NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA 08-3

	Opinion Delivered JUNE 18, 2008
JERRY PLUMLEY APPELLANT	APPEAL FROM THE POLK COUNTY CIRCUIT COURT, [NO. CV-04-166]
V.	HONORABLE JERRY WAYNE LOONEY, JUDGE
WILLIAM PLUMLEY APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

The subject matter of this appeal is a 50-acre tract of land in Polk County, where Dorothy Marek resided prior to her death from lung cancer on July 13, 2004. The parties, appellant Jerry Plumley and appellee William Plumley, are Ms. Marek's only children. The trial court found each of the wills and deeds executed by Ms. Marek prior to her death to be valid, and upon that basis held that the property was owned by the parties in equal shares as tenants in common. Jerry Plumley now appeals that decision, arguing that all of the property should have been awarded to him based on his mother's deed dated January 5, 2000, and that the deed dated April 19, 2002, in favor of William Plumley, was invalid due to Ms. Marek's mental incompetence. Jerry further argues that the April 19, 2002, deed was met with inadequate consideration, and that William was not a bona fide purchaser of the property. We affirm.

The standard of review of a circuit court's findings of fact after a bench trial is whether those findings are clearly erroneous. *See 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. *See 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 their testimony. *See Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996).

The background facts of this case are as follows. Ms. Marek moved from Illinois to Arkansas in 1990, and both of her sons continued to reside in Illinois. Before her death, Ms. Marek executed five instruments. On October 18, 1999, she executed a will that gave the balance remaining in her checking account equally to her three stepchildren, and left the remainder of her estate to Jerry. By deed dated January 5, 2000, Ms. Marek granted the Polk County property to herself and Jerry as joint tenants with right of survivorship. Both of these instruments were prepared by attorney Orvin Foster.

In April 2002 William traveled to Arkansas to visit Ms. Marek, and during his stay a deed and a will were both executed on April 19, 2002. These documents were prepared by attorney John Maddox. The deed signed by Ms. Marek purported to convey the Polk County property to William, with a reservation of a life estate to Ms. Marek. The will provided that other than the Polk County property, the remainder of Ms. Marek's estate would be divided equally between Jerry and William. After Jerry learned of the subsequent

deed and will, he took Ms. Marek back to Mr. Foster's office, where another will was executed on April 23, 2002. This final will contained the same provisions as the initial will dated October 18, 1999.

Orvin Foster testified that he first met Ms. Marek when she came to him in late 1999 about a will and planning her estate. By that time Ms. Marek was not driving, and Jerry's girlfriend drove her to Mr. Foster's office. According to Mr. Foster, Ms. Marek was alert and her mental state appeared normal, and she told him what she wanted in the will. On January 5, 2000, Ms. Marek advised Mr. Foster that she wanted Jerry to have an interest in her real property, and Mr. Foster prepared a deed to that effect.

Mr. Foster saw Ms. Marek again in late April 2002, when she arrived at his office with Jerry and Jerry's girlfriend. At that time Ms. Marek informed him that she was upset because she discovered that another will and deed had been made, allegedly signed by her. Mr. Foster thought it bizarre that Ms. Marek did not remember a new will or deed, so he wrote down her statement and had her sign it. This handwritten statement, signed by Ms. Marek, reads:

> I, Dorothy Marek, have met with attorney Orvin Foster this date 4-22-02. I have reviewed with him the documents signed 4-19-01 [sic] in the office of Maddox and Maddox, including a new will, a revocation of power of attorney, and a warranty deed. I do not fully remember the signing of these documents, especially the warranty deed.
>
> I have instructed Orvin Foster to reinstate my 1999 will by making a new one with the same provisions. I have further instructed Orvin Foster to have the warranty deed set aside, and to have Jerry Plumley appointed as my power of attorney and as the guardian over my person and estate.

Pursuant to her wishes, Mr. Foster prepared a new will signed by Ms. Marek on April 23, 2002. Although Ms. Marek also wanted Mr. Foster to file suit to cancel the April 19, 2002, deed, he never filed the suit because money was not provided for that service. According to Mr. Foster, during the April 2002 discussion with Ms. Marek, "she was agitated a great deal and my assessment was not as good as in 1999, but she seemed aware of her surroundings and circumstances." He further stated, "she was angry about the new deed and will and reiterated that it was not what she wanted to happen."

Dr. Robert J. Manis testified that Ms. Marek was one of his patients beginning in 1998. In April 1999 he diagnosed her with altered mental status with auditory and visual hallucinations, and acute and chronic alcohol toxicity. Ms. Marek also suffered from ovarian cancer, pulmonary disease, heart problems, kidney problems, and a fractured hip. In addition to chronic alcohol abuse, Ms. Marek was afflicted with major depression and generalized anxiety disorder. The last time Dr. Manis saw Ms. Marek was on March 21, 2002, when he discharged her from the hospital at her insistence against medical advice.

