

NOTICE
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2013 IL App (4th) 120797-U
NOS. 4-12-0797, 4-12-0959 cons.

IN THE APPELLATE COURT

FILED
September 18, 2013
Carla Bender
4th District Appellate
Court, IL

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of MARY T. BABER, Deceased,)	Appeal from
MARY HELEN BABER-WICKERT, as Administratrix)	Circuit Court of
to Collect,)	Edgar County
Petitioner-Appellee,)	No. 11P40
v. (No. 4-12-0797))	
ADIN H. BABER,)	
Respondent-Appellant,)	
and)	
SHARON WRIGHT,)	
Respondent.)	
-----)	
In re: the Estate of MARY T. BABER, Deceased,)	
SHARON WRIGHT,)	
Petitioner-Appellant,)	
v. (No. 4-12-0959))	
MARY HELEN BABER-WICKERT, CALLIE)	
BABER, BRUCE BABER, CHARLOTTE K. BABER,)	
ANNE G. BABER, and CYNTHIA J. EVERSOLE,)	
Respondents-Appellees,)	
and)	Honorable
ADIN H. BABER,)	Mark Goodwin,
Respondent.)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and Turner concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed the trial court's findings that decedent's son had breached his fiduciary duty and was not entitled to fees, but reversed the court's finding that decedent's daughter was not ready and willing to become executrix of decedent's estate.
- ¶ 2 This consolidated appeal arises from two separate trial court rulings made in

Edgar County case No. 11-P-40, involving the estate of Mary T. Baber, deceased, whose seven children comprise the majority of the parties involved in these proceedings.

¶ 3 In October 2011, petitioner, Mary Helen Baber-Wickert (Helen), as administratrix to collect of the estate of Mary T. Baber, deceased, filed a petition for citation to recover estate assets from respondent, Adin H. Baber (this court's case No. 4-12-0797). Following several days of hearings that occurred in December 2011, the trial court found that because Adin had breached his fiduciary duty to decedent, he owed decedent's estate \$124,756. (The court later increased the amount Adin owed to \$127,756.) Adin appeals, arguing that the court erred by (1) finding he breached his fiduciary duty to decedent and (2) denying him fees for services he performed for decedent's estate.

¶ 4 In February 2012, petitioner, Sharon Wright, filed a petition for issuance of letters testamentary, requesting appointment as executrix of decedent's estate in accordance with decedent's will (this court's case No. 4-12-0959). Following separate challenges filed by respondents, Helen, Callie Baber, Bruce Baber, Charlotte K. Baber, Anne G. Baber, and Cynthia J. Eversole, the trial court later found that because Sharon assisted Adin in breaching his fiduciary duty and concealed decedent's medical condition from respondents, she was not ready and willing to assume her duties and responsibilities as executrix. Sharon appeals, arguing that the court erred by denying her petition for issuance of letters testamentary.

¶ 5 Because we disagree with Adin but agree with Sharon, we affirm in part, reverse in part, and vacate in part.

¶ 6 I. BACKGROUND

¶ 7 A. The Pertinent Litigation Preceding Mary T. Baber's Death

¶ 8 (The following summary concerns Edgar County case No. 10-P-20, which is not the subject of this appeal but is noted to provide sufficient context.)

¶ 9 On June 21, 1930, Mary T. Baber was born. She later married and that union produced the following seven children: Bruce Baber, Helen, Sharon, Anne G. Baber, Charlotte K. Baber, Callie Baber, and Adin.

¶ 10 At an April 12, 2010, hearing, the trial court considered a "Petition for Adjudication of Disability and Appointment of Temporary and Plenary Guardians of Person and of Estate of Disabled Person" filed by Adin and Sharon.

¶ 11 The evidence presented at that hearing showed that Mary, a widow, was receiving treatment for Alzheimer's disease while she lived in her home. Vickie Weaver, a State of Illinois contract employee in the field of elder abuse, testified that she investigated allegations of "passive" neglect, deprivation, and financial misconduct against Anne, who was living with Mary. Weaver recommended that the trial court grant the petition to appoint (1) Adin as the guardian of Mary's estate and (2) Sharon as the guardian of Mary's person.

¶ 12 In support of her recommendation, Weaver noted that she had visited with Mary several times. During those home visits, she observed that Anne was not following medical advice regarding Mary's Alzheimer's medication and diabetes treatment. Anne had also reduced Mary's 24-hour home health care to a set amount of hours over a five-day period and attempted unsuccessfully to have Mary grant her a power of attorney. (On February 28, 2008, Mary had granted Adin a power of attorney.) Weaver also observed that Mary's demeanor changed in a positive way when Adin and Sharon visited or when her home health-care providers arrived.

¶ 13 Based on this evidence, the trial court granted temporary guardianship of Mary's

(1) estate to Adin and (2) person to Sharon. (The court's order was statutorily mandated to expire within 60 days (June 11, 2010) pursuant to section 11a-4 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/11a-4 (West 2010))).

