy told Jennifer about the change in her status as Nancy's power of attorney, Jennifer became "completely outraged" and had been so verbally abusive that she had made Nancy cry. When Joseph told Jennifer to not speak to Nancy "like that," Jennifer advised Joseph that it was "none of [his] fucking business," and he in turn, threatened to call the police. Jennifer told Joseph and Nancy that she was "permanently done" with both of them and that Nancy "would never see her grandchildren again." During the summer of 2009, Jennifer also threatened to "snap [Nancy's] fucking neck" and "smother her with a pillow." Joseph indicated that prior to her death, Nancy had been afraid of Jennifer, and he "was afraid of what [Jennifer] might do to [their] mom." The situation was "scary enough" that Nancy had changed her locks and security code.

¶ 42 Joseph stated that Nancy had once discussed putting the proceeds of Duane's life insurance policy into a bank account "to live off of" and that only after her death did he learn that she had used the money to open the POD account. Joseph indicated that although his mother had grown extremely sad following Duane's passing, she "was mentally competent to handle her own financial affairs" in the months preceding her death. Joseph further indicated that Nancy had made the decision to execute new powers of attorney while she was in Memphis following Duane's funeral. According to Joseph, Nancy thought that Jennifer's authority was "too broad," and Nancy "preferred" that should the need arise, Gwyn be responsible for her "personal checking and savings and stuff like that." Suggesting that the money in the POD account was rightfully Gwyn's, Joseph stated that the appellants' claim that the POD account was the result of Nancy's mental incompetence and Gwyn's undue

influence was "absurd." Joseph testified that Gwyn had not made him any promises regarding the money in the account.

¶ 43 Penelope Schmidt testified that she had known Duane and Nancy since 2005 and had been a business associate of Duane's since 2006. Following Duane's death in June 2009, Nancy assisted Schmidt with various legal and business matters pertaining to one of his former real estate ventures. Schmidt opined that Nancy had undoubtedly been competent in the months immediately preceding her death. When cross-examined, Schmidt acknowledged that she had given Jennifer the name of a therapist who she thought might have been able to help Nancy deal with the grief she experienced toward the end of her life.

¶ 44 Gwyn's daughter, Jill Ryan, testified that Nancy had been her aunt, friend, and godmother. Jill stated that during Nancy's visit to Memphis following Duane's funeral, they had talked a lot, and Nancy had discussed how her life was going to be without Duane. Although Nancy had often cried during the visit, she had also laughed when recounting funny stories about Duane or when seeing "things on TV that reminded her of him." Nancy also counseled Jill regarding an employment decision that ultimately led Jill to move from Memphis to Washington, D.C., and they further discussed the matter when Nancy returned to Alton. Jill testified that although she and Nancy had not talked about Nancy's financial affairs, Nancy "seemed like she knew what she was doing." Jill recalled that the times she had been present when Nancy and Jennifer had talked on the telephone during Nancy's visit, it seemed as if Nancy always had to struggle "to get a word in," and Jill could "hear her getting upset." Jill testified that Nancy had stated that Joseph had been helpful and considerate during Duane's illness and funeral proceedings. Jill indicated that although she had been somewhat concerned about Nancy's drinking, she did not believe that Nancy's drinking had affected her judgment or reasoning. When cross-examined, Jill acknowledged that Nancy would sometimes drink "throughout the course of the day."

¶ 45 By video deposition, Dr. Brent Matthews testified that during the summer of 2009, he and Nancy had talked about surgically repairing a ventral hernia that she had. Indicating that he and Nancy had thoroughly discussed the risks and benefits of the procedure, Matthews opined that based on their conversations, Nancy had been mentally competent in the months immediately preceding her death. When cross-examined, Matthews indicated that he was not aware that Nancy had been prescribed Xanax, and he acknowledged that Nancy's autopsy revealed signs consistent with "chronic and excessive alcohol use."

¶ 46 In November 2010, the trial court entered a written order denying the appellants' petition for citation to recover assets. The court determined that as a "will substitute," the POD account was presumed to be an accurate reflection of Nancy's testamentary intent and that the appellants had failed to rebut that presumption with clear and convincing evidence that either Nancy lacked testamentary capacity when the account was opened or the account was the result of undue influence. The court also lifted its previous order directing that Gwyn's administration of Nancy's estate be supervised and ordered that Gwyn's attorney fees be paid by Nancy's estate. Following the trial court's denial of their posttrial motion to reconsider judgment, the appellants filed a timely notice of appeal.

¶ 47 ANALYSIS

¶ 48 Suggesting that the trial court would have otherwise granted their petition for citation to recover assets, the appellants contend that the court erred in failing to apply the presumption of fraud generally applicable to transfers made between parties in a fiduciary relationship. They further contend that the trial court was not authorized to order Nancy's estate to pay Gwyn's attorney fees. As the trial court did below when denying the appellants' motion to reconsider judgment, however, we reject both of these contentions.

