

NOTICE
Decision filed 09/06/19. 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.

2019 IL App (5th) 180212-U

NO. 5-18-0212

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).

| | | |
|---|---|-------------------|
| DENISE MOLDENHAUER, as Administrator |) | Appeal from the |
| of the Estate of Norita Hermeling, |) | Circuit Court of |
| |) | Marion County. |
| Plaintiff-Appellee and Cross-Appellant, |) | |
| |) | |
| v. |) | No. 16-CH-74 |
| |) | |
| JAMES DENNISON, |) | Honorable |
| |) | Martin W. Siemer, |
| Defendant-Appellant and Cross-Appellee. |) | Judge, presiding. |

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Cates and Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* Where James Dennison had a fiduciary relationship with his mother, Norita Hermeling, undue influence is presumed and the trial court’s order quieting title to the real estate Norita Hermeling transferred to him is affirmed. Where Denise Moldenhauer was unable to meet her burden of proof to establish that James Dennison used his fiduciary relationship with Norita Hermeling to knowingly deceive, intimidate, or illegally use her assets, we affirm the trial court’s order.

¶ 2 Norita Hermeling suffered from dementia. After she moved in with her son, James Dennison, he took her to a local attorney’s office to have two legal documents prepared and signed—a power of attorney for property and a warranty deed. The warranty deed established a joint tenancy between Hermeling and Dennison in her house.

Hermeling filed this action against Dennison arguing that he unduly influenced her to have the legal documents prepared and signed, and that he improperly removed money from her bank account for his personal use. During the pendency of this case, Hermeling passed away, and a daughter, Denise Moldenhauer, was appointed as administrator of her mother's estate and substituted as the plaintiff in this case. Dennison appeals from the trial court's order concluding that he had a fiduciary relationship with his mother, and thus the presumption that he exerted undue influence over her to get her to sign the power of attorney and the warranty deed making him a joint tenant. Moldenhauer cross-appeals from the trial court's order finding that she had not met her burden of proof to establish that Dennison used his fiduciary relationship with their mother to knowingly deceive, intimidate, or illegally use Hermeling's assets. For the reasons that follow in this order, we affirm the trial court's order.

¶ 3

BACKGROUND

¶ 4 Hermeling lived in Centralia in a modest house that she owned. She was diagnosed with dementia in 2015. In January 2016, Hermeling was reported to be wandering her neighborhood asking for food. Dennison was one of her six living children. Upon hearing that she was wandering the neighborhood, Dennison went to her house and "evicted" his mother's "boyfriend." He then took Hermeling to his house in Iuka that he shared with his significant other, Patricia Harris.

¶ 5 On January 11, 2016, Dennison and Harris took Hermeling to an attorney in Salem, Samuel E. Bauerle. Before that date, Hermeling was not Bauerle's client, but Bauerle knew Dennison, who may have utilized his services in the past. On that same

date, Hermeling signed two legal documents prepared by Bauerle. One of the documents was a power of attorney, whereby Hermeling appointed Dennison as her attorney-in-fact with power to manage her bank accounts and all other property. The other document was a warranty deed whereby Hermeling conveyed her Centralia house to herself and Dennison as joint tenants with right of survivorship for \$10 in consideration. At that time, the house had a tax assessed value of \$48,968. The deed was recorded on January 26, 2016. Dennison insists that the warranty deed was signed before the power of attorney.

¶ 6 Within a few weeks of moving to Iuka, Hermeling became ill and was hospitalized at St. Mary's Hospital in Centralia. She was discharged after four or five days to a nursing home in Salem on February 2, 2016. Hermeling continued to reside in the nursing home until June 2016 when her daughter, Denise Moldenhauer, moved her to her house in Pekin.

¶ 7 On June 2, 2016, Hermeling revoked her power of attorney that had designated Dennison as her attorney-in-fact and signed a new power of attorney designating Moldenhauer as her attorney-in-fact.

¶ 8 On June 27, 2016, Doctors Nursing and Rehabilitation Center, LLC, the Salem nursing home where Hermeling resided from February 2016 until mid-June 2016, filed suit against Hermeling in Marion County for unpaid bills totaling \$8678.95. Attached to its complaint was the contract signed on February 2, 2016, by Dennison. The contract detailed that, at the time of her admission, Hermeling was covered by Medicare and Blue Cross Blue Shield health insurance. The lawsuit culminated in Moldenhauer signing a

promissory note in favor of the nursing home in the amount of \$8830.45. To resolve the debt, Moldenhauer, as Hermeling's power of attorney, granted a mortgage to the nursing home to secure the promissory note.