¶ 14 At a June 3, 2010, hearing, the trial court considered Helen's motion to continue. (Helen is licensed to practice law in New Mexico, Colorado, and Arizona and resides in Las Vegas, New Mexico.) After extensive arguments concerning the consequences of granting a continuance given the impending statutory deadline—arguments that were made by six of the seven siblings—the court granted Helen's motion, noting, in part, the court's full schedule and that all interested parties were not present (neither Charlotte nor the guardian *ad litem* were at the hearing). Noting further that it could not extend the temporary guardianships of Adin and Sharon, the court granted temporary guardianship of Mary's (1) estate to Helen and (2) person to Callie. (The record shows that Callie, a social worker, had moved into Mary's home with Anne.)

¶ 15 At an August 2010 hearing, the trial court considered competing petitions for appointment of guardianship and thereafter appointed (1) Callie as plenary guardian of Mary's person and (2) Helen as plenary guardian of Mary's estate. In so doing, the court revoked Adin's February 2008 power of attorney, finding that the evidence presented showed Adin had breached his fiduciary duty to Mary by authorizing estate funds for his temporary guardianship duties and attorney fees without court approval.

¶ 16 B. Decedent's Last Will and Testament

¶ 17 On September 18, 2011, Mary (hereinafter, decedent) died. The pertinent portions of decedent's last will and testament dated February 28, 2008, conveyed the following intent:

"ARTICLE TWO

I hereby dispose of my property in the following manner:

(1) My real estate, located in Edgar County, Illinois, *** to my beloved children, ANNE *** and ADIN ***, in their own right forever, share and share alike.

(2) I give, devise and bequeath all the rest, residue, and remainder of my estate *** to my beloved children, ANNE ***, ADIN ***, and SHARON ***, in their own right forever, share and share alike.

I am aware that I have seven children ***. I choose, for a number of varying reasons, not to leave a bequest for *** Bruce ***, *** Helen ***, Charlotte ***, Callie ***, and/or their children. I also choose not to leave a bequest for Cynthia [Eversole]. It is certainly my hope that all of my children and descendants will be successful[,] and I have fond memories of all of them.

ARTICLE THREE

I nominate, constitute and appoint my son, ADIN ***, to be the Executor of this, my Last Will and Testament, and direct that he serve without surety on his bond. In the event of his death, failure, inability or refusal to so serve, then I nominate, constitute and appoint my daughter, ANNE ***, to be successor Executor of this, my Last Will and Testament, and direct that no surety be required on her bond as Executor. In the event of her death, fail-

ure, inability or refusal to so serve, then I nominate constitute and appoint my daughter, SHARON ***, to be successor Executor of this, my Last Will and Testament, and direct that no surety be required on her bond as Executor."

(Cynthia, who was not related to decedent, was named in an earlier version of decedent's will.)

¶ 18 C. The Parties' Initial Filings and the Trial Court's Preliminary Ruling

¶ 19 On September 20, 2011, Adin filed a "Petition to Admit Will to Probate and for Issuance of Letters Testamentary" in Edgar County case No. 11-P-40, requesting appointment as executor of decedent's estate in accordance with decedent's will. In his filing, Adin estimated that the value of decedent's (1) real estate holdings was \$2 million and (2) personal estate was \$1.15 million.

¶ 20 In response to Adin's filing, the following petitions were filed: (1) a September 20, 2011, "Emergency Petition to Prevent Purported Executor of Contested Will From Seizing and Dissipating Assets of Mary T. Baber" filed by Callie *pro se*; (2) a September 23, 2011, "Petition for Appointment of Administrator to Collect" filed by Bruce, requesting appointment of Helen as administrator to collect (Bruce is an Illinois attorney); and (3) two separate September 26, 2011, filings by Anne *pro se* and Charlotte *pro se*, respectively, opposing the appointment of either Adin or Sharon, and instead nominating Helen as executrix of decedent's estate.

¶ 21 At an October 4, 2011, hearing, the trial court admitted decedent's will to probate but reserved judgment on appointing Adin as executor of decedent's estate because of the August 2010 finding that Adin had breached his fiduciary duty to decedent. Instead, the court appointed Helen to serve as administrator to collect under section 10-1 of the Probate Act (755 ILCS 5/10-1

(West 2010)). At that same hearing, Anne informed the court that she intended to contest decedent's February 2008 will "under the rules of collusion."

¶ 22 Later that month, Helen, in her capacity as administratrix to collect, filed separate petitions for citation against Adin and Sharon. Specifically, Helen claimed that (1) Adin, as decedent's attorney-in-fact, misappropriated money from decedent's financial accounts during March 2008 through May 2010 and (2) Sharon "may have concealed, converted, or embezzled or have in her possession or control personal property which belongs to [decedent's e]state."

¶ 23 D. The Citation Hearings

¶ 24 As previously explained, the citation hearings concerned Helen's separate claims that Adin and Sharon misappropriated money from decedent's estate. The trial court's citation finding as to Sharon, however, is not the subject of this appeal. Nonetheless, we summarize the evidence presented against Sharon to provide sufficient context for her later claim.