¶ 49 Citation to Recover Assets

¶ 50 "The objectives of a citation proceeding are to obtain the return of personal property

belonging to the estate but in the possession of, or being concealed by others, or to obtain information to recover estate property." *In re Estate of Joutsen*, 100 Ill. App. 3d 376, 380 (1981). In a citation proceeding, the petitioning party "must initially establish a *prima facie* case that the property at issue belongs to the decedent's estate; the burden then shifts to the respondent to prove his or her right to possession by clear and convincing evidence." *In re Estate of Elias*, 408 Ill. App. 3d 301, 315 (2011).

¶ 51 "A finding of the trial court that certain property belonged [or did not belong] to the estate will not be disturbed on appeal unless it is against the manifest weight of the evidence [citation], as the trial court in such proceedings is authorized to determine all questions of title, claims of adverse title[,] and the right of property." *In re Estate of Joutsen*, 100 Ill. App. 3d at 380. "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best v. Best*, 223 Ill. 2d 342, 350 (2006). "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 witnesses." *Id*.

¶ 52 A POD account is a testamentary disposition of funds "often referred to as a 'will substitute.' " *In re Estate of Elias*, 408 Ill. App. 3d at 315-16. "[A] written instrument executed by the holder expressing his or her intent to create a POD account raises the presumption of the holder's intent, and such presumption may be overcome only by clear and convincing evidence." *In re Estate of Weiland*, 338 Ill. App. 3d 585, 598 (2003). "A will and a will substitute may coexist," and "will substitutes are to be construed according to the rules used to construe wills." *Handelsman v. Handelsman*, 366 Ill. App. 3d 1122, 1130 (2006). Grounds for invalidating a will include undue influence and lack of testamentary capacity. *In re Estate of Elias*, 408 Ill. App. 3d at 316.

¶ 53 "A presumption of undue influence arises when it is shown that: (1) a person in a

fiduciary relationship with a testator receives a substantial benefit under the will; (2) the fiduciary is in a position of dominance over the testator; (3) the testator reposes trust and confidence in the fiduciary; and (4) the will is written by or its preparation is procured by the fiduciary." *In re Estate of Walls*, 203 Ill. App. 3d 574, 580 (1990). "To set aside a will on the grounds of lack of testamentary capacity, the petitioner must demonstrate that at the time the will was executed the testator lacked sufficient mental ability to know he was making a will, to know and remember the natural objects of his bounty, to comprehend the character and extent of his property and to make disposition of his property according to a plan formed in his own mind." *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1013 (1997).

¶ 54 "A power of attorney gives rise to a general fiduciary relationship between the grantor of the power and the grantee as a matter of law." *In re Estate of Elias*, 408 Ill. App. 3d at 319. "If a petitioner shows that a fiduciary relationship exists, any transaction between parties in which the agent profits is typically presumed to be fraudulent and the agent has the burden of proving by clear and convincing evidence that the transaction was fair and equitable and did not result from the agent's undue influence over the principal." *In re Estate of Miller*, 334 Ill. App. 3d 692, 698 (2002).

¶ 55 Here, applying the law applicable to wills, the trial court determined that the POD account was valid and that the appellants had failed to prove that Nancy lacked testamentary capacity when the account was opened or that the account was the result of Gwyn's undue influence. The court noted, *inter alia*, that numerous witnesses who had personally known Nancy had testified that she was mentally competent prior to her death and that the appellants and their witnesses had even conceded that "despite her alcohol use, Nancy was competent at least some of the time." The court further noted that the "best evidence of [Nancy's] capacity at the time she created the POD account was provided by John Keller, the president of the bank, who *** testified that he had spoken with her twice on the day she opened the

POD account." As for undue influence, the court observed that there was no evidence that Gwyn had ever "discussed the POD account with Nancy, much less influenced her to create it for Gwyn's benefit." The court further found that Keller's testimony tended to corroborate Gwyn's uncontradicted assertion that she had first learned of the POD account's existence when she had gone to Nancy's bank to open an estate account after Nancy's death. "[I]t is the obligation of the trial court, when sitting without a jury, to weigh the evidence and decide disputed questions of fact" (*Klaskin v. Klepak*, 126 Ill. 2d 376, 389 (1989)), and the appellants' contrary intimations notwithstanding, the record on appeal amply supports the trial court's findings in this case.

