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NO. 4-10-0735

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JANICE L. HERMAN, Individually and as Special Representative of the ESTATE OF DORTHA M. HILTON, Deceased, Plaintiff-Appellant, v. MARVIN HILTON, SR., and LINDA BROOKS, Defendant-Appellees.	)))))))	Appeal from Circuit Court of Logan County No. 05L7 Honorable Charles M. Feeney, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice Steigmann and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The husband of a disabled wife, having a power of attorney from her, acted fairly toward her by transferring their jointly owned assets into his sole ownership in order to qualify her for public aid. But his subsequent transfers of these assets to their daughter were fraudulent as to his creditors.

¶ 2 Janice L. Herman and Linda M. Brooks are daughters of Dortha M. Hilton and Marvin Hilton, Sr., both of whom are deceased. (Because these latter two had the same last name, we will refer to them by their first names. In the pleadings and documents in the record, "Dortha" has been variously referred to as "Dortha," "Dorotha," and "Dorothy.") Dortha died on August 7, 2005, and Herman informs us in her brief that Marvin died on October 18, 2007–although, Herman adds, no suggestion of his death ever was filed in the trial court. See 735 ILCS 5/2-1008(b)(2) (West 2006).

¶ 3 In June 2005, some two years before Marvin's death, Herman filed a lawsuit against

Marvin and Brooks. She brought this action in her individual capacity and also as the special representative of Dortha's estate. In her amended complaint, Herman alleged that Marvin had breached his fiduciary duty to Dortha, as her attorney in fact under a power of attorney, by fraudulently conveying his and Dortha's jointly owned marital residence, bank account, and certificates of deposit into his sole ownership and by subsequently transferring those assets to Brooks, thereby depriving Dortha and her creditors of their interests in those assets.

¶ 4 A bench trial was held on December 3, 2009, and on June 24, 2010, the trial court issued a decision, in which the court found in favor of Marvin and Brooks and against Herman on all counts of her amended complaint.

¶ 5 Herman appeals. She argues the trial court erred by finding clear and convincing evidence that the transactions in question were fair to Dortha.

¶ 6 There were essentially two sets of transactions. One set of transactions transferred the property from Marvin's and Dortha's joint ownership into Marvin's sole ownership, while Marvin was Dortha's attorney in fact for purposes of property. Herman has failed to establish, by legal argument, that these transactions were unfair to Dortha, considering that Dortha had to be divested of assets in order to qualify for public aid.

¶ 7 The other set of transactions transferred the property from Marvin to Brooks. We are persuaded by Herman's argument that these transactions were fraudulent as to Marvin's creditors. Therefore, we affirm the trial court's judgment in part and reverse it in part, and we remand this case for further proceedings consistent with this order.

¶ 8 I. BACKGROUND

¶ 9 A. Facts in the Present Case

¶ 10 In its decision of June 24, 2010, the trial court made factual findings, which, in the absence of a trial transcript, the parties have adopted as the record of the trial. The factual findings are as follows, interspersed with our own observations from the pleadings, the docket entries, and the exhibits admitted in evidence.

¶ 11 Marvin and Dortha were married for approximately 59 years, and numerous children resulted from their marriage. Herman and Brooks are two of the children.

¶ 12 On March 9, 1976, Marvin and Dortha bought a residence in Mt. Pulaski, Illinois, and on August 26, 1985, they bought an additional parcel. Both of these parcels ("the marital residence") were titled in the names of Marvin and Dortha as joint tenants.

¶ 13 On February 1, 1994, Dortha signed an Illinois short-form power of attorney for property, which Thomas M. Harris had drafted (Harris was their longtime attorney). This power of attorney appointed Marvin as Dortha's attorney in fact, authorizing him to act on her behalf in a variety of property matters, including "real estate transactions," "financial institution transactions," "tangible personal property transactions," and "all other property powers and transactions."

¶ 14 At the same time, Marvin signed an Illinois short-form power of attorney, drafted by Harris, which appointed Dortha as Marvin's attorney in fact for purposes of transactions with property.

¶ 15 In the 1990s, especially in the late 1990s, Dortha's mental functioning deteriorated, and at some point in the late 1990s, she was diagnosed with Alzheimer's disease. Nevertheless, she continued to reside in the marital home with Marvin.

¶ 16 In January 2000, Dortha fell, fracturing her hip. She underwent hip surgery and was transferred from the hospital into a nursing home. A surgically implanted pin in her hip broke, and

she underwent a second surgery, after which she returned to the nursing home. On approximately January 31, 2000, she moved out of the nursing home and back into the marital residence with Marvin.

¶ 17 Around this time, Marvin met with Harris to discuss estate-planning, in view of Dortha's failing health. Harris advised Marvin, first of all, that he needed a new power of attorney, since his existing power of attorney appointed Dortha as his agent.

¶ 18 Next, Harris advised Marvin to put the marital residence into Marvin's name alone because it appeared that Dortha would need long-term care, which would be very expensive. Harris also advised Marvin, in conjunction with this transfer, to establish a testamentary trust to provide for Dortha's care in case Marvin predeceased her.

¶ 19 Harris explained to Marvin that this proposed transfer of the marital residence from joint tenancy into Marvin's sole ownership was necessary to qualify Dortha for public aid and that it was best to make this transfer right away, to begin the 36-month look-back period. See 42 U.S.C. § 1396p (c)(1)(B)(i) (2000). Harris told Marvin that if, after transferring Dortha's share of the marital residence to himself, he and Dortha were able to get through the ensuing 36-month period without receiving public aid, the marital residence would be protected from a public-aid lien or from being applied toward health-care expenses before Dortha qualified for public aid.

¶ 20 As Harris recalled at trial, Marvin's concerns were twofold: taking care of Dortha's needs and getting property out of her name. Harris did not recall discussing the bank accounts with Marvin.

¶ 21 Nevertheless, on February 15, 2000, in the spirit of Harris's advice, Marvin changed his and Dortha's jointly owned account at The Farmers Bank in Mt. Pulaski so as to make himself

the sole account-holder. The account, opened in 1983, originally was in the names of both him and Dortha, and he changed it so that it was in his name alone. There was no evidence that he used Dortha's power of attorney to make this change. By the terms of their contract with the bank, either he or Dortha could have withdrawn all of the funds from the account at any time.

¶ 22 Likewise, either he or Dora had the contractual right to dispose of two certificates of deposit that they owned at The Farmers Bank. One certificate of deposit, with a maturity date of February 16, 2000, was in the deposit amount of $101,295.44, and it was titled as "Marvin Hilton or Dorothy Hilton." The certificate said that only one signature was required to surrender the certificate. Marvin signed the surrender portion of the certificate on February 15, 2000.

¶ 23 Also on February 15, 2000, Marvin changed the title of the other certificate of deposit to himself alone. This certificate of deposit, in the amount of $21,510.21, initially was titled as "Marvin Hilton or Dorothy Hilton," and it had a maturity date of May 19, 2000. On the certificate was a notation dated February 15, 2000, changing the title by eliminating Dortha's name. Marvin's signed initials are by the change.

¶ 24 After divesting Dortha of her interest in these accounts, Marvin proceeded to the real estate. On February 23, 2000, he signed a warranty deed, drafted by Harris, that conveyed the jointly owned marital residence to himself. The deed had a signature line for Marvin and a signature line for Dortha. Marvin signed for himself, and he also signed his name on Dortha's signature line as "Her attorney in fact."

