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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-22-681

TERRI PEEK, EXECUTOR OF THE ESTATE OF EMMA LOU FRIEDRICK, DECEASED APPELLANT V. SHARON D. DILEY APPELLEE	**Opinion Delivered** December 13, 2023 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, GREENWOOD DISTRICT [NO. 66GCV-20-184] HONORABLE R. GUNNER DELAY, JUDGE AFFIRMED

BRANDON J. HARRISON, Chief Judge

Sharon Diley was close to her aunt Emma Lou Friedrick for all but one year of their lives: Emma Lou's last one. Sharon prevailed in this case that Emma Lou—a widow with no children of her own—filed, alleging that a warranty deed she had executed in January 2018 that gave Sharon a joint tenancy in her home should be set aside for undue influence. If we did that, Terri Peek, Emma Lou's friend and caregiver, would inherit the home under a will Emma Lou executed in 2020, after she and Sharon had a falling out. Instead, we affirm the circuit court's finding that there was no undue influence, which was, and is, the central question presented.

We review equity proceedings like this one de novo, but will reverse a finding of fact only for clear error, meaning the entire evidence leaves us with a firm conviction it is wrong, though some evidence might support it. *Montigue v. Jones*, 2019 Ark. App. 237, at

13, 576 S.W.3d 46, 55. We acknowledge, and give appropriate deference to, the circuit court's superior ability to weigh the credibility of witnesses. *Id.* It saw them testify; we didn't.

The record establishes a few important and undisputed points about how things stood on 18 January 2018, the day Emma Lou met with Jamison Bonds, an elder-law-focused attorney, and executed the deed he had prepared. First, no one contends Emma Lou lacked mental capacity. Second, she had always intended for Sharon to inherit the home. So had Emma Lou's late husband. In fact, if Emma Lou had died on the way to her appointment with Bonds, the home would have passed to Sharon under a beneficiary deed Emma Lou had executed in 2007. Third, Emma Lou had told Sharon she would inherit it. Fourth, Sharon and her husband James, who were younger than Emma Lou but retired themselves, had already been living there with her for about four years. Finally, Emma Lou was then more than ninety years old.

Which brings us to that appointment. The Dileys testified that they first came to contact Bonds because of an insurance issue: Emma Lou had insured the house Sharon stood to inherit—which was already the Dileys' primary residence—for far less than its replacement cost. James offered to pay for a new policy with higher limits, and Emma agreed. But when the Dileys tried to get a new policy, they learned that because Sharon did not have a present interest in the house, she could not insure it in her own name.[1]

[1]The circuit court found the Dileys' testimony on that point "made perfect sense" because "Arkansas law requires that an individual have an insurable interest in a property before they can take out a policy of insurance." See Ark. Code Ann. § 23-79-104 (Repl. 2014).

The Dileys themselves made and attended an initial meeting with Bonds. And at that meeting, an elephant entered the room: Medicaid cost recovery. Bonds testified that most people come into his office with one of two concerns. One is concern about leaving a "mess" for their families. The other concern was spending their life savings on long-term care.

Bonds's notes indicated that he knew Emma Lou had executed a beneficiary deed to Sharon, who was a beneficiary under Emma Lou's 2007 will. He testified that the beneficiary deed would satisfy the first estate-planning concern by getting Emma Lou's house to Sharon, the intended beneficiary, without going through probate. Owning the home would not prevent Emma Lou from entering a nursing home on the government's dime either; but the government could get the dime back after her death by asserting and enforcing a lien against it. Conveying a joint tenancy to an intended beneficiary other than a spouse, on the other hand, according to Bonds, would prevent the government from pursuing an estate recovery against the property if Emma Lou died first, satisfying the second estate-planning concern.

Bonds also said he would have explained all this to Emma Lou at their meeting. True, Bonds did not specifically recall his meetings with Emma Lou or the Dileys. But he testified he would have followed his usual practices, including separating the client from any family for a private meeting to ensure she understood the estate plan he had prepared; that the plan reflected the client's own wishes, not someone's undue influence; and that the client had the mental capacity to execute the necessary instruments. One thing he looks for when he reviews for undue influence is consistency with the client's previous estate plans.