¶ 25 1. *Helen's Evidence*

¶ 26 At a December 2011 hearing, Helen testified that after her June 2010 appointment as temporary guardian, she performed a financial examination of decedent's farm and business operations. The results of that examination showed that decedent had been receiving approximately (1) \$30,000 annually in farm rental fees and (2) approximately \$200,000 to \$346,000 annually for oil extracted from decedent's farmlands. (The value of the annual oil income fluctuated depending on the market price for that commodity.) Helen's examination also revealed increasing annual withdrawals from decedent's estate for Adin's benefit. In this regard, Helen documented that in 2007, decedent's gross income was \$256,420, and Adin received \$25,050 from decedent's estate. In 2008, decedent's gross income was \$351,682, and Adin

received \$46,300 from decedent's estate. In 2009, decedent's gross income was \$189,410, and Adin received \$52,586 from decedent's estate. In 2010, decedent's gross income was \$272,687, and from January through May of that year, Adin received \$40,487 from decedent's estate.

¶ 27 Helen then testified about 40 withdrawals from decedent's financial accounts, totaling \$131,873, that occurred from March 2008 through May 2010, which were the subject of her citation claims against Adin. The majority of those transactions included withdrawals of (1) \$84,200 for Adin's personal use, (2) \$20,918 for payment of Adin's personal income tax obligations, (3) \$7,500 in undocumented household expenses, and (4) \$15,138 for Adin's agency services to decedent's estate. Although most of those transactions were drafted by Adin, Anne—who managed the daily operations of decedent's farm—had also withdrawn money from decedent's financial accounts for herself and Adin's benefit. In February 2010, Adin told Helen that decedent had begun paying him a temporary, monthly stipend of \$3,000. Helen also identified five financial withdrawals—totaling \$9,200—that occurred from December 2009 through March 2010, which were the subject of her citation claims against Sharon. Helen noted that Callie, Anne, and Charlotte had also received financial assistance from decedent's estate for either educational, medical, legal, or miscellaneous living expenses.

¶ 28 Sharon testified that she had been estranged from decedent for about 20 years, but during the summer of 2008, she visited decedent. In December 2008, Sharon received a phone call from Callie, asking her to visit decedent's home. Callie did not give a reason, explaining that she wanted Sharon to "draw [her] own conclusions." Upon arriving, Sharon noticed that decedent was confused and thought she was Helen. Shortly thereafter, Sharon took decedent to her physician. The preliminary result of an initial acuity test showed that decedent was suffering

from the early stages of dementia. After an extensive evaluation conducted later that month, the physician confirmed his preliminary findings, opining that a 70% probability existed that decedent's dementia was caused by Alzheimer's disease.

¶ 29 Sharon recounted that sometime during December 2009, Anne hired Angie Throneburg, a registered nurse, to manage the daily operations of decedent's farm while Anne vacationed in South Africa. Anne instructed Throneburg to call Sharon if problems arose. On December 22, 2009, Throneburg called Sharon and expressed concern that she had only \$200 remaining, which was insufficient to fulfill weekly payroll obligations to decedent's three other employees and to acquire household items, such as decedent's medicine and groceries. Because Adin lived in Missouri and could not travel to decedent's home at that time, Adin and Sharon agreed that Throneburg would estimate how much additional financing she required and Sharon—who was not authorized to withdraw money from decedent's financial accounts—would explain the situation to decedent. After doing so, decedent signed a check, authorizing \$2,500. Thereafter, Sharon paid two farmhands and Throneburg and provided Throneburg the remaining cash. (Throneburg's testimony—which was solicited out of order by Adin's counsel—was consistent with Sharon's aforementioned account.) After paying the farmhands' salaries, Sharon signed a receipt, documenting her disbursement.

¶ 30 *2. The Evidence Provided by Adin and Sharon*

¶ 31 James McClarey, a farmhand employed by decedent, testified that a couple of days before Christmas in 2009, he received his weekly salary and his annual \$250 Christmas bonus from Sharon. McClarey could not recall how much he was paid for his salary. McClarey added that Sharon also gave him the weekly salary and bonus of an absent employee, which he

later delivered to his coworker.

¶ 32 Sharon, an elementary school teacher, testified that her estrangement from decedent ended in June 2007 when Sharon had a mild heart attack. That experience caused Sharon to speak with decedent, and thereafter, Sharon began visiting with her. Sharon also rekindled her relationship with Anne, stating that they spent "a lot of time together and my students affectionately called [Anne] the room aunt." Sharon's close relationship with Anne continued until "[l]ate January or early February of 2010."

¶ 33 Immediately after the December 2009 incident with Throneburg, Sharon complained to Adin that she did not like acquiring financing from decedent. In response, Adin created a financial account for Sharon so that she could pay for miscellaneous household expenses. Sharon then detailed the following four additional transactions she drafted from that account: (1) a January 2, 2010, check for \$200 and a January 6, 2010, check for \$500 to Throneburg for household expenses; (2) a February 23, 2010, cashier's check for \$3,000 to Adin for his personal use; and (3) a March 15, 2010, cashier's check for \$3,000 to an attorney for decedent's guardianship proceedings.