¶ 25 On October 23, 2000, Marvin signed another version of this warranty deed in a similar fashion. He signed for "Dorothy Hilton" as "Her attorney in fact." The purpose of this deed was merely to correct an error in the legal description in the deed of February 23, 2000. The

corrected deed was admitted into evidence, and it bears a file stamp showing that on October 24, 2000, it was recorded in Logan County.

¶ 26 Also on February 23, 2000, the same day Marvin signed the warranty deed, he signed two other documents: a power of attorney and a will. In the power of attorney, Marvin appointed Brooks as his agent for purposes of transactions with property and Herman as his alternate agent. His will established a testamentary trust for Dortha's benefit, naming Brooks as trustee and Herman as alternate trustee. The trust directed that after payment of "just debts and expenses of administration," all of Marvin's property was to be converted into cash and given to the trustee, who was to use all of the income and principal, as the trustee deemed desirable, for the "maintenance, medical care, support, general welfare and comfortable living of [Dortha]." Marvin named Brooks and Herman as the residual beneficiaries of his estate.

¶ 27 Around this time, some family members accused Marvin of physically abusing Dortha. Marvin responded by telling certain of his children they no longer were welcome at the marital residence. The trial court thought that these accusations of physical abuse might have had something to do with why Marvin excluded some of his children from his February 2000 will. The court noted, however, that, according to Harris's testimony, the prior wills of both Marvin and Dortha excluded some of the children due to preexisting hard feelings.

¶ 28 On September 20, 2000, Marvin executed a different power of attorney because he had a falling out with Brooks. In this power of attorney, he substituted another daughter, Carol Hilton, as his agent for purposes of transactions with property, and he appointed Herman as his successor agent.

¶ 29 Eventually, Marvin and Brooks mended their relationship, and on May 25, 2002,

Marvin executed a quitclaim deed conveying his interest in the marital residence to Brooks for $5,000–"[p]lus $1.00 for contents and other consideration." (Harris testified he never advised Marvin to make this conveyance and that he had no knowledge that Marvin was going to make this conveyance. The quitclaim deed, consisting of handwritten entries on a form, says it was written by Brooks.) The deed was recorded on May 5, 2003. In addition to the stamp indicating that the deed was recorded on that date, the deed has another stamp, signed by Brooks, indicating that the deed is "exempt". Subsection (e) provides that a transfer is exempt from the real estate transfer tax where under section 31-45(e) of the Real Estate Transfer Law (35 ILCS 200/31-45(e) (West 2002)) "the actual consideration is less than $100." 35 ILCS 200/31-45(e) (West 2002).

¶ 30 On May 29, 2002, in Logan County case No. 02-P-80, Senior Services of Central Illinois, on behalf of Dortha, filed a petition for an order of protection against Marvin. That same day, the circuit court issued an emergency order of protection, which did the following: (1) forbade Marvin from having any contact with Dortha, (2) ordered Marvin to stay away from Herman, (3) granted "physical care and possession" of Dortha to Senior Services, (4) granted Senior Services "exclusive possession" of "personal property" belonging to Dortha, and (5) prohibited Marvin from "taking, transferring, encumbering, concealing, damaging, or otherwise disposing of any property belonging to Dortha." The order stated that a "hearing on extension of the order of protection" would occur on June 13, 2002, and that the order would expire on that day. The Logan County sheriff served this emergency order of protection on Marvin on May 29, 2002, the same day the order was issued.

¶ 31 On June 4, 2002, in Logan County case No. 02-P-66, Herman filed a petition to be appointed the temporary guardian of Dortha's person and estate, and also a petition to be appointed

her plenary guardian, on the ground that Dortha was disabled by Alzheimer's disease and incapable of caring for herself or her affairs. On June 4, 2002, the trial court appointed Herman to be the temporary guardian of Dortha's person and estate, and the court appointed Thomas Van Hook to be the guardian *ad litem*. (Given Herman's appointment, the emergency order of protection in Logan County case No. 02-P-80 was allowed to expire.)

¶ 32 On August 20, 2002, Herman's attorney served a notice on Brooks, Marvin, and several other persons that a hearing would be held on August 28, 2002, on Herman's petition to be appointed Dortha's guardian. A copy of the petition was attached to the notice. The trial court heard evidence on this petition on August 28, October 2 and 9, and November 13 and 27, 2002. Brooks testified on October 9.

¶ 33 On November 27, 2002, the court entered an order declaring Dortha to be a disabled person and appointing Herman as the permanent guardian of Dortha's estate and person. That same day, the circuit clerk issued letters of office to Herman stating that Herman was "authorized to have under the direction of the court the care, management and investment of the ward's estate and the custody of the ward, and to do all acts required of her by law." The letters placed no limitations on Herman's powers and duties as guardian.

¶ 34 On January 3, 2003, Marvin and Brooks went to The Farmers Bank. At that time, four accounts were in Marvin's sole name at the bank: (1) a certificate of deposit in the amount of $118,837.44, (2) a certificate of deposit in the amount of $25,185.92, (3) a savings account in the amount of $22,398.18, and (4) a checking account in the amount of $70.95. Marvin withdrew $10,000 from his savings account. He also closed the certificates of deposit prematurely and deposited the resulting funds into his checking account.

¶ 35 The next day, January 4, 2003, Marvin and Brooks returned to the bank. Marvin withdrew $15,000 in cash from his checking account and withdrew an additional $127,652.95 from his checking account in the form of a cashier's check payable to Brooks.

¶ 36 On both January 3 and 4, 2003, the president of the bank, Paul Volle, spoke with Marvin privately to make sure he knew what he was doing and that he was not acting under duress.

¶ 37 Harris had no knowledge of Marvin's paying $127,652.95 to Brooks. Nor did he ever advise Marvin to do so.

¶ 38 On January 13, 2003, Marvin executed another power of attorney, reappointing Brooks as his agent for property. This time, he named no successor agent.

¶ 39 Also in January 2003, Marvin executed another will. In this will, he established the same testamentary trust for the care of Dortha, and again he named Brooks as the trustee. He did not name a successor trustee, though, and he named Brooks as the only residuary beneficiary of his estate. He explicitly made no provision for the rest of his children.

¶ 40 On January 29, 2003, in Logan County case No. 02-P-66, Herman filed a verified pleading entitled "Petition for Approval and Payment of Guardian Expenses From the Marital Estate of Dortha M. Hilton By Marvin Hilton, Sr." In her petition, Herman alleged that Marvin and Dortha had "accumulated marital assets and property" during their more than 50 years of marriage. Herman had been taking care of Dortha at Herman's residence, and although Herman had been receiving Dortha's Social Security benefits in the amount of $530 a month, these benefits, Herman alleged, did not fully cover what she had spent for Dortha. Herman claimed that from June 5, 2002, through January 31, 2003, she had incurred out-of-pocket costs totaling $4,309.50, and she requested the court to order Marvin to reimburse her that amount out of the marital estate.

¶ 41 In a hearing on May 30, 2003, in Logan County case No. 02-P-66, at which Marvin and his counsel were present, the parties agreed that Marvin would pay $270 per month toward Dortha's expenses and that the first payment would fall due on June 1, 2003. The parties further agreed that he would pay an additional $970 to Herman within two weeks. The record does not appear to reveal whether Marvin fulfilled this agreement.

¶ 42 Upon Dortha's death in August 2005, her will left her entire estate to Marvin.

¶ 43 B. Logan County Case No. 02-P-66

¶ 44 Because Herman's argument in the present case is premised in part on a finding by the trial court in Logan County case No. 02-P-66, it is necessary for us to revisit that case in greater depth. Some six years ago, we heard Brooks's appeal from the trial court's judgment in Logan County case No. 02-P-66, and we affirmed the judgment. *In re Estate of Hilton*, No. 4-04-0296, slip order at 1 (February 23, 2005) (unpublished order under Supreme Court Rule 23).

