ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION II

CA06-395

November 1, 2006

CHARLES COGBURN
APPELLANT

v.

MARY SUE WOLFENBARGER
APPELLEE

AN APPEAL FROM MONTGOMERY COUNTY CIRCUIT COURT
[No. PR-2004-32]

HONORABLE JERRY WAYNE LOONEY, CIRCUIT JUDGE

AFFIRMED

In this probate case, three siblings are arguing over the rights to the property left at death by their ninety-two-year-old mother, Laura Cogburn. This appeal is from an order in which the Montgomery County Circuit Court's Probate Division found that Mrs. Cogburn, who died on March 25, 2004, had such diminished mental capacity that she was unable to withstand undue influence and that the transactions into which she entered in 2001 (including a will and a $50,917 certificate of deposit) must be set aside. The court directed that the intestate estate be distributed equally among Mrs. Cogburn's three children (appellant Charles Cogburn, appellee Mary Sue Wolfenbarger, and Harvey Cogburn).

Appellant, who was the other joint tenant on Mrs. Cogburn's CD, has appealed from the order, which also directed him to pay the proceeds of the CD to the estate. We affirm.[1]

On March 15, 2001, Mrs. Cogburn was taken to a lawyer by appellee and Harvey, and she signed a will distributing her estate equally among her three children. This will contained the following provision:

> I hereby make the following specific bequest: To my three children, I give, devise and bequeath the proceeds from a certificate of deposit with Chambers Bank in the current amount of $109,665.90, to be divided equally, share and share alike. Provided, however, if my grandson, David Cogburn, has not paid a certain loan to First National Bank for which $35,000.00 of said certificate of deposit was used as collateral, that amount shall be deducted from my son Charles Cogburn's share of any proceeds of the certificate of deposit prior to any distribution to said Charles Cogburn. I agreed with David Cogburn that he could use the $35,000.00 of the certificate of deposit as collateral for the loan, but that he would repay the amount to First National Bank by February 1, 2001, so that my certificate of deposit would be released.

At that time, she also gave a power of attorney to appellee and Harvey.

On August 17, 2001, Mrs. Cogburn revoked the power of attorney. She created the CD in question at Arkansas Diamond Bank in Glenwood on August 24, 2001, accompanied by appellant, who drove her there.

In April 2002, appellee filed a petition to be appointed guardian of the person and estate of Mrs. Cogburn. On March 21, 2003, the probate court entered an order appointing

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[1]We note that appellant's abstract does not comply with Rule 4-2(a)(5) of the Arkansas Rules of the Supreme Court and Court of Appeals, as it is not an *impartial* condensation of the record in this case. Appellant failed to abstract portions of the transcript harmful to his case, which required appellee to submit a supplemental abstract. For example, he omitted from his abstract testimony that he barricaded and padlocked decedent's home. Rather than remand for rebriefing pursuant to Rule 4-2(b)(3), however, we reach the merits of the appeal.

appellee guardian of Mrs. Cogburn's estate, but not her person. One month before Mrs. Cogburn died, we held, in an appeal brought by appellant, that the April 2002 medical evaluations of Mrs. Cogburn did not comply with the guardianship statutes and reversed and remanded for further proceedings. *Cogburn v. Wolfenbarger*, 85 Ark. App. 206, 148 S.W.3d 787 (2004). We described the evidence introduced at the guardianship hearing as follows:

> Ms. Wolfenbarger testified at the permanent guardianship hearing, which was held on March 7, 2003. She stated that Ms. Cogburn gave appellant's son $35,000 to pay off debts, and subsequently gave him another $30,000.
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> Ms. Cogburn testified that she does not want a guardian. She stated that she is able to take care of her home and garden, pays her bills, and drives to the grocery store. Ms. Cogburn maintained that she gave money to her grandson for hot checks, and that he promised to pay her back.
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> On cross-examination, Ms. Cogburn stated that she gave her grandson about $3,000, and then agreed that it is possible the amount was $35,000. Ms. Cogburn could not remember giving him any more money after that, and further stated she did not remember "who got the money when my bank account went from $109,000 to $55,000."
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> Two medical opinions were admitted into evidence in this case. The appellee offered a letter written by Dr. Matthew D. Hulsey, which states:
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>> I, Matthew D. Hulsey, D.O., Board Certified Family Practitioner, examined Laura Cogburn on April 5, 2002. During this examination I found Ms. Cogburn to be a pleasant 90-year-old white female that complains of short-term memory loss. Physical examination found her to be in good physical health. A cognitive screening test was performed which was suggestive of an impairment of cognition. At this time I do not feel that Ms. Cogburn is able to make reasonable or informed decisions regarding her affairs. At this time I do not feel that her condition is reversible.
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> The appellant offered the following letter by Dr. William E. Beebe:
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>> I examined Mrs. Laura Cogburn on April 19, 2002. Mrs. Cogburn exhibits signs of senile dementia and I have diagnosed her with this disease process.