¶ 34 Sharon explained that she was not surprised that Throneburg required \$200 one week after she provided her \$2,500 because (1) about \$1,200 was immediately spent on employee salary and bonus payments and (2) Sharon understood that the remaining funds provided to Throneburg were used for purposes other than payroll or groceries, such as farm expenditures. Sharon added that because she, as well as Anne, trusted Throneburg, she had no reason to question Throneburg's additional funding request. Sharon also noted that Throneburg kept receipts of her expenditures.

¶ 35 Adin testified that from 1999 through 2009, he received monthly payments from decedent that began at \$1,500 per month while he was in college and increased to \$2,000 per month in 2005 through 2008. (Adin graduated college in 2002.) Adin explained that in 2001, decedent authorized him to sign checks on a financial account that decedent owned. Thereafter, Adin occasionally drafted checks for himself in the aforementioned amounts. Adin acknowledged that on February 28, 2008, decedent granted him a power of attorney.

¶ 36 On December 24, 2009, Adin arrived at decedent's home. While there, he reconciled the money Throneburg received initially from Anne and later from Sharon against the receipts Throneburg provided, which showed no discrepancy. Adin then informed Anne, while she was in South Africa, that the \$2,000 she left Throneburg was insufficient to pay four employees their weekly salary, satisfy household expenses, and purchase decedent's medicines. (The record reveals that Anne vacationed in South Africa from December 8, 2009, through January 8, 2010.)

¶ 37 In late January 2010, Adin explained to Anne, who had returned from South Africa, that he intended to "activate" the power of attorney decedent granted him on February 28, 2008, because he was concerned about Anne's farm management and decedent's care. Adin stated that he knew his responsibilities as decedent's agent when she granted him the February 2008 power of attorney.

¶ 38 Adin admitted that he (1) withdrew money from decedent's financial accounts to pay his 2009, 2010, and first quarter 2011 federal income tax obligations; (2) failed to ensure decedent's 2009 federal taxes were filed; and (3) instructed Sharon to draft a February 23, 2010, cashier's check for \$3,000 for his personal use and a March 15, 2010, check for \$3,000 to an

attorney to begin guardianship proceedings in Edgar County case No. 10-P-20. Adin also admitted that prior to January 2010, when he activated his agency under decedent's power of attorney, he had little involvement in decedent's farm or finances.

¶ 39

3. The Trial Court's Determination

¶ 40

On February 22, 2012, the trial court entered an order, finding that Adin was, by law, decedent's fiduciary, who had received \$124,756 from decedent's estate, which was not expended for decedent's benefit. In ordering Adin to reimburse decedent's estate by that amount, the court rejected Adin's claim that he had rebutted the presumption of fraud by showing that (1) the identified disbursements were a continuation of decedent's long-standing practice of providing financial gifts to family members, (2) he was a co-owner of the financial accounts from which the funds originated, (3) the expenditures he made at the beginning of the April 2010 guardianship case were for decedent's benefit, and (4) a portion of the funds he received had been secured for the operation of decedent's household.

¶ 41

As to Sharon, the trial court found, as follows:

"[N]o fiduciary relationship can be found to have existed between Sharon and [decedent] during the period of December 22, 2009, and March 15, 2010, such that a presumption of fraud can be claimed. The Court does not believe that Sharon misappropriated any money belonging to [decedent]. The \$9,200 [at issue] has been demonstrated to have been spent, *with the assistance of Sharon*, on expenses of the decedent." (Emphasis in original.)

¶ 42

E. Adin's Motion To Reconsider

¶ 43 In March 2012, Adin filed a motion to reconsider, requesting, in pertinent part, that the trial court reconsider its refusal to award him a credit for his work as decedent's agent and temporary guardian of decedent's estate from March 2010 until May 2010, in which Adin paid himself approximately \$15,138 (\$5,350 on April 2, 2010, for 107 hours of work; \$4,050 on April 17, 2010, for 81 hours of work; and \$5,737.50 on May 21, 2010, for 114.75 hours of work (Adin valued his time at \$50 per hour)). In his motion, Adin recalled the exhibits he admitted into evidence that he claimed provided detailed descriptions of the work he performed.

¶ 44 In July 2012, the trial court entered an order, denying all of Adin's challenges to the court's February 2012 citation order, and adjusted Adin's reimbursement amount to \$127,756 based on an accounting error. With regard to Adin's fee claim, the court wrote, as follows:

"This court finds that Adin's assertion concerning error in the Court's denial of a fee credit to be unpersuasive. This Court has found that Adin *** improperly removed over \$120,000 from [decedent's] estate between March[] 2008 and May[] 2010. To suggest that he should be compensated any sum for any work he did that was potentially legitimate during this period is a little like saying that a burglar should be compensated for cleaning up the home he burglarizes as it perhaps saved the homeowner from having to expend monies for that purpose afterwards. This Court finds it reasonably ridiculous to award Adin *** any fee credit on his balance owed."