¶ 9 Hermeling filed a complaint against Dennison on November 2, 2016, in two counts. Count I asked the court to set aside a warranty deed and quiet title to the real estate (her house in Centralia). She alleges that at the time of the conveyance, Dennison had acquired her trust by undue influence and fraud. Hermeling asked the trial court to quiet title to the house and "[f]or recovery against [Dennison] of any damages done to the property." Count II alleged that Dennison took control of Hermeling's bank account and misappropriated money for his own personal gain. Hermeling also claims that while Dennison had control, he neglected to pay her debts owed to the nursing home. She alleges that Dennison's actions constituted financial exploitation of an elderly person in violation of section 17-56(g) of the Criminal Code of 2012 (720 ILCS 5/17-56(g) (West Supp. 2015) and that he should be held liable for treble damages and attorney fees.

¶ 10 Bench Trial

¶ 11 The trial court held a bench trial on June 20, 2017. Hermeling lived four hours from the courthouse, was not well, and did not appear for trial. The parties stipulated that Hermeling was incompetent because she suffered from dementia. Six witnesses testified at trial. Timelines remembered by the witnesses are sometimes inconsistent and will be specified where relevant.

¶ 12

Testimony of James Dennison

¶ 13 In late December 2015, Dennison received a call from one of his sisters that their mother was walking door to door in her Centralia neighborhood asking for food. Shortly thereafter, his mother was brought to his house in Iuka to live. By early January 2016, Hermeling decided that she wanted to change her power of attorney and deed a one-half interest in her house to Dennison. According to Dennison, Hermeling selected the attorney. Hermeling had the original deed for her house, and she took it to the attorney's office. Within a few days, they returned to the attorney's office, and Hermeling signed the power of attorney and warranty deed documents. Dennison testified that he did not coerce or use undue influence to get his mother to sign these documents, and that she was not cognitively impaired.

¶ 14 Dennison did not like his mother's boyfriend (later referred to by all other witnesses as her "caretaker"). Dennison testified that he "evicted" this man from her house before bringing her to his house in December 2015. Later, he testified that he was finally able to evict this man when he obtained the power of attorney in January 2016. Dennison believed that this man either stole or convinced his mother to give him a lot of her money and that as a result, she was unable to meet her monthly bills.

¶ 15 Dennison testified that his mother was hospitalized at St. Mary's Hospital in Centralia on two occasions in January 2016. She was hospitalized the first time because she had a heart attack. The dates of this hospitalization are not in the record. The second hospitalization was because of "chest pains," but her hospitalization resulted in a diagnosis that she was suffering from a urinary tract infection. At discharge, Dennison

testified that she was “slightly confused.” Hermeling’s physician recommended that she enter a nursing home in order to have therapy and to get physically stronger before returning to Dennison’s house.

¶ 16 Dennison testified that any money he removed or spent out of his mother’s checking account went to pay her utility bills on her Centralia house, to pay for repairs on her Centralia house, to pay for her “sitters” during January 2016 when she was not in the hospital, to pay for a new mobile phone for her, to pay for gas to travel to and from Hermeling’s house, and to pay for her cigarettes and snacks. In addition, he testified that she did not like the nursing home food, and so they occasionally brought her meals from area restaurants. Dennison was asked about all of the following withdrawals he took from Hermeling’s checking account. In February 2016, Dennison withdrew \$248 by ATM transactions and \$138.29 by debit card transactions. In March 2016, Dennison withdrew \$400 by ATM transactions and \$962.33 by debit card transactions. In April 2016, Dennison withdrew \$389.31 by ATM transactions and \$336.11 by debit card transactions. In May 2016, Dennison withdrew \$229.25 by ATM transactions and \$467.79 by debit card transactions. In addition to the ATM and debit card transactions, Dennison also wrote various checks either to himself or to local stores. Dennison saved no receipts, but on all checks he wrote the reason for the expenditure in the memo section.

¶ 17 Dennison testified that he worked full-time as an over-the-road trucker. He also testified that he was laid off in December, but did not specify the year.

¶ 18 According to Dennison's testimony, Hermeling asked him to check on her house in Centralia every day after she moved into his house in January 2016. In addition to checking on his mother's house, Dennison testified that he began to undertake repairs to her house. Flooring needed to be replaced because of flooding in both the bathroom and the laundry room. He encountered difficulty in matching the wood for that project, and so the flooring project was delayed. He worked on light switches that did not work and on replacing parts of the bathroom plumbing. He and Harris also went through boxes and boxes of papers in order to make the house more habitable. He purchased paint but had not yet begun painting. He had not yet started any of the needed repairs on the exterior of the house. Dennison testified to two disparate goals for repairing his mother's house. First, he testified that the plan was to move his mother back into her house. Alternatively, he testified that the plan was to renovate the house and rent it out so that his mother would have income in addition to her pension and social security benefits.