¶ 45 The appeal of that case involved a dispute over attorney fees. Attorney Van Hook, had requested compensation for his work and expenses as guardian *ad litem* in the proceedings for appointment of a plenary guardian over Dortha. *Hilton*, slip order at 2-3. Section 11a-10(c) of the Probate Act of 1975 (755 ILCS 5/11a-10(c) (West 2002)) provided that the trial court could look to two sources for payment of the guardian *ad litem*'s fees and expenses: the respondent (*i.e.*, the person allegedly in need of a guardian) or, alternatively, if the respondent was unable to pay, the petitioner (*i.e.*, the party requesting the appointment of a guardian). The problem was that there was more than one petitioner in Logan County case No. 02-P-66, because more than one person wanted to be Dortha's guardian. Herman filed a petition (*Hilton*, slip order at 1), Marvin filed a petition (*id.* at 2), and Brooks filed a petition (*id.*). Of those three petitioners, who should pay Hook's fees and

expenses? In deciding that question, the trial court considered, among other evidence, the testimony of Marvin and Brooks in the hearing of April 5, 2004. (According to its docket entry of December 3, 2009, in the present case, the court took judicial notice, in the bench trial, of both the transcript of the testimony in Logan County case No. 02-P-66 (petitioner's exhibit No. 19) and also of this court's decision on appeal in that case.)

¶ 46 Marvin testified in substance as follows in Logan County case No. 02-P-66, in the April 2004 hearing on Hooks's fees and expenses. (Marvin was deceased by the time of the December 2009 bench trial in the present case, but the trial court admitted in evidence, as petitioner's exhibit No. 19, the transcript of the testimony from Logan County case No. 02-P-66.) Marvin testified that in February or March 2000, Brooks came to Illinois from Florida to help him take care of Dortha, who had broken her hip. Marvin did not want just anybody in the house helping with Dortha. He wanted somebody he could trust, somebody who would not steal from him–items had been turning up missing from the house, such as a four-thousand-dollar painting that had been hanging on the wall. So, in early 2000, Brooks came to help with Dortha. Around the end of August 2000, before returning to Florida, Brooks gave Marvin a bill in the amount of $125,904 for her services. She charged him at the rate of $21.50 an hour for around-the-clock services.

¶ 47 Marvin paid the bill–over two years later–in his trip with Brooks to The Farmers Bank on January 4, 2003. Van Hook asked Marvin:

> "Q. But are you willing to spend your life, basically your life savings and everything you had to pay your daughter $21.50 per hour 24 hours a day for nine months?
>
> A. No, there was an agreement for me to move to Kansas, and

Linda was going to take care of me and my wife the rest of our lives if we needed it.

Q. And so she was going to do that once all your money was gone. Is that what the deal was once you had paid her the 21.50 for 24 hours, she would then do it for free after that?

A. She's going to take care of us, me and my wife the rest of our lives if we needed it. That was the agreement on it."

¶ 48 In addition to paying over to Brooks the $127,652, Marvin testified he sold her the marital residence for $5,000. Herman's attorney asked Marvin:

"Q. Do you think the house at that time that you sold it for $5,000 did it have–did it have a value of greater than $5,000?

A. Oh, yes. It had a value greater than that, but I'm 76 years old and my wife is 80, and for her to promise to take care of us the rest of our lives, I didn't care what the value of the house was."

¶ 49 As it turned out, however, Marvin and Dortha did not move to Kansas, and Brooks did not get a chance to take care of them for the rest of their lives, because Herman, instead of Brooks, ended up being awarded the guardianship of Dortha. Marvin was granted visitation rights, and he did not want to move out of Illinois, away from Dortha.

¶ 50 Marvin's attorney asked him in the April 2004 hearing:

"Q. Is it still your intention if Linda has guardianship, that Linda would take care of you and your wife?

A. Yes, when she gets guardianship, she will take care of me

and my wife. I'm heading to Kansas as quick as I can get there."

That plan never was realized, because Herman became Dortha's guardian–and stayed her guardian.

¶ 51 Brooks testified in substance as follows in the April 2004 hearing on the guardian *ad litem*'s fees. In February 1999, Marvin and Dortha were visiting Brooks in Florida, in the home that she shared with her husband. Dortha had been falling down a lot lately, and Brooks entered into a verbal agreement with her parents that if Dortha's condition continued to deteriorate, Brooks would move to Illinois and assist Marvin by providing 24-hour care for Dortha in the marital residence. After researching prices of similar care at numerous private health-care providers, they agreed that Brooks would be paid a wage of $21.50 per hour. Brooks testified that at the time of this verbal agreement, she did not believe she ever would end up having to take care of Dortha.

¶ 52 As it turned out, though, Dortha broke her hip on January 2, 2000, and Brooks, who was retired, moved her belongings from Florida to Illinois, where she put them in storage, and she helped take care for Dortha for eight months. Brooks testified she helped Dortha feed herself, carried her to the bathroom (since she was not permitted to put any weight on her hip), dressed her, washed her, and kept her mind occupied. This was hard work, Brooks insisted. Although Brooks lived in the marital residence from January through August 2000, caring for Dortha, she testified she fed herself from a freezer she had brought along with her and had put on the back porch. She washed her clothes in the Laundromat down the road. She subsisted on her retirement income, supplemented by funds from her husband, who remained in Florida.

¶ 53 For her 24-hour assistance from January through August 2000, Brooks assessed $125,904 in fees to her parents. She handed them a bill in that amount on August 31, 2000, about a week before she returned to Florida. By that time, Dortha had gotten her health back and was

ambulatory and speaking clearly. Marvin did not pay the bill before Brooks left. They parted on bad terms. They had got into some dispute over Herman and her husband. But they patched up their relationship in December 2000.

¶ 54 Eventually, Brooks and her husband moved from Florida to Kansas. Brooks further testified that on May 24, 2002, Marvin and Dortha visited her at her Kansas home (having still not paid her $125,904 bill). While there, Marvin, Dortha, and Brooks entered into a verbal agreement whereby Marvin would transfer ownership of the marital residence to Brooks in exchange for Brooks's promise that Marvin and Dortha could reside for the rest of their lives with her and her husband. The proceeds from the sale of the marital residence were to be used to transport Marvin's and Dortha's personal belongings to Kansas and to provide for their care and living expenses. Van Hook asked Brooks:

> "Q. And what was your agreement with your father and mother concerning the signing of the deed?
>
> A. The house was going to be sold. The money was going to be used to hire people, trucks, whatever it took to get their contents moved out there for me to move them into my house and for me to take care of them for the rest of their lives. My father has no life insurance. So the money of the sale of the home was going to be used for his burial, if he was to get sick, whatever."

¶ 55 The day after this verbal agreement, May 25, 2002, Marvin executed the quitclaim deed conveying the marital home to Brooks for $5,000 and selling her the contents for $1. Then, on May 29, 2002, Dortha was removed from the marital residence pursuant to the emergency order

of protection.

¶ 56 Van Hook asked Brooks:

"Q. When these proceedings started and it was apparent that your father was not going to move as long as Dorotha was staying here in Illinois with Janice, did you transfer the deed back to your father?

A. No, sir.

Q. Why not?

A. The deal was that I was to take care of mother and father for the rest of their lives. My father still–he has no health insurance, no life insurance to pay for anything that he has got. His health is not that good. If his health goes down, he still has to take care.