¶ 45 F. The Petitions Filed and the Subsequent Hearing To Determine

the Issuance of Letters Testamentary

¶ 46 Shortly after the trial court entered its February 2012 citation order, Sharon filed a "Petition for Issuance of Letters Testamentary," requesting appointment as executrix of decedent's estate in accordance with decedent's will. In support of her petition, Sharon claimed that (1) Adin would not contest Sharon's appointment as executrix of decedent's estate and (2) Anne was disqualified by her renunciation of decedent's will at an October 4, 2011, hearing. (In early April 2012, Helen, Bruce, Anne *pro se*, Callie *pro se*, and Cynthia *pro se* filed separate petitions, contesting decedent's February 2008 will.) Later in April 2012, Callie *pro se* filed a "motion to appoint special administrator to defend will and retain current administrator" to collect. In July 2012, Anne *pro se* filed an objection to Sharon's appointment as executrix of decedent's February 2008 will. In her prayer for relief, Anne requested that the court appoint (1) Helen as an administrator to decedent's will and (2) a special administrator to defend decedent's will.

¶ 47 1. *The Hearing on Sharon's Petition for Letters Testamentary*

¶ 48 At an August 2012 hearing, Sharon testified that she was an adult of sound mind and body who did not engage in excessive alcohol or illicit drug use. Acknowledging that she was a possible successor executrix to decedent's estate, Sharon stated that she was willing to serve in that capacity and was not experiencing any difficulties managing her own personal affairs.

¶ 49 Sharon acknowledged that two weeks earlier, she provided a deposition in which she clarified her testimony at the December 2011 citation hearing. Specifically, Sharon admitted that she failed to document three cashier's checks she disbursed to Adin (totaling \$51,000) in a check register she managed after Adin created an account for her use following the December

2009 incident with Throneburg. Sharon stated that Adin used \$3,000 of the \$51,000 for his personal use and deposited the remaining amount in a separate account. Sharon also admitted that sometime following decedent's December 2008 dementia diagnosis, she, Anne, and Callie had a conversation in which they agreed not to disclose that diagnosis to Helen or Bruce. Sharon intended to withhold temporarily that diagnosis from Helen, but intended not to tell Bruce because decedent had a restraining order against him that arose from a different dispute. (The record reveals that on February 18, 2010, Adin and Sharon informed Helen by teleconference about decedent's December 2008 dementia diagnosis because of Adin's earlier decision to "activate" decedent's power of attorney.)

¶ 50 Sharon noted that the February 23, 2010, cashier's check for \$3,000 she omitted from her register was the subject of the December 2011 citation proceeding against her. Sharon did not intend to mislead the trial court by omitting the remaining two cashier's checks, explaining that the register she created documented the cash payments she made to satisfy household expenses and payroll. With regard to the three cashier's checks at issue, Sharon surmised that the bank would document those transactions. Sharon confirmed that as executrix, she would comply with the court's guidance and would not defer to Adin.

¶ 51 Adin testified that in his capacity as decedent's agent, he instructed Sharon to disburse two cashier's checks totaling \$48,000, which he later deposited in a guardianship account. Adin admitted that he spent the remaining \$3,000 Sharon disbursed for his personal use. Adin later withdrew money from the guardianship account to pay his federal taxes and to reimburse his time acting as guardian of decedent's estate.

¶ 52 *2. The Trial Court's Determination as to Sharon's Petition*

After mentioning the factors a trial court must consider in appointing an executor as outlined in section 6-13 of the Probate Act (755 ILCD 5/6-13 (West 2010)), the court stated as follows:

"[The court] think[s] that *** the nominated individual has to be ready and willing, and the readiness, the willingness is something other than I'm standing at the starting line ready to run the race and I'm willing to do it. [The court] think[s] that the concept of readiness and willingness encompasses much more. In this particular case[,] there has been evidence from prior hearings, as well as *** today *** that [Sharon] became involved in the informal and formal administration of [decedent's] affairs and did knowingly but without *** an appreciation of really what she was doing[,] participate in setting up circumstances that allowed for Adin *** to violate a fiduciary obligation he owed to his mother. She made that set of decisions, and that's simply uncontroverted here. I think that her actions did enable or aid Adin in being able to do what he did.

[This court's] citation order did not find that [Sharon] was *** in possession of funds that needed to be returned to the estate. That citation didn't ask nor would it have involved an exoneration of any of her activities, and, again, [the court] think[s] that it could be as much from [a] negligent approach to things as it could be a

*** more culpable, willful approach to things, but [Sharon] did, nonetheless, create a circumstance that allowed for that set of losses to occur to [decedent's] estate.

The evidence has shown that there's been a very fractured relationship between a number of different people in this family. That led to distrust and dislike in *** many ways of different members of this family by other members ***. [The court] think[s] it was that environment that [Sharon] entered into the endeavor which she entered into, and [the court] think[s] it's clear from the evidence that she *** did seek to withhold information from another part of the family about the mother. I think that she and Adin did attempt to keep money away from Anne at the time that *** the household account was being restructured, and [the court] think[s] that money was taken to the exclusion of other members in the family and of [decedent], and [the court] find[s] that that set of circumstances prevents [Sharon] from being ready and willing *** to serve in this case."

