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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000891-MR

GLENN HARRISON, ADMINISTRATOR
OF THE ESTATE OF AVO HARRISON — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 96-CI-000510

JAMES E. WHITAKER AND
MARY ANN WHITAKER — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, HUDDLESTON AND KNOX, JUDGES.

GUIDUGLI, JUDGE. Appellant, Glenn Harrison, as administrator of the estate of his mother, Avo Harrison, appeals from a judgment of the Warren Circuit Court holding that Avo's conveyance of the Harrison family farm to her daughter and son-in-law, appellees Mary Ann and James Whitaker, was fair, equitable, and without fraud or undue influence. We affirm.

The trial of this matter revealed the following history. In 1946, five (5) years after her husband died, Avo Harrison (Avo) acquired approximately sixty-five (65) acres of farmland in Warrent County, where she raised her seven (7)

children. Throughout the years, she conveyed small parcels of her land to several children and grandchildren, including the Whitakers, who claim they paid Avo for their two-acre tract. By mid-1995, when she was ninety-six (96) years old, Avo retained approximately fifty (50) acres. At that time, it was determined by her children that she could no longer care for herself and should no longer live alone. Six (6) of Avo's seven (7) children were living, and ranged in age from fifty-six (56) to seventy-seven (77). It appears the only child either willing or physically able to care for Avo was her youngest daughter, Mary Ann Whitaker (Mary Ann).

Thus, in June 1995, Avo moved into Mary Ann's mobile home. At this time, Avo was receiving $450 per month in social security payments. For her services, and upon the advice of the social security office, Mary Ann charged her mother one-third (1/3) of all household expenses. At some point after Avo moved into Mary Ann's home, Avo executed a power of attorney naming Mary Ann as her attorney-in-fact. Additionally, Mary Ann became the payee of Avo's social security benefits.

In March 1996, Mary Ann hired attorney Glenn Parrish to draft a deed conveying Avo's land to Mary Ann and her husband, sating it was Avo's desire to give them her 50-acre farm. Pursuant to Mary Ann's instructions, Parrish drafted a deed conveying fee simple title to the Whitakers. While in the Whitakers' home and in their presence, Mary Ann read the deed to Avo, after which Avo executed. The following day, however, Mary Ann asked attorney Parrish to destroy the deed, which apparently,

had not yet been recorded, and to prepare a second deed in which Avo reserved for herself a life estate. On March 14, 1996, this revised deed was delivered to the Whitakers' home, where Avo executed it.

The following month, in April 1996, two (2) Avo's four (4) sons, appellant Glenn Harrison (Glenn) and his brother, Larry, discovered the transfer of their mother's property to Mary Ann and James, and apparently spoke with Avo about the matter. Glenn and Larry then hired attorney Douglas Robertson (Robertson), who filed a complaint on Avo's behalf against the Whitakers, alleging fraud and undue influence, and asked the court to set aside the deed as void. Additionally, the complaint alleged Mary Ann's home to be a hostile environment, claiming Avo feared for her safety and well-being. Avo, however, did not verify the complaint. Rather, Robertson verified it, stating that Avo was "illegally detained and for this reason unable to verify this document in her own proper person."

The trial court scheduled a preliminary hearing in the matter for May 9, 1996, to determine Avo's intentions concerning her place of residence and choice of custodian, and further ordered the sheriff to take custody of Avo and transport her to the hearing. The Whitakers were not present to testify, although it was discovered later they had not received notice of the proceeding. Nonetheless, given the testimony of other witnesses, the court issued an order naming Glenn as Avo's legal custodian and terminating Mary Ann's power of attorney. Avo lived with Glenn and his wife for approximately one (1) week, after which

Glenn put Avo in a local nursing home on May 14, 1996. Avo died one (1) month later, on June 13, 1996. Glenn, as administrator of Avo's estate, was substituted as plaintiff in this litigation. A trial on the matter was held on February 26, 1997. The following month, the trial court entered judgment in favor of the Whitakers.