¶ 56 As previously noted, the appellants suggest that the trial court erred in failing to apply the presumption of fraud generally applicable to transfers made between parties in a fiduciary relationship. At oral argument, the appellants more specifically suggested that the trial court deliberately ignored or disregarded the presumption. As Gwyn notes on appeal, however, in its written order denying the appellants' petition for citation of assets, after acknowledging that "a fiduciary relationship existed between Nancy and Gwyn," the court considered the presumption of fraud but determined that it did not "arise on the facts of this case." As Gwyn further notes on appeal, the cases that the appellants primarily rely on in support of their argument that the trial court erred in failing to apply the presumption of fraud "dealt with *inter vivos* gifts, not testamentary dispositions." Moreover, "the concepts of a presumption of a fraudulent transaction due to a fiduciary relationship and undue influence are inextricably intertwined" (*In re Estate of Elias*, 408 Ill. App. 3d at 318), and "Illinois follows the bursting bubble theory, which provides that once evidence is established which contradicts the presumption, the presumption vanishes." *Ferris Elevator Co. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 355 (1996).

¶ 57 Here, giving credence to Gwyn's testimony that she was not aware of the POD

account's existence until after Nancy's death, it is difficult to discern how Gwyn could have possibly exerted undue influence over Nancy's creation of the account. Under the circumstances, the presumption of fraud generally applicable to transfers made between parties in a fiduciary relationship was rebutted by competent evidence, and accordingly, the trial court's conclusion that the presumption did not "arise on the facts of this case" was not against the manifest weight of the evidence. *Cf. In re Estate of Elias*, 408 Ill. App. 3d at 310, 320 (holding that the trial court correctly determined that the decedent's transfer of funds into a POD account benefitting the fiduciary was presumed fraudulent where the fiduciary failed "to come forward with sufficient evidence to rebut the presumption," the evidence established that the fiduciary and the decedent were alone when the account documents were filled out by the fiduciary, and the evidence further established that the fiduciary had assumed control of "all aspects of [the decedent's] finances and health care[ ] and [had] abused her fiduciary duty"), with *In re Estate of Rybolt*, 258 Ill. App. 3d 886, 888-90 (1994) (holding that where after discussing the account with bank officials in the fiduciary's presence, the decedent opened a POD account benefitting the fiduciary, it was not against the manifest weight of the evidence to conclude that in the absence of proof of undue influence, the presumption of fraud had been overcome).

¶ 58 Attorney Fees

¶ 59 As a fiduciary, the executor of a will "owes a duty of good faith toward the estate" and is "directly accountable to the court." *In re Estate of Minsky*, 59 Ill. App. 3d 974, 979 (1978). "The executor has a statutory duty to defend the will unless she has reasonable grounds to believe the will is invalid," and a "mere charge of fraud and undue influence is not tantamount to evidence of the executor's bad faith or knowledge that the will is invalid." *In re Estate of Lipchick*, 27 lll. App. 3d 331, 336-37 (1975). Because legal counsel is "considered indispensable" to the discharge of an executor's duties, the trial court may

authorize that an executor's attorney fees "be paid from the assets of the estate." *Id*. at 336. "A trial court has broad discretionary powers in awarding attorney fees and its decision will not be reversed on appeal unless the court abused its discretion." *In re Estate of Callahan*, 144 Ill. 2d 32, 43-44 (1991).

¶ 60 Here, claiming that Gwyn participated in the citation proceedings not as an executor but as a "private individual *** resisting an effort to force her to return monies that belong[ed] to [Nancy's] estate," the appellants argue that the trial court abused its discretion in ordering the estate to pay Gwyn's attorney fees. We disagree.

¶ 61 First of all, the appellants' citation action stemmed from their petition to remove Gwyn as executor, the merits of which were not fully resolved until after the trial on the merits of the appellants' petition for citation to recover assets. Secondly, even if the appellants' citation and removal actions had not been concurrently litigated, "[t]he fact that the executor has a personal interest in the estate does not render her unsuitable to serve [citation], nor should it make the allowance of attorney[ ] fees improper." *In re Estate of Lipchik*, 27 Ill. App. 3d at 337. That she might be "personally interested as a devisee or legatee or otherwise does not preclude an executor from suing for a construction of the will although the final construction may adjudicate [her] rights as a beneficiary under the will." *In re Estate of Gerbing*, 61 Ill. 2d 503, 506 (1975). Lastly, despite the appellants' insistence that the $500,000 used to open the POD account should have passed to Nancy's estate, as discussed above, the trial court's determination that the balance of the account rightfully belonged to Gwyn was not against the manifest weight of the evidence, and Gwyn clearly defended against the appellants' citation and removal actions in good faith. "A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court" (*Patton v. Lee*, 406 Ill. App. 3d 195, 199 (2010)), and we cannot conclude that the trial court abused its discretion by ordering that Gwyn's attorney fees be

paid by the estate.

¶ 62 CONCLUSION

¶ 63 For the foregoing reasons, the trial court's judgment is hereby affirmed.

¶ 64 Affirmed.