Dr. Manis indicated that Ms. Marek had been drinking heavily for a long time, and stated that chronic inebriation can cause deterioration in mental function. However, he also stated that each time she left the hospital she was generally well-functioning and capable of caring for herself, other than when she left against medical advice. Dr. Manis testified:

> At times she was obviously inebriated and during those times she was not functional, but when she was not drunk she was fine. If the records reflect that I did not see her on the date that she signed the will or the deed, I have no way of knowing and cannot give any testimony of what her mental status was on that day.

. . . .

> Because of the length of time and on any given date she would have been fine, I can give no testimony as to how she was the day she signed the will. She might have been perfectly fine, able to dispose of her property and make all the decisions for herself. She could have been drunk or sober. From my experience, it depended on what was going on in her life and who was around. She tended to drink less if she had family around and more when she was alone.

Dr. James W. Rogers was also among Ms. Marek's treating physicians, and he saw her from January 2002 until her death on July 13, 2004. Dr. Rogers testified that in January 2002, Ms. Marek seemed reasonably within her senses. However, he had concerns about her ability to make good decisions or fully participate in executing a will or deed on April 19, 2002. On that date, in response to questions from family members worried about Mr. Marek's well being, Dr. Rogers wrote the following letter:

> Dorothy M. Marek is under my care. I now believe she is unable to manage her affairs due to progression of her chronic intoxication. While in the hospital she continued with alcohol use and has left the hospital against medical advice. I believe this constitutes sufficient error in judgment jeopardizing her health. Dorothy has been under my care since January 2002. She had also seen Dr. Manis and Dr. Meaney. I do feel this is a progressive disorder and Dorothy has shown little initiative for recovery.

Based on this letter of April 19, 2002, Dr. Rogers also doubted that Ms. Marek had the mental capacity to execute her final will a few days later.

Patricia Ann Krieger was friends with Ms. Marek since childhood and still lives in Illinois. Ms. Krieger testified that Ms. Marek had expressed the desire to divide her assets between her two sons. Ms. Krieger came to visit Ms. Marek on April 6, 2002, after discovering that Ms. Marek was sick in the hospital. Sometime after that, Ms. Marek asked to see a lawyer and she was taken to Mr. Maddox's office, accompanied by Ms. Krieger, Ms. Krieger's daughter, and William. Mr. Maddox prepared a deed and will, which

Ms. Marek signed. According to Ms. Krieger, Ms. Marek deeded her Polk County property to William because she had previously entered into an agreement entitling Jerry to her real property in Illinois. Ms. Krieger maintained that Ms. Marek was very happy upon executing the April 19, 2002, will and deed, and that she never doubted Ms. Marek's mental condition.

Ms. Krieger's daughter corroborated much of Ms. Krieger's testimony. She said that Ms. Marek "seemed competent to me the day she signed it."

William Plumley testified that he came to visit his mother in late March or early April 2002. He further testified:

> When I got here in 2002, I went to the hospital to see my mom. She did not look well and was somewhat incoherent and did not recognize me. I believe the doctors were telling me it was something like dementia. I had an airport bottle of alcohol and gave her most of it in orange juice. Ten minutes later, she recognized me. That was the only alcohol I gave her. She did not recognize me the first two days. I stayed here when she was discharged two or three days later. I was surprised she was discharged; she was always trying to get out of the hospital before the doctors recommended.
>
> I started asking my mom about her finances and assets. I saw the lock box. I had gone with my mother and discovered there was a will and a deed. I brought it to her attention. I think Patsy showed up the next day. My mom did not know these papers were signed and had no recollection of them. We went to Mr. Maddox's office on the 17th and talked about the wills. I believe the 19th, my brother showed up unexpectedly. Mr. Maddox called on the 19th and we signed the papers and recorded them.

William testified that Ms. Marek was alert and normal, and was able to answer questions about her children and property when she signed the will and deed on April 19, 2002. He further thought that there was a "very strong chance" that she was not competent in 1999 or 2000.

Benji Ferguson is a legal secretary for the Maddox Law Firm and prepared the will and deed that were signed by Ms. Marek on April 19, 2002. According to Ms. Ferguson, Ms. Marek seemed very alert and wanted to leave her Arkansas property to William because she had left some Illinois property to her other son. As for the will, Ms. Marek wanted to leave everything else to William, but William "insisted she leave it fifty-fifty." Ms. Ferguson notarized the document. Ms. Ferguson stated, "Ms. Marek appeared to be in a competent mind and know what she was doing on the day the documents were signed, or we wouldn't have signed them." Although not available to testify, it was accepted that John Maddox would corroborate Ms. Ferguson's testimony that Ms. Marek appeared competent.