Whether Janice is guardian of mother or not, and that was part of the agreement that I take care of both of them, and he's still living, and I have now applied for guardianship of mother so I don't know what the outcome is going to be. So whatever the outcome is we will decide on what happens with the deed from there.

Q. So if you don't get the guardianship and the guardianship remains with Janice, then you're going to transfer the deed back to your father?

A. I will have to get back with my father and decide what he wants to do at that point."

¶ 57 On January 4, 2007, Marvin issued Brooks the cashier's check in the amount of $127,652.95, and on January 13, 2003, Brooks wrote this on her bill of August 31, 2000, in the amount of $125,904, near Marvin's signature: " '[P]aid in full by Marvin Hilton all penalties dropped."

¶ 58 Judge David L. Coogan, who was presiding over the April 2004 hearing, also questioned Brooks, and he was concerned about the $127,652.95 that Brooks had collected from Marvin for helping with Dortha for eight months, from January through August 2000. Judge Coogan asked Brooks:

> "Q. At $21.50 an hour for 24-seven do you know how much that would cost a year for you to take care of your mother?
>
> A. Your Honor, I don't know, but that is the verbal agreement that my parents agreed on. We called all the different agencies. If they had to hire a nurse to come into the home, she would have to have stayed there 24 hours a day. He was unfamiliar with any kind of medical background at that point.
>
> Q. Would you be surprised if I told you that 24 hours a day at $21.50 an hour times 365 days a year that would be $188,340 a year?
>
> A. I'm sure it would be, but if they brought a nurse in there, a travelling nurse charges $30.00 an hour at times. So if they brought a professional nurse in there and she stayed the same amount, her bill would be triple the amount what mine was."

Although Brooks had worked in a psychiatric hospital and had been an administrative assistant in

a nursing home, she admitted she was not a registered nurse, a certified nursing assistant, or a licensed practical nurse.

¶ 59 Van Hook asked Brooks:

> "Q. And at the time that you received that money in January of 2003 you were aware of these [guardianship] proceedings in this courtroom, were you not?
>
> A. Correct.
>
> * * *
>
> Q. Did you know that the court or the guardian may have the right to some of those funds because of the concept of marital property?
>
> A. I don't know. My bill was submitted in 2000 way before any of this ever started taking place. I did a job. I worked for a living and I expected to get paid for my job. It was before this guardian ever happened. Two years prior before it ever happened. So I have no idea why my job has anything to do with the estate matters."

¶ 60 At the end of the hearing in Logan County case No. 02-P-66, Judge Coogan initially would not go so far as to say that anyone had been "overcharged," but ultimately he found a "dissipation" of marital assets. He just could not bring himself to stick the citizens of Logan County with the guardian *ad litem*'s bill after hearing that Brooks had collected over $125,000, from what used to be Dortha's and Marvin's account, for helping to take care of her mother for eight months

and after hearing that for a mere $5,000, Brooks additionally had been deeded what used to be Dortha's and Marvin's house. Judge Coogan said:

> "THE COURT: Well, in this particular case I'm not saying anybody is undercharging or anybody is overcharging, but the County of Logan is not going to pick up the tab on the guardian ad litem where there are funds involved. I think there was some marital funds involved in this particular case.
>
> If we have someone that was basically paid $125,000 in cash and a house, attorneys for Mr. Hilton by this Guardian Ad Litem's Exhibit Number 1 on expenses of $10,000 has already gone out. This was already paid out. I expect some money out of the marital assets to pay for the guardian ad litem's fee.
>
> I'm going to take a short recess here for a minute and come back, but I don't think a person–it is a lot like a child support. Well, I make $50,000 but I quit my job yesterday so, judge, there is nothing you can do. You cannot make me pay child support. I don't think you can become impoverished by voluntary dissipation of funds. I think that some of the funds are still marital assets that should be used to pay the GAL."

¶ 61 After the recess, Judge Coogan expressed concern that a power of attorney had been used as a substitute for a guardianship. He remarked:

> "[T]he court is concerned to a great degree in the fact that power of

> attorneys are not basically designed to avoid a person having to go through a guardianship proceeding. If a person needs a guardian and they are incompetent, they are disabled, there is not substitute for a guardianship proceeding.
>
> In this particular case I believe that we have heard the testimony of Mr. Hilton that his wife was failing physically and mental health, and that was the reason that he had assets transferred both real estate and cash in financial institutions transferred from basically joint tenancy over to himself. I have great reservations about whether or not that was proper and, in fact, I don't think it is."

Because "voluntary indigence [was] not a reason for the citizens of Logan County to pick up this guardian ad litem fee," Judge Coogan ordered Brooks, and Brooks alone, to deposit $5,000 with the circuit clerk, to cover Van Hook's fees and expenses.

¶ 62 Brooks objected. She argued she had earned the $127,652.95 fair and square, the same way Van Hooks had earned his $5,000. Judge Coogan was not persuaded.

¶ 63 Brooks immediately filed an appeal, and on April 30, 2004, Van Hook, counsel for Herman, and counsel for Marvin and Brooks appeared before Judge Coogan in a hearing on Van Hook's motion for a continuance. Van Hook had moved to continue any further proceedings until Brooks's appeal was decided. In granting the motion, Judge Coogan remarked:

> "THE COURT: I'm not sure anything can be heard today. My main concern on this is that we are not going to litigate this and litigate this. If it is up in front of the Appellate Court, that is fine.

I made a finding last time that I believed marital assets were used in dissipation and some of that should be restored back for payment of fees in this case.

Ten thousand dollars worth of marital money has already been paid to counsel for Marvin Hilton, Sr. No money has been paid anywhere else.

Now, those are my findings. The Appellate Court if they see fit, they can reverse. If they see fit, they can affirm. While things are up on appeal we are not going to proceed any further.

As I stated before I think the citizens of Logan County are not going to pay a guardian ad litem fee on a case where a house was in essence given away and $130,000 was given away in cash. I'm not going to do it. I don't have the authority to do it, and I'm not going to do it."

¶ 64 We affirmed Judge Coogan's decision in Logan County case No. 02-P-66, reasoning in part as follows:

"In the case *sub judice,* Herman filed the initial petition for appointment of guardian and to adjudicate [Dortha] a disabled person. [Marvin] also filed a petition for appointment of guardian of his wife. The trial court appointed Van Hook as guardian *ad litem*. Over a year later, [Brooks] petitioned the court for the appointment of a different guardian of her mother's estate and her person.

[Brooks] asked the court to appoint her as plenary guardian. By inserting herself in the matter, [Brooks] became more than an 'interested bystander.'

Based on section 11a-10(c) [of the Probate Act of 1975 (Probate Act) (755 ILCS 5/11a-10(c) (West 2002))], the trial court had the authority to order [Dortha] or her estate to pay the guardian *ad litem*'s fees. If [Dortha] or her estate were unable to do so, the court could order the petitioner to pay all such fees or such amounts [Dortha] or her estate were unable to pay. The court found [Dortha] had nothing. *Further, based on the evidence, the court found the marital assets appeared to have been dissipated through [Marvin's] $125,000 payment to [Brooks] and the transfer of the house to her for $5,000.* Thus, the court implicitly found neither [Dortha] nor her estate could pay for the guardian *ad litem*'s fees. The court then had the authority to look to [Brooks] for payment as she was a petitioner. While Herman was also a petitioner and [Dortha] had other children, the court found [Dortha]'s estate would have had assets to pay the fees had it not been for the work of [Marvin] and [Brooks]. Therefore, as the court looked solely toward [Brooks], we will not address whether [Dortha's] other children should have been assessed a portion of the fees because they are not parties to this appeal." (Emphasis added.) *Hilton*, slip order at 7-8.

