ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION III

CA07-185

OCTOBER 10, 2007

CAROLYN WALTERS HOCKADAY APPELLANT	APPEAL FROM THE WHITE COUNTY CIRCUIT COURT [NO. CIV2005-708]
V.	HON. BILL MILLS, JUDGE
PHILLIP EUGENE WALTERS APPELLEE	AFFIRMED

Carolyn Walters Hockaday appeals from an order of the White County Circuit Court setting aside a quitclaim deed that conveyed ninety-six acres in White County to her from her half-brother, Phillip Eugene Walters, appellee in this case. Appellant's sole argument on appeal is that the evidence was not sufficient to support the circuit court's decision to set aside the deed. We disagree and affirm the circuit court's decision.

To summarize the essential facts, appellee owns approximately ninety-six acres in White County with his ex-wife as joint tenants with the right of survivorship. Appellant alleges that appellee executed a quitclaim deed conveying the property to her on May 17, 2004, the date the deed was filed of record. On November 22, 2005, appellee filed a complaint to set aside the deed, alleging that the deed was a forgery. He later amended his

complaint, alleging in the alternative that the deed was signed under undue influence and duress and while he did not have the mental capacity to execute the deed. After a hearing on the matter, the circuit court found that appellee was incompetent to execute the deed and set it aside.

The determination of whether a deed is void because of the mental incapacity of the grantor is measured by his or her mental ability at the time of the execution of the deed. *Andres v. Andres*, 1 Ark. App. 75, 83, 613 S.W.2d 404, 409 (1981). If the grantor is mentally competent at the time he executes the deed at issue, the deed is valid. *Id*.

> In the oft cited case of *Kelly's Heirs v. McGuire*, 15 Ark. 555 (1855), the court announced that if one is 'of such great weakness of mind, as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract, made by him under such circumstances, will be set aside. And it is not material from what cause such weakness arises. It may be from temporary illness, general mental imbecility, . . . the infirmity of extreme old age.' The fact that a grantor is old and in feeble health is a circumstance bearing on the question of mental capacity as is gross inadequacy of price. *Campbell v. Lux*, 146 Ark. 397, 225 S.W. 653 (1920), *McEvoy v. Tucker*, 115 Ark. 430, 171 S.W. 888 (1914).

Watson v. Alford, 255 Ark. 911, 912–13, 503 S.W.2d 897, 898 (1974). Each case presenting a question of a grantor's mental capacity is to be decided on its own particular facts and circumstances. *Id*.

The standard of review of a circuit court's findings of fact after a bench trial is whether those findings are clearly erroneous. *First Nat'l Bank v. Garner*, 86 Ark. App. 213, 167 S.W.3d 664 (2004). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm

conviction that a mistake has been made. *Id*. In reviewing a trial court's findings of fact, we give due deference to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Jones v. Jones*, 43 Ark. App. 7, 12, 858 S.W.2d 130, 134 (1993).

Appellee lives on the property that was described in the quitclaim deed. He testified that he had owned the property with his ex-wife since 1988 or 1989. He and his ex-wife purchased it from his ex-wife's mother. He testified that there was a mortgage on the property in favor of Community Bank in the original principle amount of $32,093.28. He stated that he made all of the mortgage payments through automatic withdrawal from his checking account, both before and after the deed was allegedly executed. This was confirmed by testimony from the senior vice president of Community Bank. Appellee also testified that he paid the property taxes and insurance on the property without any contribution from appellant. He stated that, from the time of the deed until the time of trial, appellant had not paid taxes or insurance on the property, made any payments on the note, or taken possession of the property.

On May 17, 2004, the date the deed was allegedly executed, appellee was in the White County Hospital awaiting heart surgery—originally scheduled for May 17, but which actually took place several days later. Appellee testified that he did not remember signing the deed or discussing a transfer of the property to appellant on that day or any other day. He said that he did not learn of the existence of the deed until Memorial Day 2005 at a family gathering

on the property. He testified that appellant told him at the gathering that he did not have rights to anything but his clothes and to "get in his truck and get out." Appellee's son testified that he witnessed this confrontation and that appellant said that she wanted an inventory of everything on the property and that appellee owned nothing but his truck and clothes. Appellee's son testified that appellee appeared surprised and upset.