At trial, conflicting testimony was elicited as to whether or not the deed at issue was procured free of undue influence. Although a detailed recitation of the evidence presented at trial may be unnecessary, we set forth the following summary of the witnesses' testimony to show the conflict that existed among the family members and to show the trial court's judgment is supported by probative evidence and thus not be disturbed.

Both Glenn and Larry testified that when they approached their mother about her conveyance of the farm to Mary Ann and James, Avo acknowledged having signed some papers, but told them she did not know what she had signed. From her comments, Glenn testified, Avo apparently thought the papers would prevent the state from taking her farm in the event she became ill and had to be hospitalized. She told Glenn that Mary Ann explained to her the papers would prevent her from "losing" the farm. Both Glenn and Larry testified that Avo could not possibly have read the deed, considering she was nearly blind and could see only movement around her. They testified that, initially, Mary Ann had allowed them to visit Avo at their convenience, and had kept the door of her home unlocked to enable

them to do so. However, they further testified, when Mary Ann discovered they knew about the transfer of the farm, she locked them out of her house, denying them access to their mother.

Glenn testified that when he attempted to talk to Mary Ann about the conveyance of the family farm to her and her husband, Mary Ann told him "she'd see him dead and in hell" before he would "get the property." He testified that his mother had always treated her children equally and fairly, and did not intend that only one (1) of them acquire title to the farm. Rather, he testified, Avo intended that the property be divided equally upon her death. Finally, Glenn testified that Avo told him she was afraid of Mary Ann.

Likewise, Larry testified that he understood from his mother the farm was to be sold upon her death and the proceeds divided equally among her children. He noted that Avo was very close to several of her grandchildren, having raised three (3) of them herself, and that she would not have taken any action which might exclude them from sharing in her estate. Larry testified that from July through December of 1995, he and his wife, Lily, came to Mary Ann's home each morning to fix Avo her breakfast. However, just three (3) months prior to Avo's conveyance of her farm, Mary Ann told them they were not to come to her home and fix Avo's breakfast anymore. She informed them she had found someone else to assist Avo. Finally, Larry noted that Mary Ann did not contact attorney Parrish concerning acquiring title to Avo's farm until Larry had been admitted to the hospital for

emergency surgery on March 1, 1996, which kept him in bed for over a month.

Lily Harrison, Larry's wife, testified that after Avo had been removed from Mary Ann's home pursuant to court order, she told Lily the Whitakers had "forced" her to sign some papers, and that she now had no home and no money. Larry's daughter, Judy Keown, testified that after Avo was removed from Mary Ann's house, Avo told Judy she wanted to go home but that Mary Ann had made her sign some papers and had taken her home away from her. Judy further testified that Avo said she was afraid of Mary Ann.

Ivan Harrison, a retired police officer and one of Avo's grandsons, testified that he did not believe it was Avo's desire to convey her farm to Whitakers. In any event, he testified, Avo would not have given her farm to any one (1) child unless she did so openly, not in an "underhanded and sneaky" manner. He lived with Avo for a ten-year period (from age two to age twelve), and knew her to be a "fair and honest type" person.

Wanda Wilson, a longtime friend of Avo's, testified that Avo once told her she did not really care what happened to her land after her death as long as Ryan Harrison, a grandson whom she raised (son of James Earl Harrison, another of Avo's sons) got a piece of her land on which to build a house if he so desired. Wanda described Avo as "strongwilled" and added that she did not believe Avo could be "forced" to do anything she did not want to do. Finally, Wanda testified that when she visited Avo in December 1995, Avo did not appear to be mistreated or abused, nor did she appear to be held against her will.