¶ 65 C. The Trial Court's Decision in the Present Case

¶ 66 Whereas Judge Coogan presided over the April 2004 hearing in Logan County case No. 02-P-66, Judge Charles M. Feeney presided over the December 2009 bench trial in the present case and wrote the decision of June 24, 2010–a painstaking and conscientiously reasoned decision. In his decision, Judge Feeney first set forth his factual findings (which we have stated in part II(A) of this order), and then, under the heading of "Analysis," he considered, one by one, counts I, II, IV, and V of the amended complaint. (The amended complaint has no count III.) Here are the theories that the counts asserted and his conclusions as to each count.

¶ 67 1. *Count I: The Marital Residence*

¶ 68 a. Herman's Allegations

¶ 69 In count I of her amended complaint, Herman alleged that Marvin had breached his fiduciary duty to Dortha, as her attorney in fact, by using her power of attorney to transfer her interest in the jointly owned marital residence to himself and by subsequently transferring the marital residence to Brooks without adequate consideration. According to count I, Marvin made these transfers not for Dortha's benefit but in order to punish Herman and others of his children for reporting his physical abuse of Dortha. The transfers "depriv[ed] [them] of potentially inheriting the aforesaid real estate by testate or intestate succession," Herman alleged, and the transfers had "the additional purpose of hindering or thwarting expected creditors of Dortha"–including Herman, who claimed she was entitled to compensation for her out-of-pocket expenses as Dortha's plenary guardian.

¶ 70 As a remedy, Herman requested the avoidance of the warranty deed conveying the marital residence to Marvin; or, alternatively, a declaration that Marvin's quitclaim deed to Brooks

severed the joint tenancy, converting Dortha's interest into that of a tenant in common; or, alternatively, damages in the amount of half the value of the marital residence, to be paid by Marvin to Dortha's estate.

¶ 71 b. The Trial Court's Decision on Count I

¶ 72 The trial court agreed with Herman that Marvin's execution of the warranty deed conveying Dortha's interest in the marital residence to himself was presumptively fraudulent. Nevertheless, the court found that the presumption of fraud had been rebutted by clear and convincing evidence because Marvin had removed Dortha's name from the marital residence not for the purpose of enriching himself but for the purpose of gaining public aid for her. See *Glass v. Burkett*, 64 Ill. App. 3d 676, 680-81 (1978) ("Where a fiduciary relationship exists at the time of a transaction whereby the dominant party appears to gain, the transaction is deemed presumptively fraudulent but such presumption is not conclusive and may be rebutted by clear and convincing proof that the dominant party has exercised good faith and has not betrayed the confidence reposed in him.") The court found: "Mr. Hilton's actions, based upon the advice of his learned and long time legal advisor, were intended not to remove assets from Mr. Hilton as much as they were to gain a resource to assist in the tremendous expenses of long term care."

¶ 73 Considering that Marvin followed Harris's advice in good faith and considering that, in his will, Marvin left everything in trust for Dortha, the trial court inferred that Marvin actually intended to take nothing from Dortha, despite the absolute terms of the warranty deed. The court said:

> "[T]he Court is convinced that Mr. Hilton did not intend to deprive Mrs. Hilton of anything, but in fact took the action he took

> in order to gain an additional financial resource with which to provide care to Mrs. Hilton. In this endeavor, he followed the advice of his attorney. While these actions may or may not have resulted in the later consequence of depriving Mrs. H[i]lton's estate of assets, these actions when taken were intended to gain a resource with which to pay expected future creditors. The contemplated creditors were long term care providers such as in a nursing home. Mr. Hilton acted in preparation for unknown future events. The Court finds by clear and convincing evidence that Mr. Hilton's actions in changing the real estate to his name only were not fraudulent but were fair and equitable to Mrs. Hilton in that they were done to help provide for her future care."

Therefore, concluding that the presumption of fraud had been rebutted by clear and convincing evidence, the court found against Herman on count I of her amended complaint.

¶ 74 2. *Count II: Tangible Personal Property and Documents Evidencing Ownership of Intangible Personal Property*

¶ 75 a. Herman's Allegations

¶ 76 In count II of her amended complaint, Herman alleged that Dortha had owned, singly or jointly, "tangible personal property and documents evidencing ownership of intangible personal property" and that Marvin had sold this personal property to Brooks for $1 pursuant to the quitclaim deed. Herman cited this court's decision in *Hilton*, in which we noted the circuit court's finding that the "marital assets appeared to have been dissipated" by the transfers to Brooks. Herman also attached a copy of *Hilton* to her amended complaint "for purposes of collateral estoppel."

¶ 77 Herman requested the avoidance of the quitclaim deed "as a dissipation of [Dortha's] assets." Alternatively, she requested damages from either Marvin and Brooks or from both of them.

¶ 78 b. The Trial Court's Decision on Count II

¶ 79 The trial court observed that Herman had "presented little or no evidence as to the personal property, its conditions, its manner of acquisition, its value, or its manner of ownership." Because of Marvin's unrebutted testimony, from Logan County case No. 02-P-66, that items of personal property had been "inappropriately" removed from the home, the court was uncertain which items of personal property even remained in the home when Marvin quitclaimed the home and its contents to Brooks.

¶ 80 In any event, regardless of which items of personal property Brooks received, who owned the items to begin with, and what these items were worth (questions that the evidence failed to resolve), Judge Feeney disagreed with Judge Coogan's earlier decision that the transfer of this personal property to Brooks–or, for that matter, the transfer of the marital residence to her–was a "dissipation," a word that Judge Feeney seemed to regard only as a term of art in the context of divorce proceedings. Although Judge Feeney acknowledged the common meaning of "dissipate" as "to squander or to waste," he focused on "dissipation" within the meaning of section 503(d)(2) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(d)(2) (West 2010)): "the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time that the marriage is undergoing an irreconcilable breakdown." *In re Marriage of O'Neill*, 138 Ill. 2d 487, 497 (1990) (Internal quotation marks omitted.)

¶ 81 Judge Feeney reasoned:

"Dissipation can only occur at a time when the marriage is

undergoing an irreconcilable breakdown. The use of marital property for the sole benefit of one spouse or for any other reason at any other time is not dissipation. The marriage of Mr. and Mrs. Hilton did not suffer any type of breakdown. Certainly the relationship of Mr. and Mrs. Hilton changed due to their health issues and most particularly the health of Mrs. Hilton. Nevertheless the marriage remained intact.

In addition the use of the marital property must be for a purpose unrelated to the marriage. While Mr. Hilton may or may not have struck a wise bargain with his daughter, Ms. Brooks, Mr. Hilton['s] conveyance of the real estate and later the money was to provide for the long term care of both Mr. and Mrs. Hilton. The testimony set forth of Ms. Brooks in Plaintiff Exhibit 19 indicates that the proceeds from the sale of the home was even intended to provide a resource for burial expenses as there was no life insurance. These are uses related to the marriage. If the use of the marital property was for a purpose related to the marriage, then at least within the meaning of the Illinois Marriage and Dissolution of Marriage Act, such a use could not be dissipation.

The Court believes that Mr. Hilton took the action he did in regard to these assets in order to provide for Mr. and Mrs. Hilton's remaining years. Perhaps a better bargain could have been struck. Mr. Hilton however reached an agreement with a child he trusted to

> care for him and Mrs. Hilton. The plan included moving to Kansas and potentially adding on to Ms. Brooks' home to add accommodations for Mr. and Mrs. Hilton. The plan consisted of Ms. Brooks caring for Mr. and Mrs. Hilton until death and then providing for the funeral expenses. Such expenses could be tremendous. As such Mr. Hilton gave practically all him and Mrs. Hilton had to achieve this future. The Court is not going to look at the situation in hind sight and say a better bargain could have been reached.
>
> The Court does not find a dissipation of assets to support avoiding the complained of transactions."