¶ 19 While Hermeling was in the nursing home, Dennison talked about his frequent visits. He and Harris always brought her cigarettes and snacks. At some point, there was a problem with the nursing home bill. Hermeling's insurer, Blue Cross Blue Shield, would only provide nursing home care for a limited 90-day period. The nursing home needed Dennison, as Hermeling's power of attorney, to prepare paperwork to submit to Illinois Medicaid, which he did. He learned that Medicaid had additional questions about his application and that they would be sending him paperwork in early June 2016. He never received the paperwork. Dennison testified that he used some of his mother's money to pay the nursing home \$2396. In August or September 2016, he received a

letter from Medicaid indicating that, because it had not received his responses to its questions, Hermeling's Medicaid claim was denied. He forwarded a copy of the letter to two of his sisters but did not send a copy to Moldenhauer, who was then designated as their mother's power of attorney.

¶ 20 Dennison was notified by a nursing home employee that his power of attorney had been revoked—that his sister, Moldenhauer, had had a new power of attorney prepared and signed by their mother. He claimed that he a very good relationship with his mother until she was moved to Pekin. He testified that he called Moldenhauer multiple times in an effort to speak with Hermeling but that Moldenhauer would not allow any communication.

¶ 21 Testimony of Denise Moldenhauer

¶ 22 Moldenhauer testified that she is the oldest of Hermeling's six living children. She and her husband reside in Pekin, approximately four hours from Centralia. Currently, her mother lives with her. She had been her mother's power of attorney from 2013 until January 2016, but she was not listed on her mother's checking account, and the power of attorney powers were never utilized as her mother seemed to be somewhat capable.

¶ 23 At Thanksgiving 2015, Moldenhauer testified that she became aware that her mother's dementia had progressed in that Hermeling had no idea that it had been Hermeling's sister who drove her the four hours from Centralia to Pekin. Then in late December 2015, Moldenhauer received a telephone call from her mother, who stated that she was starving. Moldenhauer called Dennison first because he was geographically

closest to their mother. She testified that Dennison alternatively informed her that he was either unavailable or that he would not help. She called her sister who lived in New Hampshire to inquire whether she recalled if Centralia had any stores that could deliver food. A local grocery store was contacted but did not offer delivery services, but Moldenhauer found a Pizza Hut restaurant that delivered, and she sent two pizzas to her mother's house. She continued to call Dennison and eventually she learned that he did go get their mother and took her back to his house for what was supposed to be a few days.

¶ 24 Before Hermeling went to live with Dennison, Moldenhauer testified that she had frequent telephone contact with her mother. After Hermeling moved to Iuka with Dennison and Harris, she could no longer reach her. She called Dennison to ask what, if anything, was wrong with their mother and/or her phone. Dennison informed Moldenhauer that she would never find her mother and would never see her again.

¶ 25 In light of Dennison's statement that she would never find her mother, Moldenhauer began an investigation. She ultimately located Hermeling at the Salem nursing home. She started coming down to Salem every weekend to spend time with Hermeling. She never saw Dennison or Harris during those weekend visits. She also never saw any extra food or snacks in her mother's room at the nursing home in contradiction to Dennison's testimony. In fact, Moldenhauer testified that every weekend, she had to go shopping for Hermeling at the local Wal-Mart store. Moldenhauer purchased Hermeling a new mobile phone so that she could maintain contact with her family.

¶ 26 Moldenhauer learned from the nursing home that Dennison had replaced her as their mother's power of attorney. She only learned by accident that her mother had deeded a joint interest in her house to Dennison when they were at the courthouse filing paperwork. At no point did Hermeling ever inform Moldenhauer that she had transferred a joint interest in her house to Dennison.

¶ 27 In May 2016, Moldenhauer received a call from the nursing home with concerns over payment. Shortly thereafter, she and her husband checked Hermeling out of the nursing home and moved her to their Pekin house.

¶ 28 She testified that her mother currently needed round-the-clock care and that her cognitive abilities were greatly decreased.

¶ 29 Approximately two months before the hearing, Moldenhauer visited her mother's house. She testified that it looked like no repairs had been started or completed. The bathroom plumbing and electrical repairs had not been done. She admitted that she had not looked at the laundry room and so did not know whether any flooring repairs to that room had been completed.