Appellee then testified that he was not certain when he was admitted to the hospital for heart surgery. He remembered having severe chest pains and riding in an ambulance. He also said that he did not remember anything about the day that the deed was executed and that he did not remember signing a consent-to-operate form on the same day that he allegedly signed the deed. Appellee's son testified that appellee was heavily medicated and sedated during much of his stay in the hospital and that appellee only vaguely recognized him when he arrived at the hospital.

Appellant testified that, at the time the deed was executed, she lived in Norfolk, Virginia, and was visiting appellee after hearing that he had been admitted to the hospital. Appellant testified that she was appellee's older half-sister and that she cared for appellee after their parents died when appellee was sixteen and she was twenty-five. She said that appellee had a learning disability and that it was difficult for him to read from a book and learn. She admitted that, even if appellee had not been in the hospital, his learning disabilities would have prevented him from understanding what he was signing if it were not explained to him. She testified that she explained the deed in detail to him in the hospital.

She also testified that she asked a notary at the hospital to come in and that the notary also asked him questions before he signed the deed. Appellant denied that she told appellee on Memorial Day that he did not own anything and to get off of the property. Finally, she stated that she had made payments on the indebtedness on the property, but she did not have any checks or documents reflecting these payments. She admitted that she did not pay anything to appellee for the property at the time the deed was executed but claimed that she gave him $500 in cash some time in 2001.

William Grady Walters, Jr., appellant's brother and appellee's half-brother, testified that appellant was staying at his house when she came to visit appellee in the hospital. He said that he went with appellant to the hospital and was in the room when appellee executed the deed. He stated that appellant and the notary explained the document to appellee and that appellee said that he agreed to the deed. He also testified that, while he did not know specifically what the property was worth, the average for land in the area was $2,000 an acre.

After hearing the testimony, the circuit court found that appellee did not remember signing the deed or discussing with appellant that he would transfer his property to her. The court also found that, although appellant testified that appellee had agreed several years earlier to convey the property to her, there was no writing evidencing this agreement. The court noted that appellant did not pay anything to appellee for the property at the time the deed was executed and that appellee continued making the mortgage payments and paying the property taxes after the alleged conveyance. Finally, the court found that appellee "did

not know what he was doing nor was he mentally able to fully appreciate the effect and consequences of executing the Quitclaim Deed. The [appellee] did not possess the necessary mental capacity, while he was in the hospital, to intelligently transact business because of the stress and medication he was taking along with his diminished learning capacity." The court then held that appellee was incompetent to execute the deed and ordered that it be set aside.

We find that the evidence was sufficient for the circuit court to set aside the deed. It was undisputed that, at the time the deed was allegedly executed, appellee was in the hospital awaiting heart surgery. There was testimony that appellee was heavily sedated and did not remember signing the deed or discussing a conveyance of his property with appellant or anyone else. While appellant testified to the contrary, we give due deference to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Jones v. Jones*, 43 Ark. App. 7, 12, 858 S.W.2d 130, 134 (1993). Appellant testified that appellee suffered from learning disabilities and would have required an explanation of the deed in order to understand it even in the best of circumstances. There was no testimony that anything was given to appellee as consideration for the conveyance at the time the deed was executed. Appellant's own brother testified as to the great inadequacy of consideration.

"Mental weakness, although not to the extent of incapacity to execute a deed, 'may render a person more susceptible of fraud, duress, or undue influence, and, when coupled with any of these, or even with unfairness, such as great inadequacy of consideration, may

make a contract voidable, when neither such weakness nor any of these other things alone, . . . would do so.'" *Cain v. Mitchell*, 179 Ark. 556, 17 S.W.2d 282 (1929) (quoting *Pledger v. Birkhead*, 156 Ark. 443, 246 S.W. 510 (1923)). We hold that the circuit court's findings are not clearly erroneous and affirm its decision to set aside the deed.

Affirmed.

HART and GRIFFEN, JJ., agree.