Avo's ophthalmologist, Dr. Gerald Sullivan, testified by way of deposition. After being shown the deed which Avo signed, he testified that in March 1996, at the time Avo signed the deed, she may have been able to read the wording in the deed, but only if she had used visual aids which magnified the lettering many times. Further, he testified, Avo most likely would have abandoned the effort even then, given the difficulty of the process:

> Q: I now show you what has been marked as Exhibit A, which is a deed dated March 14, 1996, recorded in Deed Book 722, Page 153, in the Warren County Clerk's Office. Would Mrs. Harrison have been able to have read the wording in that deed?
>
> A: It would be possible with special visual aids that might magnify this many times and put it on a screen to read it a letter at a time, but in the ordinary sense of what we think of as reading, picking it up and examining it, no.
>
> Q: So the only way that she would have been able to have read that would have been with very specialized visual aids?
>
> A: And it would be an abeyance process and probably would be abandoned before the end was reached.

Avo's otolaryngologist (ear doctor), Dr. William Moore, testified by deposition that Avo could not understand normal conversation. Although Avo was wearing a hearing aid on her right ear at the time he examined her, in June 1995, he determined that the right ear was so severely impaired, a hearing aid would no longer be of any benefit. He did not consider the left ear to be particularly "aidable" either, but recommended an above-the-ear hearing aid which might give Avo some ability to

understand conversation in that ear. His records, however, did not indicate any purchase made of such a hearing aid on behalf of Avo. Dr. Moore further testified:

> Q: What method would someone need to employ to effectively communicate with Mrs. Harrison?
>
> A: they would have had to concentrate on her left ear and spoken slowly and distinctly near her left ear in order for her to understand, in my opinion.
>
> Q: Did you observe anything else remarkable about Mrs. Harrison's medical condition?
>
> A: Well, of course, she was 96 years old. She was very frail. I think she only weighed around 80 pounds or in that area. Very apprehensive as I recall because of her lack of being able to communicate, possibly a little bit depressed. I'd hesitate to make that as a direct comment, but that's not an unusual accompaniment of this type of hearing loss. But mainly a lady that was very concerned about her inability to communicate and the withdrawal feeling that they have because of this.
>
> Q: So she wasn't totally deaf?
>
> A: She wasn't totally deaf, but from average communication, she was extremely limited. She had extreme difficulty understanding anything I asked her in the office. We had to really-in fact, we were not able to communicate.

Attorney Glenn Parrish testified that it was Mary Ann who first contacted him concerning preparation of a deed conveying Avo's property to Mary Ann and her husband. He further stated he neither visited Avo nor spoke with her at all after being hired by the Whitakers. When asked why he did not independently visit Avo, he explained he had no reason to suspect undue influence on the Whitakers' part. While he was aware that

Avo was "old" and "hard-of-hearing," he testified that Mary Ann had not informed him of Avo's specific age, her bad eyesight, the number of children she had, nor the fact that she was in the care and custody of Mary Ann and her husband.

Parrish's assistant, Kathy Bell (Bell), who delivered the second deed to Avo, testified she asked Avo for identification and then handed the deed to Avo to read. The only persons present were Bell, Mary Ann, and Avo. Bell asked Avo whether she was are the document transferred her property to the Whitakers, reserving a life estate for herself, to which Avo responded, "yes." Bell informed Avo she was under no obligation to sign the document is she did not want to, and testified that Avo appeared to sign the deed of her own free will and did not appear to be under any duress. Bell testified that she had not been made aware of Avo's visual and hearing impairments. She further stated she had not observed any visual aids which would have assisted Avo in reading the deed, nor did she speak directly into Avo's left ear. Nonetheless, she testified, she was seated to the left of Avo as she spoke with her. Although Mary Ann claimed that Kathy Bell read the deed to Avo, this testimony was contradicted by Bell, who specifically denied reading the deed aloud.

Mary Ann Whitaker testified she spoke with her mother about drawing up a will but that Avo was "adamant" about not wanting to do so. Mary Ann apparently asked Avo what she wanted to do with her farm, and stated that Avo responded by telling Mary Ann that Glenn and Larry had all they were going to get from

her, Percy (another son) did not need anything, Earl had houses all over town, and her daughter, Marie, was never coming back home. Allegedly, Mary Ann then told her mother, That just leaves me," to which Avo responded, "Well, you don't want it anyway." However, Mary Ann informed Avo she would, in fact, like to have the farm. Apparently, Avo expressed some concern about "displeasing" her sons. Nonetheless, Mary Ann insisted that Avo wanted to give her and her husband, James, the farm. She conceded that she had told Douglas Robertson, the attorney hired by Glenn and Larry to represent Avo, that she would "deed the property back" to Avo but that she had agreed to do so only because attorney Robertson was "screaming and hollering" at her and threatening to sue if she did not reconvey the farm to her mother.