¶ 30 Moldenhauer's attorney was able to work out a settlement with the nursing home on the outstanding debt. She signed a promissory note to the nursing home for the amount owed and granted a mortgage to the nursing home on her mother's house in order to secure the promissory note.

¶ 31 On cross-examination, Moldenhauer admitted that she did not know how her brother spent their mother's money, and stated that he may have spent the money on their mother's bills and things that she needed.

¶ 32 Testimony of Samuel E. Bauerle

¶ 33 Samuel E. Bauerle was the attorney who drafted the two legal documents in January 2016 for Dennison and Hermeling. He did not know Hermeling before she hired him, although he knew Dennison beforehand as he had been a client.

¶ 34 Testimony of Nancy J. Satterthwaite

¶ 35 Nancy J. Satterthwaite worked for attorney Bauerle. She typed the two legal documents in January 2016 for Dennison and Hermeling. She confirmed that Hermeling had not been a client in the past and that she thought that Dennison had at least consulted with Bauerle in the past.

¶ 36 Testimony of Patricia Ann Harris

¶ 37 Patricia Ann Harris testified that she had been involved in a relationship with Dennison for 23 years. Dennison called her in December 2015 and asked her to go check on his mother as he had heard that his mother needed food. When Harris arrived, she said that it looked like Hermeling had lost weight. Hermeling told Harris that her caregiver had been gone for three months. She confirmed that she was hungry but said that a man had brought her two boxes of food recently. When Harris checked her refrigerator, she found only two boxes of Pizza Hut pizza.

¶ 38 Harris was present when Hermeling decided to have the legal documents prepared. She testified that Hermeling said she wanted the new power of attorney when she was in the hospital. Harris did not testify to the dates of this hospitalization. She testified that Hermeling was then angry at Moldenhauer, and that this is how the family “rolled,” in that the mother would exclude one child and then change her mind later. Harris was also

present when the legal documents were signed. She said that Hermeling had good cognitive skills at that time.

¶ 39 When Hermeling came to live with them, Harris said that she was working 50 hours per work as a home healthcare aide, while Dennison was working full time as a trucker from Sunday nights to Friday nights. On cross-examination, she was questioned about how Dennison was able to go to Hermeling's house every single day as he testified, if he was working full-time from Sunday nights to Friday nights. Harris said that she must have been mistaken—that Dennison was laid off in December 2015. When asked then if they were having financial issues because Dennison had just lost his job at the time that Hermeling went to have the legal documents prepared in early January 2016, Harris changed the timeline again, and stated that Dennison was not laid off until March or April 2016. After he was laid off, then Dennison began driving to Hermeling's house every day.

¶ 40 Harris was adamant that any money Dennison removed from Hermeling's account went to pay Hermeling's bills. She admitted that because she was at work when Dennison was withdrawing and spending Hermeling's money that she had no direct knowledge of how he spent the money. She testified that he contacted one or both of his two sisters (but not Moldenhauer) to get approval each time he intended to withdraw money from Hermeling's account

¶ 41 Harris stated that Dennison made repairs to Hermeling's house and that together they went through boxes of papers. She indicated that Dennison replaced the bathroom sink, faucet, and all the plumbing.

¶ 42 In her experience as a home healthcare aide, Harris explained that elderly people who get a urinary tract infection tend to operate in a “mental fog.” Because Hermeling had a urinary tract infection in late January 2016, this opinion was offered to explain how Hermeling was cognitively well when she executed the legal documents in early January 2016 but somewhat confused when she entered the nursing home in early February 2016.

¶ 43 Testimony of Karen Sue Potter

¶ 44 Karen Sue Potter is another one of Hermeling’s daughters. She testified that she used to be Hermeling’s primary caregiver in that she took her grocery shopping and drove her to doctor’s appointments. But, after the caregiver moved in with her mother, she discontinued contact. Potter was called to testify to confirm that Dennison called her frequently to ask if he could use their mother’s money to pay bills and to buy her snacks and other items. She testified that Dennison spent \$800 of his own money to help pay their mother’s utility bills.

¶ 45 Trial Court’s Judgment Order

¶ 46 The trial court entered its order on February 22, 2018. The order was delayed because Hermeling passed away on July 13, 2017, and the parties asked that the court postpone any ruling until an estate could be opened and an administrator appointed. Moldenhauer was named the administrator of the decedent’s estate.

¶ 47 The trial court began its analysis of this case by determining that there was a fiduciary relationship between Dennison and Hermeling. The court found that it did not matter which legal document was signed first, as both were signed as part of the same consultation. Furthermore, even if the warranty deed had been signed first, the court

stated that the deed was not operative as a conveyance until it was delivered and the record was silent as to when the deed was delivered to Dennison.