He testified that he was "absolutely certain" there had been no undue influence, because he would not have proceeded with the execution of the instruments unless he had been certain. If he had developed any concern about Emma Lou's mental capacity during their meeting, he would have asked questions to make sure she was oriented with time and place. "Do you know who the President is? Do you know what year it is?" etc. And he would have explained to Emma Lou that unlike her existing beneficiary deed to Sharon, which she could unilaterally revoke, she would not be able to undo the joint tenancy unless Sharon agreed. The circuit court found Bonds "credible and competent" and found his testimony weighed in favor of its finding that there was no undue influence.

The Dileys had made the appointment for Emma Lou to meet with Bonds and drove her there. Consistent with Bonds's testimony, James testified that at one point, Bonds met privately with Emma Lou for thirty to forty-five minutes. The Dileys were not privy to what they discussed, but Emma Lou seemed relieved afterward; and of course, she had signed the instruments Bonds had prepared, including the warranty deed.

The Dileys continued to live with Emma Lou for more than a year. Sometime in early 2020, Emma Lou lashed out uncharacteristically at their four- or five-year-old granddaughter. The Dileys' son urged them to come live with him in Kansas, which they eventually did.

Terri points to a number of facts that sound (in the abstract) like hallmarks of undue influence but turn out (on the record) to seem benign enough, and consistent with the circuit court's view that Sharon was a loved and loving niece whose relationship with Emma Lou soured in her declining years: The Dileys moved in with Emma Lou? She asked them

to, the circuit court found. In the six years they lived there, they took her to church, took care of the yard, and looked after her needs. James never got a job? He was retired. Sharon wrote checks to herself from Emma Lou's bank account? She was—and long had been—Emma Lou's designated agent under a durable power of attorney. James testified that the checks were to reimburse Sharon for expenses like groceries and medication she picked up for Emma Lou, whose medication alone cost four hundred or five hundred dollars a month. The circuit court found him credible and his testimony "consistent with the common experience of caregivers." Terri represents that in 2017, Sharon "had Emma Lou admitted to an Alzheimer's ward." She was hospitalized with a bladder infection and was home in a week.

Terri notes that Sharon gave no consideration for the deed, less than even the "grossly inadequate" consideration discussed in *Bennett v. Ballow*, 2022 Ark. App. 311, 653 S.W.3d 357, where we held that two deeds by a grantor of similar age should be set aside for undue influence. The deeds in *Bennett* were prepared by a neighbor who hustled them to the grantor's hospital bed after a car accident. *Id.* at 1–2, 653 S.W.3d at 361. The grantor had intended to leave the property to someone else. *Id.* at 6, 653 S.W.3d at 363. Emma Lou intended to leave the house to Sharon—not Terri or, for that matter, Uncle Sam. The conveyance to Sharon was, if anything, protective of Emma Lou's existing estate plan. Other arguments seem grounded in a sense that Sharon did not *deserve* the house, in the end, because Terri took better care of Emma Lou than Sharon had. The question, though, is whether Emma Lou was making her own choice, and exercising her own free will, when she executed the deed.

The circuit court found Sharon had procured that deed during a confidential relationship with Emma Lou. Sharon disputes that. On a different record, this might have required a complicated analysis of who (Sharon or Terri) had what burden of proof. *See, e.g.*, *Montigue*, 2019 Ark. App. 237, at 15–17, 576 S.W.3d at 56–57; *Est. of McKasson v. Hamric*, 70 Ark. App. 507, 511, 20 S.W.3d 446, 449 (2000). But the circuit court found Sharon had proved beyond a reasonable doubt that the deed was the product of Emma Lou's own intentions and desires about the disposition of her property. Because the record supports that finding even under the most favorable standard for Terri, we leave that analysis for a case where it might make a pivotal difference. Emma Lou may have come to regret the conveyance to Sharon. But deeds are not set aside for regret.

Affirmed.

KLAPPENBACH and BARRETT, JJ., agree.

Walters, Allison, Parker & Estell, by: *Meagan Burns*, for appellant.

Gean, Gean & Gean, by: *David Charles Gean*, for appellee.