¶ 82 Thus, because (1) Marvin's and Dortha's marriage was not undergoing an irreconcilable breakdown when Marvin transferred the previously jointly owned assets to Brooks and (2) these transfers were for purposes related to the marriage, Judge Feeney concluded that the transfers were not a "dissipation" of marital assets–even though, in Logan County case No. 02-P-66, Judge Coogan had characterized these transfers as "a voluntary dissipation of funds" and, on that basis, had ordered Brooks alone to pay the guardian *ad litem*'s fees and expenses. Accordingly, Judge Feeney found against Herman on count II of her amended complaint in this case.

¶ 83 3. *Count IV: The Bank Accounts*

¶ 84 a. Herman's Allegations

¶ 85 In count IV of her amended complaint, Herman alleged that Marvin's transfer of the jointly held bank accounts (including the certificates of deposit) into his sole ownership was presumptively fraudulent, a breach of his fiduciary duty to Dortha. Herman requested an avoidance

of the transfers along with a declaration that the joint tenancy in the bank accounts was severed and converted into a tenancy in common. Alternatively, Herman requested damages, to be paid by Marvin to Dortha's estate, in the amount of half the value the bank accounts had at the time Marvin transferred them into his sole ownership.

¶ 86 b. The Trial Court's Decision on Count IV

¶ 87 The trial court reasoned that although Marvin did not use the power of attorney–and did not need to use it–to transfer the jointly owned bank accounts into his sole ownership and although, normally, a party to a joint bank account had the right to unilaterally withdraw all the funds from the account without incurring liability to the other joint depositor (*In re Estate of Vogel*, 291 Ill. App. 3d 1044, 1048 (1997)), Marvin was not a normal joint depositor: he was in a fiduciary relationship with the other joint depositor, Dortha. Consequently, the court agreed with Herman that Marvin's transferring the bank accounts into his sole name was presumptively fraudulent.

¶ 88 Nevertheless, the trial court found the presumption of fraud to have been rebutted by clear and convincing evidence because, as with the transfer of the real estate from joint tenancy into Marvin's sole name, the transfer of the bank accounts apparently had the same motivation: to qualify Dortha for public aid, not to enrich Marvin. The court said:

> "The Court finds that the analysis in regard to the bank accounts is essentially the same as that pertaining to Count I. Mr. Hilton took the action he took not to deprive Mrs. Hilton of anything, but rather to serve the best interest of Mrs. Hilton by gaining an additional financial resource. The additional resource of course is public aid. Therefore as with Count I, the Court finds by clear and

> convincing evidence that Mr. Hilton did not take the action in regard to the bank accounts for his own purposes, but rather to serve the best interests of Mrs. Hilton by gaining a financial resource."

Therefore, the court denied the relief that Herman requested in count IV of her amended complaint.

¶ 89 4. *Count V: Marvin's Payment of $125,000 (Actually, $127,652.95) to Brooks*

¶ 90 a. Herman's Allegations

¶ 91 In count V, the final count of her amended complaint, Herman alleged that in January 2003, Marvin paid Brooks $125,000 "without receiving a reasonably equivalent value in exchange" and "with the actual intent to hinder and delay" Herman's claim for reimbursement for the care she gave Dortha "for at least three continuous years immediately preceding [Dortha's] death." Again Herman referred to *Hilton* "for purposes of collateral estoppel," particularly to the language to the effect that "marital assets appeared to have been dissipated" (*Hilton*, slip order at 8).

¶ 92 Herman requested, as a remedy, the "avoidance" of the $125,000 payment as well as an attachment of Brooks's property so as to enforce repayment of the $125,000 to Dortha's estate. Alternatively, Herman requested a judgment requiring Marvin, Brooks, or both of them to pay damages in the amount of $125,000 to Dortha's estate.

¶ 93 b. The Trial Court's Decision on Count V

¶ 94 The trial court rejected Herman's claim in count V because in January 2003, when Marvin made the payment to Brooks, few, if any, assets were left in Dortha's estate. Marvin had emptied Dortha's estate of assets so that she could "gain the financial resource of public aid for a possibly lengthy stay in a nursing home." And again the court reasoned: "As these actions were done to further Mrs. Hilton's best interests and as previously ruled were not fraudulent, Mrs. Hilton's

estate had no interest in these assets."

¶ 95 Not only, the trial court concluded, was the money no longer Dortha's (and consequently Herman, as the special representative of her estate, had no right to complain of how it had been spent), but Marvin paid the money to Brooks in order to provide for himself and Dortha, not to thwart a statutory claim by Herman that did not exist as of yet and that Marvin did not know Herman was going to assert.

¶ 96 The trial court did not believe Marvin had "acted with the intent to defraud anyone." Instead, the court found:

> "His actions were taken to provide for the waning years of him and his wife. He struck a bargain with Mrs. Brooks, a person he trusted, to care for him and his wife. Even if the bargain was foolish, this does not establish fraudulent intent. His various wills and his actions consistently demonstrate the efforts of a spouse attempting to provide for his partner."

Hence, even if the bargain were foolish–even if the payment of $125,000 to Brooks were a bad idea–Marvin had no fraudulent intent in making the payment but instead was motivated by a desire to provide for himself and his wife in their waning years. Consequently, the court found against Herman on count V of her amended complaint.

¶ 97 D. Herman's Motion for Reconsideration

¶ 98 In July 2010, Herman filed a timely motion for reconsideration. In the August 2010 hearing on that motion, Herman argued, in part, that in arriving at its decision in the June 2010 order, the trial court had failed, first of all, to sufficiently consider that Marvin had physically abused

Dortha–a circumstance which, Herman claimed, militated against the court's finding that Marvin had been primarily concerned with Dortha's best interest in making the transfers. Second, Herman reminded the court that in the three years prior to Dortha's death, Herman had been solely responsible for Dortha's care, which involved incurring expenses. Third, Herman argued that the court's finding that Marvin's transfer of assets was fair and equitable "[could not] be reconciled" with Judge Coogan's findings in Logan County case No. 02-P-66 or this court's conclusions on appeal in that case.

¶ 99 The trial court addressed Herman's claims as follows:

> "[This court] tried to be fairly detailed in reciting *** the important facts *** that [the court] thought were relevant ***. The [court does] not dispute that [Marvin] physically abused [Dortha], and [this court] alluded to that in [its] order, and maybe not in overt terms *** describing all the abuse, but *** something along the lines of how apparent it became that [Marvin] was ill equipped to properly care for [Dortha], and [this court believes] the order [is] clear.
>
> *** [The court does not believe it is] in dispute that [Herman] cared for [Dortha] for a substantial period of time, and [Herman] has a valid claim for that against [Dortha's] estate. That really does not answer the question. *** [T]hat's an outcome that is desired as far as *** a payout from somewhere to satisfy that claim.
>
> The question before the court is *** what *** assets *** are out there *** to satisfy any claim of that estate, and *** that is the

issue that [this court] tried to address.

For instance, [the court does not believe] it is appropriate, and [it is] inaccurate, to try to juxtapose [this court's] order [and] the rulings [this court] made against, for instance, the very brief statements and rulings that Judge Coogan and the appellate court addressed in regard to the payment of attorney's fees. [Judge Coogan and the appellate court were] addressing an issue within a statute that is a very different issue than the one [this court] had to address, and so they're really very different issues and related only in a very strained way.