¶ 48 The court concluded its decision regarding count I by stating that the transfer of the one-half interest in Hermeling's house is presumed fraudulent. When a fiduciary relationship exists, the dominant party is prohibited from seeking or obtaining any benefit for himself. *In re Guardianship of Spinnie*, 2016 IL App (5th) 150564, ¶ 19, 65 N.E.3d 541. The court found that Dennison failed to present clear and convincing evidence to overcome the presumption that the transfer of the one-half interest in Hermeling's house was appropriate. The court also concluded that Moldenhauer failed to establish that the house had sustained any damages.

¶ 49 On count II, the trial court found that Moldenhauer was not able to establish that Dennison illegally misappropriated money from Hermeling's bank account and failed to pay all her nursing home bills. The court found that because the statute contained no presumption of fraud regarding a fiduciary relationship, Moldenhauer's evidence was insufficient to establish that Dennison "knowingly and by deception or intimidation obtained control" over Hermeling's property or "illegally used her assets or resources." 720 ILCS 5/17-56(a) (West Supp. 2015).

¶ 50 ANALYSIS

¶ 51 Both Dennison and Moldenhauer have filed appeals in this case. In his appeal, Dennison contends that the trial court erred in concluding that he obtained the one-half interest in his mother's house by fraud. In her cross-appeal, Moldenhauer contends that

the trial court erred in concluding that she did not establish that Dennison financially exploited their elderly mother.

¶ 52 Fraud/Undue Influence

¶ 53 A power of attorney conveys powers to the agent who can then act for the principal and establishes a fiduciary relationship between the two parties as a matter of law. *In re Estate of Elias*, 408 Ill. App. 3d 301, 319, 946 N.E.2d 1015, 1032 (2011). In Illinois, if a person has been designated as an agent under a power of attorney, that agent holds a fiduciary duty to the person who made the designation. *Spring Valley Nursing Center, L.P. v. Allen*, 2012 IL App (3d) 110915, ¶ 12, 977 N.E.2d 1230; 755 ILCS 45/2-7(a), (b) (West 2014); *Clark v. Clark*, 398 Ill. 592, 600, 76 N.E.2d 446, 449 (1947). “The mere existence of a fiduciary relationship prohibits the agent from seeking or obtaining any selfish benefit for himself, and if the agent does so, the transaction is presumed to be fraudulent.” *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 12. Once a power of attorney is in place, any transfer of the principal’s property to the agent holding the power of attorney that either materially benefits the agent or is for the agent’s own use is presumptively fraudulent. *Id.* The rule applies to any transfer of property by the principal directly to the agent. *Id.*

¶ 54 Although here there is a presumption of fraud because Hermeling transferred a one-half interest in her Centralia house to Dennison, her son and the holder of her power of attorney, that presumption is not conclusive and may be rebutted by clear and convincing evidence. *Id.* ¶ 13. The burden to rebut the presumption of fraud is on the holder of the power of attorney, who must establish “that he acted in good faith and that

he did not betray the confidence placed in him.” *Id.* The transaction at issue will be upheld if the holder of the power of attorney can satisfy the burden. *Id.* Conversely, if the holder of the power of attorney is unable to satisfy that burden, then the transaction will be set aside. *Id.* A trial court’s decision that a presumption of fraud has or has not been overcome is entitled to deference and will not be reversed unless the decision is contrary to the manifest weight of the evidence. *Id.* ¶ 14.

¶ 55 This court addressed similar issues before concluding that the person holding the power of attorney was able to rebut the presumption of fraud in the case of *In re Guardianship of Spinnie*, a case cited by the trial court in its order. In *Guardianship of Spinnie*, a son, who was then the guardian of the person and estate of his mother, filed an action against a sister to recover assets he alleged were improperly acquired from their mother. *In re Guardianship of Spinnie*, 2016 IL App (5th) 150564, ¶ 1, 65 N.E.3d 541. In 2007, the mother executed a power of attorney for property naming the sister as her agent. *Id.* ¶ 3. At about the same time, the mother received a fairly substantial worker’s compensation settlement and she distributed funds to several people including the sister who then held the power of attorney. *Id.* In 2013, the brother filed a petition to adjudicate the mother as disabled, appoint a guardian *ad litem* for her, and terminate the sister’s power of attorney status. *Id.* ¶ 4. The guardian *ad litem* met with the mother, who indicated that she was not being financially exploited, she did not think that a guardianship was necessary, and she did not think that her son should be her guardian. *Id.* Daniel Cuneo, Ph.D., examined the mother and reported that in his professional opinion, the mother’s emotional, mental, and psychological functions were impaired, and

that she needed a guardian to manage her person and her estate. *Id.* ¶ 5. Thereafter, the court concluded that the mother was a disabled adult and appointed her son as the permanent guardian of the mother’s person and estate. *Id.* The trial court entered judgment against the sister after concluding that there was a presumption of fraud/undue influence involving the \$31,733.19 the mother transferred to the sister. *Id.* ¶ 14. The court concluded that the sister’s testimony that their mother gifted the money to her was insufficient to overcome the burden of proof. *Id.*