When asked why she believed she deserved the farm, Mary Ann stated her brothers had promised to help her care for Avo but that they later refused to do so, placing "undue responsibility" on her. She stated her opinion that her brothers "never treated me very nice," and that she did to like they "very well." Further, Mary Ann voided her concern that she might not get her share of the farm "because of her brothers." Specifically, she said, "I deserve my part...I knew I would not get." Mary Ann noted that since 1980, she had done her mother's grocery shopping and had helped her keep her bills current. She further noted that when her mother first came to live with her, she worked from 6 a.m. until 2 p.m. each day, but eventually began working from 4 a.m. until noon in order to spend more time with her mother.

Mary Ann testified she did not inform her brothers about the transfer of property because she knew "they'd raise the devil." In fact, she stated, Larry did enter her home and proceeded to berate their mother after he learned of the transfer, an allegation which Larry denied during his testimony. Finally, Mary Ann testified she read the first deed to her mother "practically word-for-word" and her mother knew what she was signing. Mary Ann denied placing any pressure on her other to sign the deed and insisted her mother was well aware that she was conveying her property to the Whitakers.

James E. Whitaker testified that he and Mary Ann contacted, instructed, and paid attorney Parrish to draft the deeds Avo eventually signed. He stated that after Avo signed the first deed conveying fee simple title to the Whitakers, Avo commented to him, I guess you'll kick me out now, won't you?" James testified he responded, "You've got a home as long as you want it." Nonetheless, the Whitakers instructed attorney Parrish to destroy the first deed, and prepare a second deed in wich Avo reserved a life estate. After Avo's sons discovered the transfer, he testified, he told Avo he would "sign this place back over" to her, not on the "sayso" of the boys but rather, based upon what Avo wanted to do. James testified that Avo told him, "It's alright."

Melissa Cooper, the Whitakers' daughter, testified she was the family member who initially suggested to her grandmother that "she couldn't stay there [in her home] forever, and that Avo's family "would have to find someplace else for her." She

testified that even though her mother, Mary Ann, went to Avo's home everyday to help with housework, Avo's home was no longer sanitary nor was Avo able to keep herself or her clothing clean. Melissa testified that when Avo voiced her preference to live with Larry, she informed Avo that Larry's wife, Lily, "had said there was no way in hell Avo could live with them." She testified that in response to her question concerning what Avo intended to do with the farm, Avo, replied, "I'll give it to who takes care of me." Melissa was present when Avo signed the first deed, and testified that Avo understood what she was doing and signed the deed of her own free will. Further, she testified, several days after Avo executed the second deed, she asked Avo, "Are there any changes you want done on these papers?" Allegedly, Avo replied, "No, they're the way I want them to be."

Shelia Embry, a home healthcare worker hired by Mary Ann to assist Avo for several hours each day, testified that Avo was well cared for by the Whitakers and that she saw no signs of neglect or abuse. She stated that one morning, Avo told her Larry was very angry with her but that she thought she had done the "right thing." Shelia testified she asked Avo whether she wanted the Whitakers to have the farm, to which Avo responded she did, although she added she was afraid Larry would never come to see her again. Shelia further testified that she visited Avo in Glenn's home, following Avo's removal from Mary Ann's house, Avo wondered aloud whether her sons would allow her to return to the Whitakers' house if she were to "let [them] have the farm."