*** [T]he motion to reconsider is denied."

¶ 100 This appeal followed.

¶ 101 II. ANALYSIS

¶ 102 A. Marvin's Transfers of the Assets From Joint Ownership into His Sole Ownership

¶ 103 Harris advised Marvin to transfer the marital residence out of joint tenancy and into his sole ownership so that Dortha could qualify for public aid. Accordingly, using a power of attorney from Dortha, Marvin transferred the marital residence out of joint tenancy and into his sole ownership. Also, in the spirit of Harris's advice, Marvin transferred the bank accounts out of his and Dortha's joint ownership and into his sole ownership.

¶ 104 Because Marvin was Dortha's agent by virtue of the power of attorney and because a presumption of fraud arose from a transfer of the principal's property by the agent for the agent's own use (*Deason v. Gutzler*, 251 Ill. App. 3d 630, 637 (1993)), the trial court held that Marvin's

transfers of the marital residence and the bank accounts into his sole ownership were presumptively fraudulent. Nevertheless, the court found the presumption of fraud to be overcome by clear and convincing evidence that these transfers were fair to Dortha. See *id.* In the court's view, the transfers were fair to Dortha because it was necessary to divest her of assets, and to make Marvin the sole owner of the assets, in order to qualify her for public aid–which she would need because hers and Marvin's assets would be insufficient to cover the anticipated tremendous cost of her long-term care.

¶ 105 For essentially three reasons, Herman contends the trial court erred by finding that the fairness of the transfers from joint ownership into Marvin's sole ownership was proved by clear and convincing evidence. First, Herman says that "transferring assets of an incompetent spouse to the other spouse to deplete for the transferee's own benefit, thereby diverting the assets to some purpose other than for the benefit of the incompetent spouse" "seems contrary, on its face, to the rationale underpinning the 'spend down' concept." In support of that proposition, Herman quotes a phrase from *Reed v. Department of Human Services*, 392 Ill. App. 3d 88, 94 (2009): "[T]he Medicaid Act expresses an intent by Congress that individuals are expected to deplete their own resources before obtaining assistance from the government." (Internal quotation marks omitted.) But Dortha did deplete her resources. Through her agent, she depleted her resources by transferring them to her agent. The quoted phrase from *Reed* speaks merely of depletion, not the uses to which the depleted resources are put. So, it is unclear how the language from *Reed* invalidates the strategy that Harris recommended.

¶ 106 Second, Herman argues that the transfer of the assets from joint tenancy into Marvin's sole ownership did not defeat the Rights of Married Persons Act (750 ILCS 65/0.01 through 22

(West 2002)), under which Marvin was liable for Dortha's medical expenses. Even so, Herman does not appear to dispute that the strategy of divesting Dortha of assets would qualify her for public aid. Or, if Herman does dispute the efficacy of that strategy for qualifying Dortha for public aid, Herman does not offer a reasoned legal explanation of why the strategy would not work. Just because medical providers and other creditors would have pursued the marital residence and bank accounts in any event, it does not follow that it was a bad idea to get Dortha on public aid as soon as possible; and in order to receive public aid, she had to spend down her assets.

¶ 107 Third, Herman asserts that because Marvin physically abused Dortha, he could not have intended to promote her best interests by transferring the jointly owned assets to himself. As Herman herself argues, however, the test is not subjective but objective. Marvin's feelings or attitude toward Dortha–his subjective state of mind–has no bearing on the objective fairness of the transactions.

¶ 108 In short, Herman has provided us no reasoned legal argument for overturning the trial court's finding that transferring the marital residence and bank accounts from joint ownership into Marvin's sole ownership was fair to Dortha, given that this was apparently a legitimate strategy for qualifying Dortha for public aid.

¶ 109 B. Fraudulent Conveyances to Brooks

¶ 110 1. *Marvin's Transfer of the Marital Residence to Brooks*

¶ 111 In count I of her amended complaint, Herman alleges that Marvin transferred the marital residence from joint tenancy into his sole ownership so as to "hinder[] or thwart[] expected creditors of [Dortha]" and that he thereafter quitclaimed the marital residence to Brooks (to the same end, we presumably are to infer). Similarly, in count V, Herman alleges that Marvin paid Brooks

$125,000 "with the actual intent to hinder and delay" a statutory custodial claim by Herman for her care of Dortha. See 755 ILCS 5/18-1.1 (West 2002).

¶ 112 In her brief, Herman reiterates her position that these transfers were an end run around Marvin's creditors. She argues that under the Rights of Married Persons Act (750 ILCS 65/0.01 through 22 (West 2002)), Marvin was obligated to pay for the expenses of Dortha's care and that his transfers of the marital residence and the cash to Brooks were stratagems to get out of that obligation–to avoid having to reimburse creditors, including Herman, for the expenses of taking care of Dortha. Section 15(a)(1) of the Rights of Married Persons Act provides: "The expenses of the family *** shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." 750 ILCS 65/15(a)(1) (West 2002). Medical expenses of a spouse are "expenses of the family" within the meaning of section 15(a)(1), and spouses are liable for each other's medical expenses, regardless of whether they live apart and regardless of whether they consented to each other's medical expenses. *St. Mary of Nazareth Hospital v. Kuczaj*, 174 Ill. App. 3d 268, 274 (1988). Because no meaningful distinction can be drawn between medical expenses and caregiving expenses, the same rule applies to a spouse's caregiving expenses.

¶ 113 Marvin anticipated that the cost of long-term care for Dortha would be overwhelming. So, he proceeded to divest her–and ultimately himself–of all assets. If Marvin ostensibly had no assets, he would not have to pay for Dortha's care; and according to Herman, that is how the strategy defrauded Marvin's creditors. Herman maintains that even if Marvin's transfer of the marital residence and bank accounts to himself had been proved, by clear and convincing evidence, to be fair for purposes of rebutting the presumption of fraud (see *Addis v. Grange*, 358 Ill. 127, 133

(1934); *Glass v. Burkett*, 64 Ill. App. 3d 676, 680-81 (1978)), his subsequent transfers of those assets to Brooks effectively cheated his creditors out of reimbursement for the family expense of taking care of Dortha.

¶ 114 Brooks argues, on the other hand, that Marvin conveyed the marital residence to her with the best of intentions: to provide for Dortha and himself in their old age. She says: "Throughout his testimony in Case No. 02-P-66 [Marvin] stated that the marital residence was transferred or sold to Linda Brooks for $5,000.00 because Mrs. Brooks had agreed to take care of Mr. & Mrs. Hilton for the remainder of their lives at the residence of Mrs. Brooks in Kansas." Brooks also cites her own testimony to the effect that the marital residence was to be sold and that the proceeds were to be applied toward (1) moving her parents and their belongings to her house in Kansas, (2) taking care of them there for the rest of their lives, and (3) paying for Marvin's burial.

¶ 115 Brooks insists:

> "There is no evidence that the purpose of these transfers was to benefit Mr. Hilton. To the contrary, the testimony provided by Mr. Hilton and Mrs. Brooks in Case No. 02-P-66 clearly identifies family members working toward providing for aging parents and insuring that Mr. and Mrs. Hilton would always have a place to live, have access to assistance for their health care needs if needed, and have funds for their burial.
>
> The intent of the arrangement was to provide a secure avenue for the Hiltons to live out their final days. Mr. Hilton was doing his absolute best to insure that he and Mrs. Hilton were provided for in

a manner acceptable to him."