¶ 56 On appeal, this court confirmed that “a power of attorney creates a fiduciary relationship between the principal and the agent as a matter of law.” *Id.* ¶ 19. In order to rebut the presumption of the fiduciary relationship, the holder of the power of attorney must show by clear and convincing evidence that her actions were meant in good faith and that she did not betray the confidence placed in her. *Id.* ¶ 22. Significant factors to consider in determining whether the presumption has been rebutted include whether the agent made an honest disclosure to the principal, whether the agent paid adequate consideration, and whether the principal had competent and independent advice. *Id.* (quoting *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 13). Finding that clear and convincing evidence is a relative term, this court stated that depending upon each factual situation, the holder of the power of attorney may only need to respond with *some* evidence in rebuttal, or may need to respond with *substantial* evidence in rebuttal. *Id.* (quoting *In re Estate of Pawlinski*, 407 Ill. App. 3d 957, 966, 942 N.E.2d 728, 736 (2011)). Any transfer of property after the execution of the power of attorney, regardless of whether the transfer was made pursuant to the power of attorney, was

fraudulent if the conveyance either materially benefited the sister or was for the sister's own use. *Id.* ¶ 25. The fact that the mother signed these transfers herself did not insulate the sister from the presumption of fraud that resulted from her position as her mother's power of attorney. *Id.* ¶ 26. A gift is never presumed when there is a fiduciary relationship. *Id.* ¶ 23. However, this court concluded that the sister was able to rebut the presumption of undue influence because almost all of the transactions were made at the same time that the mother was gifting other family members, and therefore, the transfers to the sister were intended as gifts, were fair and equitable, and were not a result of undue influence. *Id.* ¶ 28.

¶ 57 We turn to the facts in this case. The only transfer in this case found to have violated Dennison's fiduciary duty to Hermeling was the transfer of the joint interest in Hermeling's Centralia house. There is no question that Dennison had a power of attorney over his mother's property. The transfer of realty presumptively violated his fiduciary duty and was therefore the result of undue influence or fraud. See *id.* ¶ 19. Whether Dennison actually coerced, used undue influence, or fraudulently misled his mother is not the question, although if he did not do so, that could potentially mitigate against the presumption. To rebut that presumption, Dennison would need to show by clear and convincing evidence that he acted in good faith and did not betray his mother's confidence. See *id.* ¶ 20. We find that the significant "good faith" factors referenced in *Guardianship of Spinnie* do not completely serve to support Dennison's position. There was no evidence or testimony from anyone in this case that Dennison had a frank discussion with Hermeling about the transfer of realty, and so that factor does not support

“good faith.” The stated consideration for the deeded interest was \$10. Testimony at the hearing was that the property had a stated tax value of approximately \$49,000. The vast discrepancy between the value of a one-half interest in the Centralia house and the consideration paid does not support “good faith.” While allegedly Hermeling hired Samuel E. Bauerle to prepare the two legal documents, there was no testimony in a general sense about whether Bauerle consulted with her about the process or her intentions when she “hired” him and/or when she signed the documents. Before trial, the parties stipulated that Hermeling was incompetent and that Moldenhauer would represent her interests. Moldenhauer claimed her mother’s attorney-client privilege, which precluded any specific testimony about what her mother said to the attorney. However, general questions were allowed. From that general testimony, we glean that Hermeling came into Bauerle’s office with her existing property deed and asked the attorney to prepare the power of attorney and the warranty deed. We find the evidence regarding this factor is inconclusive but fails to support “good faith.” Overall, Dennison was not able to rebut the presumption of fraud.

¶ 58 We also find that any stated rationale for Hermeling’s decision to deed the one-half interest to her son and fiduciary, Dennison, was suspect. The only testimony about Hermeling’s rationale came from Dennison. He testified that she told him that she wanted to do this before she died, *i.e.*, she apparently wanted to gift the property to Dennison while she was able to accomplish the task. If there is a fiduciary relationship between a parent and adult child, the fiduciary relationship defeats any presumption that the parent intended to give the child a gift. *Spinnie*, 2016 IL App (5th) 150564, ¶ 23

(quoting *Deason v. Gutzler*, 251 Ill. App. 3d 630, 638, 622 N.E.2d 1276, 1282 (1993)).