Finally, attorney Douglas Robertson, retained by Glenn and Larry, went to Mary Ann's house to visit Avo and discuss with her the matter of the conveyance of her farm. Although he was accompanied by Glenn and Larry, Mary Ann refused entry to her two brothers, allowing only attorney Robertson to enter, and only after she had initially denied him entry. Robertson testified he was alone in the room with Avo, and spoke to her within eight (8) to ten (10) inches of her ear. He asked Avo whether she wanted to say with her daughter, to which Avo responded she did not. Allegedly, she told Robertson she was afraid of the Whitakers.

Robertson testified that while Avo said she had signed something, she insisted she had not deeded her form to the Whitakers and had no intention of doing so. He stated it appeared Avo thought she had signed a will leaving her property equally to her children which, she said, was her intent. He testified that although Mary Ann had agreed to reconvey the property to her mother, Mary Ann's husband, James, called Robertson and told him Mary Ann "would do nothing of the sort," that Mary Ann "would be paid for everything she'd done for that old woman," and that Mary Ann "was entitled to that property and wasn't going to give it back."

Robertson testified that Avo understood he was filing a lawsuit on her behalf, but that he did not believe she could sign the complaint with any understanding of precisely what she was signing. He admitted he did not read the complaint to her. Finally, he testified that when he visited Avo in the nursing home, just prior to her death, Avo told her that her daughter and

granddaughter, during their visits with her, had tried to convince her not to go forward with the lawsuit.

The trial court entered judgment in favor of the Whitakers on March 11, 1997. The court found Avo to be of sound mind and in relatively good health, considering her age. While the court noted it could not set aside a conveyance except in a "clear case based on convincing evidence," it found a confidential relationship to exist between Avo and the Whitakers and as such, shifted the burden to the Whitakers to show that procurement of the deed was free from fraud or undue influence. The court found the allegations in the complaint, i.e. that the Whitakers' home was a hostile environment, that Avo was held against her will, and that Avo was abused, were unsubstantiated.

Focusing on the testimony of Kathy Bell and Shelia Embry, as well as Mary Ann's testimony that she read the first deed to Avo and Melissa's testimony that she was at her parents' home when the deed was read to Avo, the court concluded the Whitakers met their burden of proof:

> The Court concludes the Defendants have met their burden of proving the deed was not procured by fraud or undue influence. The fact of two deeds being signed with the second one reserving the life estate, coupled with Ms. Bell's testimony, makes it clear she knew and understood the nature of the document. The testimony of Ms. Embry, while hearsay, is admissible as Ms. Embry is a disinterested witness and the statement of Avo Harrison is against her interest as a named Party to this suit.
>
> The Court concludes the conveyance to be fair and equitable under the circumstances described herein.

On appeal, Glenn argues the trial court's conclusion that the transfer of property was free from undue influence is not supported by the evidence. Specifically, he asks this Court to consider the following evidence to constitute proof of undue influence: (1) institution by Avo herself of the lawsuit requesting that the deed be set aside as void; (2) the many steps the Whitakers took to conceal the transaction; (3) the Whitakers; isolation of Avo once the conveyance was discovered by other family members; (4) the Whitakers' demand that Larry and Lily stop coming to their home to fix breakfast for Avo; (5) the Whitakers' engagement of an attorney's services immediately after Larry became indisposed due to emergency surgery; (6) the Whitakers' failure to inform Kathy Bell of Avo's visual and hearing impairments; (7) the failure to read the second deed to Avo; and, (8) the absence of any magnifying devices which would have assisted Avo in reading the second deed prior to signing it.

When a physically infirm individual such as Avo (who was effectively blind, nearly deaf, and needed assistance with daily chores) conveys property to her custodian and, in this case, her attorney-in-fact, the burden is placed upon the custodian to establish "that any influence acquired or confidence reposed was not abused." Riddell v. Pace, Ky., 271 S.W.2d 31, 33 (1954). As noted in Riddell, not all influence is "undue." Rather, "[t]he influence acquired and exerted must be of sufficient force to destroy the free agency of the grantor and to constrain him to do, against his will, that which he would otherwise have refused to do and this pressure may be applied

either directly or indirectly." Id. at 33-34. (Citation omitted). Riddell further instructs:

> [P]roof of undue influence must amount to more than a bare showing that the opportunity for its imposition existed.
>
> Equally intrenched in the law of this jurisdiction is the idea that one may dispose of his estate in whatever manner he chooses if it be the result of his unconstrained choice, with the corollary thought that it is not within the province of the court to make a disposition different than that made by the grantor or testator, as the case may be, notwithstanding the fact that the court might not agree with the person's conception of right or wrong or even fair play. . . . [A]ll acts of kindness are not stimulated by motives of greed and . . . often the recipients of such acts desire to compensate those who had aided and administered to their needs in time of distress and suffering. All influence is not undue.