Thus, according to Brooks, Marvin transferred the marital residence to her pursuant to an agreement between him and her that she would use the proceeds from the sale of the marital residence to take care of Marvin and Dortha for the rest of their lives.

¶ 116 But Brooks did not use the marital residence to take care of Marvin and Dortha in Kansas for the rest of their lives, because Herman, rather than Brooks, ended up being appointed the permanent guardian of Dortha's person and consequently Marvin did not move out of Illinois, choosing instead to continue residing near Dortha. Because the promise to take care of Marvin and Dortha for the rest of their lives is unfulfilled, "reasonably equivalent value" was not given for the conveyance of the marital residence, and the conveyance is fraudulent as to creditors. 740 ILCS 160/5(a)(2) (West 2002).

¶ 117 Section 5(a) of the Uniform Fraudulent Transfers Act provides as follows:

> "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (A) was engaged or was about

> to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." 740 ILCS 160/5(a) (West 2002).

Thus, under section 5(a), a transfer can be fraudulent as to a creditor even if the creditor's claim arises after the transfer was made. Herman's claim for reimbursement for taking care of Dortha as the guardian of her person arose after Marvin transferred the marital residence to Brooks. That fact does not save the transfer from being fraudulent, provided that the elements of section 5(a) are fulfilled.

¶ 118 Let us parse through those elements. One element is that a "transfer was made." 740 ILCS 160/5(a) (West 2002). A "transfer" means "every mode ** of disposing of or parting with an asset." 740 ILCS 160/2(l) (West 2002). Quitclaiming one's interest in land is a way of disposing of the land or parting with it. With respect to real property, a transfer is made "when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the

interest of the transferee." 740 ILCS 160/7(a)(1) (West 2002). Recording the deed prevents a subsequent purchaser from acquiring an interest superior to the transferee. 765 ILCS 5/30 (West 2002). On May 5, 2003, Brooks recorded the quitclaim deed from Marvin. Consequently, a "transfer was made." 740 ILCS 160/5(a) (West 2002).

¶ 119 The next element is that the debtor (in this case, Marvin) made the transfer either with an "actual intent to hinder, delay, or defraud any creditor" or "without receiving a reasonably equivalent value in exchange for the transfer." 740 ILCS 160/5(a)(1), (a)(2) (West 2002). The trial court found that Marvin did not "act[] with the intent to defraud anyone." Intent to defraud is a question of fact (*Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 55 (2009)), and we decline to second-guess the trial court's factual finding that Marvin had no actual intent to defraud anyone, including his creditors (see *Gonzalez v. Second Federal Savings & Loan Ass'n*, 2011 IL App. (1st) 102297, ¶ 7).

¶ 120 Section 5(a)(2), however, states another element, which is an alternative to an actual intent to hinder, delay, or defraud a creditor: the debtor made the transfer "without receiving a reasonably equivalent value in exchange for the transfer." 740 ILCS 160/5(a)(2) (West 2002). An actual intent to defraud results in a "fraud in fact," whereas a conveyance for no consideration or inadequate consideration results in a "fraud in law," meaning that fraud is presumed. *Anderson v. Ferris*, 128 Ill. App. 3d 149, 152-53 (1984). For purposes of "reasonably equivalent value," "value does not include an unperformed promise made otherwise in the ordinary course of the promisor's business to furnish support to the debtor or another person." 740 ILCS 160/4(a) (West 2002). It does not appear that Brooks was in the business of furnishing support for others. And as we have discussed, her promise to furnish support for Dortha and Marvin, in return for the transfer of the

marital residence to her, is unfulfilled. It follows that her promise to furnish support does not qualify as "value," let alone "reasonably equivalent value," for the transfer of the marital residence to her.

¶ 121 Given the lack of "reasonably equivalent value," the transfer is fraudulent in law because Marvin "believed that he would incur[] debts beyond his ability to pay as they became due." 740 ILCS 160/5(a)(2)(B) (West 2002). It is undisputed that, on the advice of his attorney, Marvin took steps to qualify Dortha for public aid because he believed that the cost of her long-term care would be more than he and Dortha could afford. This belief on Marvin's part is the final element in section 5(a)(2)(B), and therefore the conveyance of the marital residence to Brooks is fraudulent as to creditors. Herman may avoid the conveyance to the extent necessary to satisfy her claim as a creditor. See 740 ILCS 160/8(a)(1) (West 2002).

¶ 122 2. *Marvin's Payment of $127,652.95 to Brooks*

¶ 123 Marvin obligated himself to pay Brooks $21.50 an hour for around-the-clock care for Dortha. As Judge Coogan observed, that was equivalent to an annual salary of $188,340 (24 hours x $21.50 x 365 days = $188,340). Common experience teaches that nonprofessional, in-home helpers generally do not earn six-figure incomes. Brooks was not a registered nurse. She was not even a certified nursing assistant or a licensed practical nurse. Nevertheless, she received $127,652.95 for 8 months of what appears to be rather low-skilled labor. Granted, she was on duty around the clock, but even so, the rate and the total sum are exorbitant on their face; and the high rate would have been in effect even while Dortha was sleeping.

¶ 124 Typically, whether a debtor received a "reasonably equivalent value" within the meaning of section 5(a)(2) of the Uniform Fraudulent Transfer Act (740 ILCS 160/5(a)(2) (West 2002)) is a question of fact (*Wachovia Securities LLC v. Neuhauser*, 528 F. Supp. 2d 834, 859 (N.D.

Ill. 2007)), but in this case, a finding that Marvin received a "reasonably equivalent value" for the $127,652.95 he paid Brooks would be against the manifest weight of the evidence (see *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010). "[R]easonably equivalent value is something more than consideration to support a contract." *In re Image Worldwide, Ltd.*, 139 F.3d 574, 580 (7th Cir. 1998). "[A] party receives reasonably equivalent value for what it gives up if it gets roughly the value it gave." (Internal quotation marks omitted.) *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 631 (3d Cir. 2007). Marvin did not receive roughly $127,652.95 in value. Brooks was grossly overpaid.

¶ 125 We note that the obligation to pay Brooks $21.50 per hour, around the clock, supposedly was created by a verbal agreement in February 1999. The only time Brooks provided care for Dortha was from February or March 2000 until August 2000. In May 2002, after Marvin was accused of abusing Dortha, he executed the quitclaim deed to Brooks, but the deed was not recorded until more than one year later. Likewise, the payment for Brooks's care of Dortha, under the "verbal agreement," was not made until January 4, 2003: years after the "agreement," almost 3 years after the care began, and 2 1/2 years after the care ended. In other words, despite this alleged agreement, assets were never transferred to Brooks until long after she rendered the services and shortly after Herman was named Dortha's guardian, whereupon it became obvious that Herman would make a claim for the expenses she inevitably would incur in taking care of Dortha.

¶ 126 In sum, given that Marvin did not receive a "reasonably equivalent value" for the $127,652.95 he paid Brooks, this transfer was fraudulent as to his creditors, for the same reasons we have explained with respect to the transfer of the marital residence. Herman may avoid this transfer and obligation to the extent necessary to satisfy her claim as a creditor. See 740 ILCS 160/8(a)(1)

(West 2002).

¶ 127 III. CONCLUSION

¶ 128 For the foregoing reasons, we affirm the trial court's judgment in part and reverse it in part. We reverse the judgment insomuch as it found against Herman on her claims that the transfers of the marital residence and the $127,652.95 from Marvin to Brooks were fraudulent as to creditors. Otherwise, we affirm the judgment, and we remand this case for further proceedings.

¶ 129 Affirmed in part and reversed in part; cause remanded.