The record contains no testimony from any witness to confirm that Hermeling had a desire to gift the interest in her house to Dennison as opposed to the other five living siblings. We find that this testimony was self-serving. Furthermore, as stated above, because Dennison and Hermeling had a fiduciary relationship, the presumption that Hermeling intended to gift the one-half interest in her house to Dennison is defeated. See *Deason*, 251 Ill. App. 3d at 638; *Lemp v. Hauptmann*, 170 Ill. App. 3d 753, 758, 525 N.E.2d 203, 206 (1988).

¶ 59 Dennison also contends that there was no fiduciary relationship when his mother signed the warranty deed because she signed the deed first, and the power of attorney second. In other words, because he was not serving as his mother's power of attorney when she signed the warranty deed, his subsequent position of authority gained mere moments later is irrelevant and cannot serve to defeat the gift. Both Dennison and Harris testified that this was the precise order that the documents were signed. At the trial, Bauerle and Satterthwaite were not asked about the order in which the two legal documents were signed. On appeal, Dennison claims that the court reporter made mistakes in the transcripts. He and Harris both signed bystander's reports attached to the record on appeal indicating that at the hearing, both Bauerle and Satterthwaite testified that the warranty deed was signed first. The transcript of the trial was transcribed and certified by Jodi Wollerman, a certified court reporter, who "reported in machine shorthand the proceedings had on the hearing *** and transcribed the same," which she certified as a "true and accurate transcript of the proceedings." We would find it unusual

for a court reporter to have omitted even one question and answer but highly improbable that she could have omitted the identical questions with answers from two witnesses. We find that the testimony of both Dennison and Harris, coupled with their bystander's reports, were designed to support their own personal agendas in this case.

¶ 60 We agree with the assessment made by the trial court that both documents were signed at the same consultation, and that the order was not significant. The trial court concluded that the warranty deed, although signed, did not complete the transfer of interest until the deed was delivered to Dennison. With no testimony about delivery, we affirm the trial court's finding that even if the warranty deed was signed before the power of attorney, the deed was not operative and could not serve to convey the interest until delivery. See *Herron v. Underwood*, 152 Ill. App. 3d 144, 153, 503 N.E.2d 1111, 1118 (1987).

¶ 61 We conclude that the trial court correctly found that, because of the fiduciary relationship Dennison had with his mother, the transfer of realty violated the fiduciary duty and was presumptively based upon fraud or undue influence. Dennison did not meet his burden to overturn that presumption. We affirm the trial court's order voiding the warranty deed with title to the estate of Norita Hermeling confirmed and quieted.

¶ 62 Financial Exploitation of an Elderly Person

¶ 63 Section 17-56(a) contains the elements required in a financial exploitation case:

“A person commits financial exploitation of an elderly person or a person with a disability when he or she stands in a position of trust or confidence with the elderly person or a person with a disability and he or she knowingly and by deception or intimidation obtains control over the property of an elderly person or

a person with a disability or illegally uses the assets or resources of an elderly person or a person with a disability.” 720 ILCS 5/17-56(a) (West Supp. 2015).

Financial exploitation of an elderly person or a disabled person is a felony. *Id.* § 17-56(b). An “elderly person” is defined as being 60 years of age or older, while a disabled person is defined as someone who suffers from either a physical or mental impairment “that impairs the individual’s *** ability to independently manage his or her property or financial resources, or both.” *Id.* § 17-56(c)(1), (2). The term “deception” has multiple meanings. Deception can mean to knowingly:

“(a) Create or confirm another’s impression which is false and which the offender does not believe to be true; or

(b) Fail to correct a false impression which the offender previously has created or confirmed; or

(c) Prevent another from acquiring information pertinent to the disposition of the property involved; or

(d) Sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not valid, or is or is not a matter of official record; or

(e) Promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did not intend to perform.” 720 ILCS 5/15-4 (West 2014); 720 ILCS 5/17-56(c)(4) (West Supp. 2015).

Deception can also mean “a misrepresentation or concealment of material fact relating to the terms of a contract or agreement” or the use “of any misrepresentation, false pretense or false promise in order to induce, encourage or solicit” the elderly or disabled person to enter into a contract or agreement. 720 ILCS 5/17-56(c)(4) (West Supp. 2015).