Id. at 34. (Citations omitted).

Generally, direct proof of undue influence is difficult to establish. Thus, Kentucky courts have typically allowed parties to prove undue influence by way of circumstantial evidence. See Sublett v. Sublett, 31 Ky. 23, 226 S.W.2d 324 (1950), which enumerates those circumstances which may properly be considered:

> In Walls v. Walls, 30 Ky. {l. Rptr.], 949, 99 S.W. 969, 970, we said: "Direct proof of undue influence can seldom be had. Like fraud, it must be proved ordinarily by circumstances, and, though each circumstance standing alone might be quite inconclusive, yet the effect of all the circumstances when taken together may be more convincing."
>
> Among the circumstances that may be considered are mental incapacity, confidential relations, active participation by the beneficiary or his agent in the preparation of the deed or other instrument,

> the exclusion of near relatives, the result accomplished, false statements and recitals as t consideration in the conveyance, inadequacy of consideration under such circumstances, and concealment of or failure to record the conveyance.

Id. at 327.

Given the parties' close relationship, the burden was upon the Whitakers to show, by clear and convincing evidence, that Avo transferred her farm to them freely and voluntarily, with an understanding of the consequences thereof.

> [W]here the circumstances are such as to raise a suspicion of fraud or undue influence, as where one of the parties is enfeebled by sickness or old age, and the relation between the parties is one of special trust and confidence, the burden is upon the donee to show, by clear, convincing, and satisfactory evidence, that the gift was the voluntary and intelligent act of the donor.

Kimmel v. Berresheim, 173 Ky. 734, 191 S.W.2d 456 (1917) (quoting the trial court's opinion). See also, Gay v. Gay, 308 Ky. 545, 215 S.W.2d 96, 98 (1948) ("[t]o be valid, a deed must be made freely and voluntarily by one having mental capacity to understand its consequences."). As previously mentioned, Sublett calls for a totality of the circumstances test, noting that "though each circumstance standing alone might be quite inclusive, yet the effect of all the circumstances when taken together may be more convincing." Sublett, 226 S.W.2d at 327 (quoting Walls v. Walls, 30 Ky. L. Rptr. 949, 99 S.W. 969, 970 (1907)).

On appeal, the question is not whether we, the reviewing court would have decided the issue differently, but

whether the findings of fact are clearly erroneous, the opposite result is compelled, or the trial court abused its discretion. See Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982). Given that over twenty (20) witnesses testified at trial, half of whom were members of the Harrison family, there was, inevitably, conflicting evidence presented to the court. We are not to disturb the judgment of the trial court "on conflicting evidence unless we have something more than a doubt as to the correctness of his findings." Jones v. Jones, 305 Ky. 5, 202 S.W.2d 746, 749 (1947). The trial court was entitled to accept as true the appellees' evidence and reject all other evidence to the contrary. Findings of fact made by a trial court may not be set aside unless "clearly erroneous." Ky. R. Civ. Proc. (CR) 52.01. When there is probative evidence to support the trial court's findings, they must not be disturbed. We believe the trial court's finding that the Whitakers carried their burden of proof is not clearly erroneous, considering the totality of the evidence in the record.