¶ 54 The trial court then appointed Helen as "administrator with will annexed" contingent upon supervised administration. (Thereafter the court awarded Helen \$20,450 for guardian fees in case No. 10-P-20.) In September 2012, the court entered a written order, naming a special administrator to defend decedent's will.

¶ 55 These appeals followed.

¶ 56

II. ANALYSIS

¶ 57

A. Adin's Claims of Error

¶ 58

Adin argues that the trial court erred by (1) finding that he breached his fiduciary duty to decedent and (2) denying him fees for services he performed for decedent's estate. We address his contentions in turn.

¶ 59

1. *The Trial Court's Breach-of-Duty Finding*

¶ 60

a. The Fiduciary Duty Inherent in a Power of Attorney, the Presumption of Fraud, and the Standard of Review

¶ 61

In *Spring Valley Nursing Center, L.P. v. Allen*, 2012 IL App (3d) 110915, ¶¶ 14, 977 N.E.2d 1230, the appellate court outlined the following duties and presumptions inherent in a power of attorney and our standard when reviewing a trial court's findings regarding that fiduciary status:

"When a person is designated as an agent under a power of attorney, he has a fiduciary duty to the person who made the designation. [Citations.] 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. [Citation.] Thus, any conveyance of the principal's property that either materially benefits the agent or is for the agent's own use is presumed to be fraudulent. [Citations.] This rule applies to conveyances of the principal's property by the agent to a third party on behalf of the principal and also to conveyances

made by the principal directly to the agent. [Citations.]

The presumption of fraud *** is not conclusive and may be rebutted by clear and convincing evidence to the contrary. [Citations.] The burden is on the agent to rebut the presumption by showing that he acted in good faith and that he did not betray the confidence placed in him. [Citation.] If the agent satisfies that burden, the transaction in question will be upheld. *** However, if the agent fails in that burden, the transaction will be set aside. [Citations.] Some of the significant factors to be considered in determining if the presumption of fraud has been rebutted include whether the fiduciary made a frank disclosure to the principal of the information he had, whether the fiduciary paid adequate consideration, and whether the principal had competent and independent advice. [Citations.]

A trial court's determination as to whether a presumption of fraud has been overcome, made after an evidentiary hearing, is entitled to deference and will not be reversed on appeal unless it is against the manifest weight of the evidence. [Citations.] A ruling is against the manifest weight of the evidence only if it is clearly evident from the record that the opposite conclusion should have been reached or if the ruling itself is arbitrary, unreasonable, or not based on the evidence presented. [Citations.]"

¶ 62 b. Adin's Claim Regarding His Fiduciary Duty

¶ 63 Adin argues that the trial court erred by finding he breached his fiduciary duty to decedent. We disagree.

¶ 64 Adin first contends that approximately 27 of the 40 transactions that were the subject of the December 2011 citation hearing were not presumptively fraudulent because they "were not procured by virtue of [his] fiduciary relationship" with decedent. Specifically, Adin asserts that "[i]n Illinois, cases where a transaction benefitting someone with power of attorney over the alleged donor has been held to be presumptively fraudulent, the party with power of attorney used his powers to bring about the transaction."

¶ 65 In support of his assertion, Adin cites *In re Estate of DeJarnette*, 286 Ill. App. 3d 1082, 677 N.E.2d 1024 (1997), *Lemp v. Hauptmann*, 170 Ill. App. 3d 753, 525 N.E.2d 203 (1988), and *Deason v. Gutzler*, 251 Ill. App. 3d 630, 622 N.E.2d 1276 (1993), pointing out that "[i]n all the these cases, the fiduciary took *affirmative action* by virtue of their fiduciary status as power of attorney *in order to bring about transactions* from which they benefitted." (Emphases in original.) Adin claims further that he often received money from decedent without using the powers of his agency, positing that he "did not seek to exercise the powers [decedent] granted to him until December 2009."

¶ 66 In other words, Adin claims that he owed decedent a fiduciary duty only for the financial transactions that followed his "activation" of decedent's power of attorney, which, according to him, did not occur until December 2009. We reject that claim because Adin's contention regarding the fiduciary duty that attaches and flows from the agent to the grantor is not the law in Illinois. The fiduciary duty inherent in a power of attorney is not enacted at the

whims of the agent who holds such a duty but, instead, is established as a matter of law. See *In re Estate of Elias*, 408 Ill. App. 3d 301, 320, 946 N.E.2d 1015, 1033 (2011) (rejecting the agent's argument that a fiduciary duty did not attach until he activated his power of attorney because "it is well established that a power of attorney gives rise to a general fiduciary relationship as a matter of law").

¶ 67 In this case, decedent's February 28, 2008, power of attorney created, as a matter of law, a general fiduciary relationship that bound Adin on that date. Thus, any conveyance on or after that date that came from decedent's estate for his benefit—even if it was voluntarily provided by decedent herself—is presumed fraudulent subject to clear and convincing evidence by the agent to overcome that presumption.

¶ 68 In the alternative, Adin contends that even if the burden had shifted to him to rebut the presumption of fraud, the decedent's established pattern of giving Adin gifts of money for his support demonstrates the appropriateness of the transfers. The trial court considered and rejected this claim raised by Adin, and given the record before us, no reason exists to disturb the court's rejection by concluding that decision was against the manifest weight of the evidence.