Additionally, the illegal use of the assets or resources of an elderly or disabled person

includes the “misappropriation of those assets or resources by undue influence, breach of a fiduciary relationship, fraud, deception, extortion, or use of the assets or resources contrary to law.” *Id.* A person “stands in a position of trust and confidence with an elderly person or person with a disability when he *** is [an] *** adult child *** of the elderly person or person with a disability.” *Id.* Finally, a civil cause of action can be filed for financial exploitation. *Id.* § 17-56(g). The burden of proof shall be by a preponderance of the evidence. *Id.* Damages to the victim or to the estate are treble the amount of the value of the property obtained plus a reasonable attorney fees and court costs. *Id.*

¶ 64 The trial court found that Moldenhauer had proven that Dennison held a fiduciary relationship with Hermeling, an elderly person, however, she did not prove the breach of that duty by a preponderance of the evidence as required by the statute.

¶ 65 Moldenhauer argues that the court applied the wrong burden of proof because under the common law once a fiduciary relationship is proven there is a presumption of fraud which shifts the burden of proof to the defendant, who must rebut the presumption by clear and convincing evidence. *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 13. She argues that Dennison did not rebut the presumption of fraud and she is thereby entitled to damages. Moldenhauer contends that the presumption of fraud in cases of fiduciary duty should apply to cases filed pursuant to this elder exploitation statute because the legislature is presumed to be knowledgeable of the common law. See *Kozak v. Retirement Board of the Fireman’s Annuity & Benefit Fund*, 99 Ill. App. 3d 1015, 1018, 425 N.E.2d 1371, 1373 (1981).

¶ 66 We agree with the trial court and decline to read the common law presumption into this unique criminal statute that affords claimants a civil remedy and mandates the preponderance of the evidence burden of proof. We consider the statutory language to be the best evidence of the legislature’s intent, and we must afford that language its plain and ordinary meaning. *Jordan v. O’Fallon Township High School District No. 203 Board of Education*, 302 Ill. App. 3d 1070, 1079, 706 N.E.2d 137, 143 (1999) (citing *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189, 561 N.E.2d 656, 661 (1990)).

¶ 67 The elder exploitation statute lists “breach of a fiduciary relationship” as one of the enumerated examples of acts that constitute an “illegal use of the assets or resources” of an elderly or disabled person. 720 ILCS 5/17-56(c) (West Supp. 2015) We find that the legislature’s inclusion of this delineated conduct was intended to ensure that a breach of a fiduciary duty was actionable under the elder exploitation statute. The legislature contemplated the common law causes of action because it specifically provided that elder exploitation claimants maintain the right to pursue “any cause of action or seek any remedy available under the common law[] or other applicable law.” *Id.* § 17-56(g). Thus, Moldenhauer was not constrained to file this claim only pursuant to the elder exploitation statute and alternatively could have filed a common law breach of fiduciary duty claim against Dennison. As the statute contains no reference to application of the common law presumption of liability in a case of misappropriation by breach of fiduciary duty, and as the language of the statute is the best evidence of the legislature’s intent, we affirm the trial court’s conclusion that the presumption of liability does not apply to Moldenhauer’s statutory claim. *Jordan*, 302 Ill. App. 3d at 1079.

¶ 68 The trial court concluded that Moldenhauer was unable to establish that Dennison illegally used Hermeling's money. We agree. If Dennison used the money in his mother's checking account to provide for her various needs, to pay utility bills on her Centralia house, and to purchase supplies to repair her Centralia house as he testified, then those expenditures would not necessarily constitute a breach of his fiduciary duty. There is no specific evidence in the record that Dennison engaged in any misrepresentation or fraudulent actions or that he gained access to her checking account by undue influence. While not all of Dennison's testimony was consistent, there is no definitive evidence that what he said is untrue. Dennison and Moldenhauer's sister, Karen Sue Potter, testified that he called her incessantly with requests for approval of his expenditures of their mother's money. Harris testified that Dennison did not spend his mother's money on himself. However, Potter and Harris were not there with him at every convenience store, grocery store, gas station, or restaurant to know whether he only spent money on Hermeling. Moldenhauer had the burden of proof but testified that she could not say that Dennison did not spend the money as he stated. The record simply does not contain detailed documentation that Dennison misappropriated Hermeling's money. We find that Moldenhauer did not meet the burden of proof on this issue and affirm the trial court's judgment.

¶ 69 Although Moldenhauer established that Dennison was in a position of trust and owed a fiduciary duty to Hermeling, there was insufficient evidence that Dennison illegally used Hermeling's assets. We affirm the trial court's ruling on count II.

¶ 70

CONCLUSION

¶ 71 For the foregoing reasons, the judgment of the circuit court of Marion County is hereby affirmed.

¶ 72 Affirmed.