As part of this appeal, appellant, Glenn Harrison, asks this Court to review the issue of whether the Whitakers converted Avo's funds to their own use. Apparently, shortly after Avo moved in with the Whitakers, they purchased a new dryer for $290. Mary Ann used Avo's funds to pay one-third (1/3) the cost of the dryer. Additionally, the Whitakers purchased a new mobile home for $23,000, the monthly mortgage payment for which was $253.39. Again, Mary Ann used Avo's funds to satisfy one-third (1/3) of the monthly payment. At trial, Glenn maintained that Mary Ann's

use of Avo's funds to satisfy these debts was inappropriate, arguing that as fiduciary, Mary Ann could not act on behalf of her mother in matters in which she had a private interest. The trial court found that "the accounting submitted regarding Avo Harrison's money handled by the Whitaker's [sic] to be acceptable." We have reviewed the evidence in the record, and find no error in the court's decision. As such, we affirm the trial court on the issue of conversion.

For the foregoing reasons, we affirm the judgment of the Warren Circuit Court.

HUDDLESTON, JUDGE, CONCURS.

KNOX, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KNOX, JUDGE, DISSENTING. I respectfully dissent.

I believe that under Sublett's totality of the circumstances test, the Whitakers failed to carry their burden of showing that procurement of the deed was free from undue influence. Sublett identifies those circumstances which may be considered in assessing proof of undue influence: mental incapacity, confidential relations, active participation by the beneficiary or his agent in the preparation of the deed, the exclusion of near relatives, the result accomplished, false statements and recitals as to consideration in the conveyance, inadequacy of consideration under such circumstances, and concealment of or failure to record the conveyance.

The trial court found Avo to be of sound mind, which may very well have been the case. However, such a finding is not conclusive of Avo's capacity to understand a legal transaction,

or to remain immune to influence or coercion which might make her do something she would not otherwise do. The Court in McCarty v. Conley, 289 Ky. 61, 157 S.W.2d 475 (1941), made a distinction between the "sound" mind and the "enfeebled" mind:

> I have not overlooked the fact that the only professional witness in the case, Dr. Hunter, testified that the decedent at the time he made this deed was of sound mind. I do not understand the soundness of mind is conclusive of questions similar to the one under consideration. The decedent certainly had an enfeebled mind and one that in all probability could not withstand the importunities of the one in whose custody he was . . . .

Id. at 480. (Quoting from the trial court's order).

The factor of mental capacity goes not only to Avo's ability to understand the nature and consequences of her actions, but also to her ability to be controlled by others. While Avo seems to have been mentally alert at the time she conveyed her farm to Mary Ann and James, there is ample evidence she did not understand the nature of the document she signed.

Avo gave conflicting stories about the type of document she had signed, telling several people she did not know what she had signed, yet indicating to Glenn she thought it allowed her to keep her farm, while indicating to attorney Robertson she thought it was a will dividing her property equally among her children. Although Avo told Sheila Embry she thought she had done the "right thing," the evidence indicates she was not sure what that "thing" was. Further, Avo was ninety-six (96) years old, nearly blind and deaf, and completely dependent upon Mary Ann for care and support. During Avo's execution of each of the two (2)

deeds, Mary Ann was present. Thus, given the circumstances, I do not believe the evidence establishes Avo fully understood that the document she signed would prevent her other children, upon her death, from sharing in the only valuable asset she possessed.

The second factor, confidential relations, is present in this case, and the trial court so found. Mary Ann was Avo's custodian to whom Avo looked for care and support, and upon whom Avo was extremely dependent. The records from Avo's nursing home, Rosewood Health Care Center, establish that Avo needed assistance in nearly all of her daily activities, and even had to be told what food was on her plate since she could not see it.

The third factor is also present in this case. Mary Ann actively participated in the preparation of both deeds, having hired attorney Parrish, instructed him as to the terms of the deed, and paid him for his services. Further, Mary Ann did not inform Parrish that Avo was ninety-six (96) years old, blind and nearly deaf, or that Avo had a total of six (6) surviving children.