¶ 69 As we have previously noted, because of the power of attorney at issue, Adin was burdened with proving, by clear and convincing evidence, that he acted in good faith and that he did not betray the confidence decedent placed in him when—over a 26-month period—he withdrew (1) \$84,200 for his personal use, (2) \$20,918 to satisfy his tax debt, (3) \$7,500 in undocumented household expenses, and (4) \$15,138 for his services to decedent's estate. Despite Adin's claim that such excessive transfers of wealth were appropriate gifts from decedent, the record in this case belies that claim. Accordingly, we reject Adin's argument that the trial court

erred by finding he breached his fiduciary duty to decedent.

¶ 70

2. Adin's Claim Regarding Fees

¶ 71

Adin also argues that the trial court erred by denying him fees for services he performed for decedent's estate. We disagree.

¶ 72

"The Probate Act entitles estate representatives to reasonable fees for their services, subject to the circuit court's discretion based upon such factors as the size of the estate, the work done, the skill evidenced by the work, the time expended, the success of the efforts involved, good faith, and the efficiency with which the estate was administered." *Elias*, 408 Ill. App. 3d at 322, 946 N.E.2d at 1034; 755 ILCS 5/27-1 (West 2010). The decision to grant fees as permitted by section 27-1 of the Probate Act rests within the trial court's sound discretion. *Elias*, 408 Ill. App. 3d at 322, 946 N.E.2d at 1035.

¶ 73

We first note that in its February 2012 citation order, the trial court explained its findings, in part, as follows:

"The Court believes the burden is on Adin *** to establish, by clear and convincing evidence, that the presumptively fraudulent transactions in which he benefitted were fair and equitable to the decedent. That proof was not provided by Adin ***. The occupation of the role as beneficiary to a person for 10 years previous to the agency period in question does not do this. The occupation of the role of a convenience account holder to the decedent for 10 years previous to the period in question does not do this. The gratuities provided by the decedent to other members

of the family over a period of time does not do this. *A total of hours, without more, for time allegedly spent handling the affairs of a principal pursuant to a power of attorney does not do this.*"

(Emphasis added.)

¶ 74 As this court has previously noted, in his motion to reconsider, Adin recalled the exhibits he admitted into evidence that he claimed provided detailed descriptions of the work he performed. Specifically, that the trial court's finding was "at odds with the testimony of Adin *** during the [citation] proceeding, the exhibits admitted into evidence in that proceeding, (which provided *detailed* descriptions of the work Adin performed)[.]" (Emphasis in original) Adin, however, did not provide additional specificity in his motion to reconsider regarding the service he provided on behalf of decedent's estate.

¶ 75 In this case, the record shows that Adin's detailed exhibits consisted of three spreadsheets labeled "2010 March Hours," "2010 April Hours," and "May 2010 Hours," showing the number of days in each aforementioned month, with numbers—delineating the hours expended on that day—in three different categories labeled "phone", "driving", and "books". Those spreadsheets were accompanied by printed calendars showing the days of the week and corresponding times that were blocked out, with descriptors labeled "forensic accounting," "financial paperwork", "driving", "mileage", and first names of specific persons without elaboration. In some instances, Adin's descriptors indicated cryptic or incomplete phrases such as, "talked to J.R., found out cattle" and "called Vicki, because Anne had."

¶ 76 Here, we agree with the trial court that Adin's "detailed" exhibits, documenting the work he provided on decedent's behalf, lack specificity. Adin had an opportunity to correct

that deficiency, given the court's February 2012 citation order. Because he failed to do so, we reject his claim that the court abused its discretion by denying him fees for services he performed for decedent's estate.

¶ 77 B. The Trial Court's Denial of Sharon's Request for Letters Testamentary

¶ 78 1. *The Pertinent Portions of the Probate Act
and the Standard of Review*

¶ 79 Section 6-8 of the Probate Act, entitled, "Issuance of letters testamentary," provides, as follows:

"When a will is admitted to probate, letters testamentary shall be issued to the executor named in the will if he qualifies and accepts the office, unless the issuance of letters is excused." 755 ILCS 5/6-8 (West 2010).

¶ 80 Section 6-13 of the Probate Act, entitled, "Who may act as executor," provides, in part, as follows:

"(a) A person who has attained the age of 18 years and is a resident of the United States, is not of unsound mind, is not an adjudged disabled person as defined in this Act and has not been convicted of a felony, is qualified to act as executor." 755 ILCS 5/6-13(a) (West 2010).

¶ 81 To the extent this court must interpret any provision of the Probate Act, we do so *de novo*. *In re Estate of Koester*, 2012 IL App (4th) 110879, ¶ 47, 975 N.E.2d 1115. However, when reviewing a trial court's factual determinations and the inferences gleaned from those facts,

we defer to the court and will not reverse unless such findings are contrary to the manifest weight of the evidence. *In re Estate of Vail*, 309 Ill. App. 3d 435, 438, 722 N.E.2d 248, 251 (1999).