I believe Mrs. Cogburn is not incapacitated and can voice her desires and wishes coherently.

85 Ark. App. at 208-09, 148 S.W.3d at 789.

On May 21, 2004, appellee filed a petition to probate the will that Mrs. Cogburn signed on March 15, 2001, and to be appointed personal representative according to the terms of the will. Appellee also requested an injunction restraining Charles from disposing of the $50,917 CD. She filed an affidavit, in which she stated:

> The $109,6655.90 [sic] certificate of deposit mentioned in the Will is no longer in existence. While under the undue influence of Charles Cogburn, Laura Cogburn cashed the $109,655.90 to pay of [sic] the loan of $35,000 mentioned in the will, which was not paid by David Cogburn, and $30,000 of the CD was used by Charles Cogburn for his son David Cogburn. The remaining amount was placed in a CD in the ... amount of $50,917.90 in the names of Laura Cogburn or Charles Cogburn with Arkansas Diamond Bank.

Appellee filed an amended petition, adding an allegation that a confidential relationship had existed between appellant and their mother.

Charles responded to the complaint by claiming that the CD was his by right of survivorship and that appellee had procured the will, exerting undue influence on Mrs. Cogburn. He filed a counterclaim seeking probate of the intestate estate, which he valued at less than $3000, and asking that he be appointed personal representative.

The court admitted the will to probate and appointed appellee as personal representative on July 30, 2005. It also restrained appellant from disposing of the CD until further orders. At the conclusion of the trial held on August 19, 2005, the circuit judge stated:

> I'm obviously in a little different position than a Court coming to this cold since I had the privilege of meeting your mother and hearing the evidence that was presented at the permanent guardianship hearing and obviously we made some errors there in the

fact that we didn't get new medical evidence at that time and I based my decision in March of 2003 on the very letters that Mr. Yeargan has referred to which happened to be a year old and the Court said that was too old and had us re-open it for purposes of taking additional evidence and that's the reason why Mr. Charles Cogburn was taking her to Dr. Meany at the time of her death which was to follow up on that. In any event, if we worked backward from there, I have to go back and take judicial notice of everything that happened there in March of 2003 and it occurred to me that the best place to look would be the Court of Appeals' own opinion with regard to that in which they reviewed and mentioned some of what had gone on there and some of the testimony that was given and Ms. Cogburn was here and I recall her testimony at that time. She was very concerned, always had been and continually concerned about these CDs and that's what the evidence was at that time, always was wanting to know where her money was. Obviously she continued to ask that question even after the guardianship. At that time, in March of 2003, there was testimony about these loans. She was confused. At one point she thought she'd given her grandson $3,000 and another point then she admitted that it could possibly be $35,000 and now we know it was every bit of that plus some more, but she at one point and I'm quoting here from the Court of Appeals opinion, she said she couldn't remember who got the money when her bank account went from $109,000 to $55,000. So we know that at least some point there backing up from there, she was very confused about what happened with her money.

In his September 15, 2005, letter opinion, the circuit judge stated:

This entire matter revolves around the competency of Laura Cogburn and her ability to act independently and to withstand undue influence by her relatives. It is abundantly clear that Ms. Cogburn was easily influenced by whichever of her children happened to be in a position to do so at a particular time.