Mary Ann did not inform her four (4) brothers and one (1) sister that she was acquiring title to a farm which, apparently, her siblings believed would be divided equally among them, Avo's never having given them any indication otherwise. In fact, despite Mary Ann's having freely informed the court that it was Avo's expressed desire to deed the farm to her, she never shared this expression of Avo's wishes with her siblings, either before or after the conveyance was accomplished. Further, there is no evidence indicating that Avo herself informed her other

children of her desire to convey the farm to Mary Ann. When Mary Ann's brothers discovered the transfer of property, Mary Ann locked them out of her house and denied them access to their mother. Thus, the fourth factor, exclusion of near relatives, is present in this case.

Avo apparently had adamantly resisted executing a will, according to Mary Ann's testimony, which, of course, had circumstances remained the same, would have resulted in equal division of Avo's property among her children. She had expressed this position and maintained it throughout her life. Three (3) months prior to her death, however, Avo transferred what amounted to her entire estate to Mary Ann. Further, according to witness Wanda Wilson, Avo wanted her grandson, Ryan, to share in her land. Conveyance of the farm to Mary Ann, however, was contradictory to this expressed desire. I believe the result accomplished by way of the deed (the fifth factor) raises the suspicion that Avo's conduct was, in fact, contrary to her wishes.

The consideration stated in the deed is "love and affection." However, the testimony of Mary Ann and of those who testified on her behalf indicates that Mary Ann believed the consideration to have been the services she rendered to her mother. If such were the case, the deed could have more specifically identified the consideration. After all, Mary Ann instructed attorney Parrish as to the terms of the deed. As it is, the deed makes no mention of the alleged true consideration for the transfer of Avo's farm.

Finally, although Mary Ann recorded the deed soon after Avo executed it, and prior to Avo's death, she nonetheless concealed the transaction from Avo's family.

Given the mother-daughter relationship between Avo and Mary Ann and, considering that Avo was dependent upon Mary Ann for daily care and support, the transfer of Avo's farm to Mary Ann must be closely scrutinized. See Woods v. Madden's Adm'x, 294 Ky. 14, 170 S.W.2d 877, 879 (1943) ("transactions of this kind between near relatives or those occupying a confidential relation to each other will be closely scrutinized . . . ."). Further, given the parties' close relationship, the burden was upon the Whitakers to show, by clear and convincing evidence, that Avo transferred her farm to them freely and voluntarily, with an understanding of the consequences thereof.

> [W]here the circumstances are such as to raise a suspicion of fraud or undue influence, as where one of the parties is enfeebled by sickness or old age, and the relation between the parties is one of special trust and confidence, the burden is upon the donee to show, by clear, convincing, and satisfactory evidence, that the gift was the voluntary and intelligent act of the donor.

Kimmel v. Berresheim, 173 Ky. 734, 191 S.W.2d 456 (1917) (quoting the trial court's opinion). See also Gay v. Gay, 308 Ky. 545, 215 S.W.2d 96, 98 (1948) ("[t]o be valid, a deed must be made freely and voluntarily by one having mental capacity to understand its consequences."). As previously mentioned, Sublett calls for a totality of the circumstances test, noting that "though each circumstance standing alone might be quite inconclusive, yet the effect of all the circumstances when taken

together may be more convincing." Sublett, 226 S.W.2d at 327 (quoting Walls v. Walls, 30 Ky. L. Rptr. 949, 99 S.W. 969, 970 (1907)).

In light of the evidence in the record recounting the circumstances under which Avo transferred her farm to the Whitakers, I do not believe the Whitakers carried their burden of proof. Given that over twenty (20) witnesses testified at trial, half of whom were members of the Harrison family, there was, inevitably, conflicting evidence presented to the court. I realize that this Court is not to disturb the judgment of the trial court "on conflicting evidence unless we have something more than a doubt as to the correctness of his findings." Jones v. Jones, 305 Ky. 5, 202 S.W.2d 746, 749 (1947). However, in this case, I believe the trial court did not consider compelling evidence in this case, erroneously finding the Whitakers showed that Avo transferred her property freely and voluntarily, absent any undue influence. As such, I would reverse the judgment of the Warren Circuit Court.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Robert E. Harrison Bowling Green, KY	John E. Donnelly, Jr. Bowling Green, KY