¶ 82 *2. Sharon's Claim of Error*

¶ 83 Sharon argues that the trial court erred by denying her petition for issuance of letters testamentary. We agree.

¶ 84 Over a century ago, the Illinois Supreme Court considered section 5 of the Administration act, which provided, as follows:

" 'Where two or more executors are appointed in and by the same will, and one or more of them dies, refuses to take upon himself the executorship, or is otherwise disqualified, letters testamentary shall be granted thereon to the other person or persons so named, not renouncing as aforesaid, and not disqualified.' "

Clark v. Patterson, 214 Ill. 533, 540, 73 N.E. 806, 809 (1905).

¶ 85 In interpreting the meaning of that provision, the supreme court stated, as follows:

"Section 5 of our Administration act was designed to establish the rule in Illinois in all cases in which all who were nominated executors could not or would not serve. The purpose of the section was to carry into effect, as far as possible, the wishes of the testator as to the person or persons to whom the control and management of his property should be committed, and not to create additional grounds or reasons for refusing to appoint the persons nominated by the testator as executors of his estate. Section 5 was

not intended to, and does not, confer power on the court to pre-
scribe additional grounds of competency or incompetency in
granting letters testamentary. The words 'otherwise disqualified'
and 'not disqualified,' employed therein, plainly mean not other-
wise legally incompetent or not legally competent under the stat-
ute." *Clark*, 214 Ill. at 541, 73 N.E. at 809.

¶ 86 In that case, in rejecting the appellants' objections to the appellee's appointment as executrix of decedent's estate on the grounds of infidelity, the supreme court stated that "the executor named in a will has the right to act unless there is some express provision of law which declares that he shall not, and as a consequence the testator may lawfully select any person for this trust who does not fall within one of the classes expressly mentioned and declared to be incompetent." *Clark*, 214 Ill. at 542, 73 N.E. at 809. See *Nonnast v. Northern Trust Co.*, 374 Ill. 248, 268, 29 N.E.2d 251, 262 (1940) ("[I]t is mandatory to have letters testamentary issued to the executor named in a will if he is ready, willing and qualified to act after the will is proved and admitted to probate"); see also *Belleville Savings Bank v. Schrader*, 214 Ill. App. 388, 393 (1919) ("[T]he law does not give to legatees and devisees under a will the right to nominate who shall act as the executor thereof, where the testator has already named some competent person to act in said capacity who is ready, willing and able to so act").

¶ 87 We first note that the sole duty of a trial court in a probate proceeding is to "give effect, if possible, to the wishes of the testator as expressed in the will, or as implied by law." *In re Estate of Rice*, 77 Ill. App. 3d 641, 649, 396 N.E.2d 298, 305 (1979). In this case, the court admitted decedent's February 2008 will to probate and in that instrument, decedent nominated

three of her adult children to manage the affairs of her remaining estate. As the mother of those seven adult siblings, decedent was in the best position to know the strengths and weaknesses of each, and she saw fit to nominate Adin, Anne, and Sharon—in that order—to the exclusion of her remaining four children.

¶ 88 For reasons we have already noted, Adin and Anne expressed that they were not ready, willing, or able to act in that capacity. The evidence regarding Sharon, decedent's third nominee, shows that she was qualified under the plain language of section 6-13 of the Probate Act and she expressed her readiness, willingness, and ability to act in that capacity. Despite having met those statutory requirements and her expressed intent, the trial court opined that the phrase "ready, willing and able" provided the court discretion to delve further into Sharon's previous activities involving decedent's affairs and then disqualify her as executrix of decedent's estate based upon those actions. The court erred in so doing.

¶ 89 Here, mindful of the regrettable dysfunction and distrust that exists among the parties and the action taken by them as a direct result, we are sympathetic to the trial court's message regarding that conduct. However, as the supreme court held in *Clark* and *Nonnast*, absent a statutory prohibition, such conduct is irrelevant when deciding whether to grant the testator's intent regarding who shall manage his or her estate. If Sharon's later actions as executrix warrant a challenge, remedies are available, provided, again, that they fall within statutory parameters. See *Estate of Rice*, 77 Ill. App. 3d at 651, 396 N.E.2d at 306, quoting *Clark*, 214 Ill. at 544, 73 N.E. at 810 ("It is only when one or more of such statutory causes are properly brought before the court for judicial action thereon that the courts have jurisdiction to revoke letters of administration or letters testamentary").

¶ 90 Accordingly, because we agree with Sharon that the trial court erred by denying her petition for issuance of letters testamentary, we reverse the trial court's judgment on that issue. In the interest of judicial economy, we appoint Sharon as executrix of decedent's estate with all the duties and responsibilities accompanying that position. In so doing, we also reverse the trial court's judgment appointing Helen as administrator with will annexed and vacate the trial court's September 2012 appointment of a special administrator to defend decedent's will.

91 III. CONCLUSION

¶ 92 For the reasons stated, we affirm in part as modified, reverse in part, and vacate in part.

¶ 93 Affirmed in part, reversed in part, and vacated in part.