Prior to making her will in March, 2001, she had been persuaded, apparently by her son, Charles, to pledge $35,000.00 of a C.D. as collateral for a loan made by her grandson, David. In March, 2001, she was persuaded to make a will, change the C.D.'s and execute a power of attorney at the behest of her other children. Subsequently, she was persuaded to make another loan to her grandson to pay off hot checks. In August, 2001, she was persuaded to change the C.D. yet again and to revoke the power of attorney. By the Spring of 2002, the medical opinion entered in the original guardianship case was that she was not capable of making rational decisions regarding her finances. That was certainly the case by the time of the hearing on March 7, 2003.

I believe Ms. Cogburn to have had such diminished capacity as to have been unable to withstand undue influence at least as early as 2001. Accordingly, I do not

> believe any of the transactions she entered in 2001 to have been made freely and without undue influence. Thus, the C.D. should be part of her estate but distributed intestate because the same problem exists with regard to the making of her will. The administratrix may wish to pursue collection efforts to obtain repayment of the amounts transferred to David Cogburn through the efforts of Charles Cogburn.

The order making these findings, directing appellant to pay the proceeds of the CD to appellee, setting aside the will, and distributing the estate equally among the three children was entered on December 30, 2005. This appeal followed.

Although probate cases are reviewed de novo on appeal, we will reverse a probate court's determination on the questions of mental capacity and undue influence only if it is clearly erroneous, giving due deference to the superior position of the trial judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Pyle v. Sayers*, 344 Ark. 354, 39 S.W.3d 774 (2001).

The questions of undue influence and mental capacity are so closely interwoven that they can be considered together. *Hooten v. Jensen,* 94 Ark. App. 130, __ S.W.3d __ (2006). The influence that the law condemns is not the legitimate influence that springs from natural affection, but the malign influence that results from fear, coercion, or any other cause that deprives the individual of her free agency. *Id*. Undue influence may be inferred from the facts and circumstances of a case. *Id*. If the maker of a deed, will, or other instrument has sufficient mental capacity to retain in her memory, without prompting, the extent and condition of her property, and to comprehend how she is disposing of it, and to whom, and upon what consideration, then she possesses sufficient mental capacity to execute such instrument. *Rose*

v. Dunn, 284 Ark. 42, 679 S.W.2d 180 (1984). Where the mind of the testatrix is strong and alert, the facts constituting undue influence must be stronger than where the mind of the testatrix is impaired either by some inherent defect or by the consequences of disease or advancing age. *Pyle v. Sayers, supra.* The influence of children over parents is legitimate so long as they do not extend a positive dictation and control over the mind of the testatrix. *Id*.

Appellant argues that the trial court's findings that Mrs. Cogburn suffered from diminished mental capacity and that she was acting under undue influence when she created the CD are clearly erroneous. He points out that he testified that, for approximately thirty years, she and he had held a prior CD as joint tenants with rights of survivorship; that he testified that she asked him to drive her to the bank where she placed the CD in their names; that appellee admitted that their mother was of sound mind when the will was signed five months before the CD was created; that Harvey testified that their mother knew what she was doing until right before her death; and that the doctors' letters discussing Mrs. Cogburn's mental capacity were written in April 2002, eight months after the CD was created.[2]

The testimony at trial that demonstrated that appellant had, on two previous occasions, persuaded Mrs. Cogburn to use funds in her CD to help his son, David; that appellant took their mother to the bank, and was the only person with her, when she executed the CD in question; that, on the day the will and power of attorney were signed, five months before the

[2]Appellant also asserts that the evidence did not establish the existence of a confidential relationship between him and his mother. Appellee disagrees and argues that they were in a confidential relationship, noting that their mother lived in a house across the street from appellant on his property. The trial court, however, did not make a finding on the question of a confidential relationship, so we do not address it here.

CD was executed, appellant padlocked Mrs. Cogburn's door and barricaded her driveway; that Mrs. Cogburn had previously had a stroke; that appellant admitted in 2001 that he could get Mrs. Cogburn to do anything he wanted; that, at the preliminary guardianship hearing, Mrs. Cogburn could not remember who had received the proceeds that reduced the original $109,000 CD to $50,000; and that the doctors' letters introduced at the guardianship hearing showed that Mrs. Cogburn was confused and had difficulty thinking. In light of this evidence, we cannot say that the circuit court's findings are clearly erroneous.

Affirmed.

PITTMAN, C.J., and GLOVER, J., agree.