Jerry Plumley testified that Ms. Marek "knew exactly what she had signed" when executing the January 5, 2000, deed. However, he thought that when the April 2002 deed was executed in favor of William, his brother had been serving her alcohol for many days and she had become incoherent. Jerry stated that when his mother sobered up and found out what she had done, she wanted to have it reversed. Jerry acknowledged that he had also served her alcohol, but only in small quantities. He described his relationship with his mother as "very good," and testified that he lived with her and took care of her from April 2002 until she died.

Gwen King helped take care of Ms. Marek from May 2001 until August 2003. She testified that William took Ms. Marek out of the hospital against medical advice on April 19, 2002. Ms. King stated, "I always went to town with Dorothy, and that day Bill wouldn't let me go with them to town." She further asserted that William offered to give her some of his

mother's property upon acquisition, an assertion that William denied. Ms. King stated that when William was there Ms. Marek was intoxicated nearly every day, but that when Jerry was there she drank at a minimum. Ms. King also testified that William badgered his mother into buying him a van against her wishes. Ms. King said that during the entire time she worked there, Ms. Marek told her that she wanted Jerry to have the property.

Jerry's girlfriend, Debra Hubbard, also testified. She stated that on the days Ms. Marek executed the October 1999 will and January 2000 deed, Ms. Marek had not been drinking and her mental condition was good.

This case was before the trial court pursuant to William's petition for ejectment filed against Jerry after their mother's death, and Jerry's counter-petition asking to set aside the April 19, 2002, warranty deed in favor of William. Upon consideration of the evidence, the trial court issued the following letter opinion, which was incorporated into its order now on appeal:

> The issue before the Court involves the validity of five documents: Will dated October 18, 1999; Deed dated January 5, 2000; Will dated April 19, 2002; Deed dated April 19, 2002 and Will dated April 22, 2002. The mental competency of Ms. Marek on each of these dates is of consequence.
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> The medical records indicate that in 1999 Ms. Marek suffered from multiple medical problems and significant problems with intoxication. In April, 1999, she suffered from hallucinations; in August, 1999, she refused treatment for serious medical conditions. In early October, 1999, she was admitted to the Geropsychiatry Unit with depression, mental impairment and a number of related problems all exacerbated by alcoholism. However, in spite of these medical records, all indications are that she had her lucid moments and, at those times, was quite capable of meeting the test for competency. As to each date on which she signed the instruments, there is evidence that she was in one of her lucid intervals. If so, all instruments must be considered valid.
>
> The result is that the will of April 22, 2002 would revoke all prior wills and would dispose of Ms. Marek's property. However, the deed of April 19, 2002 would

> terminate the right of survivorship and the joint tenancy created in the deed of January 5, 2000 (converting it into a tenancy in common). Thus, the property transferred by the April 19, 2002 deed would be a one-half interest in the described property. The remaining one-half would pass by the will of April 22, 2002.[1]

On appeal, Jerry Plumley argues that the deed of April 19, 2002, was invalid, and therefore the trial court erred in failing to award him all of the Polk County property pursuant to his mother's previous deed executed on January 5, 2000. Jerry argues that Ms. Marek was unduly influenced and incompetent when she executed the deed to William on April 19, 2002. He further contends that Ms. Marek's mental impairment, coupled with inadequate consideration, provides equitable relief from the trial court's error. Alternatively, Jerry asserts that William has no claim to the property because he was not a bona fide purchaser.

As an initial matter, we address the burden of proof regarding Ms. Marek's competence when she executed the April 19, 2002, deed. When a deed is part of a testamentary plan, as here, one who procures the deed bears the burden of proving that the grantor had the necessary mental capacity and freedom from undue influence. *See Stanley v. Burchett*, 93 Ark. App. 54, 216 S.W.3d 615 (2005). However, in the present case Jerry failed to argue such a burden shift to the trial court, and the issue was not addressed in the trial court's ruling. Nor did he raise the argument in his appellate brief. For the first time in his reply brief, citing *Pyle v. Sayers*, 344 Ark. 354, 39 S.W.3d 774 (2001), Jerry offers the legal standard that where a person benefitting from a will also procures the will, a rebuttable

[1]It is evident that the will of April 22, 2002, referenced by the trial court was actually the will of April 23, 2002.

presumption of undue influence arises and creates a burden for the proponent of the will to prove beyond a reasonable doubt that the testator had the requisite mental capacity and freedom from undue influence.

It is well settled that an appellant must raise an argument below and obtain a ruling to preserve the issue for appellate review. *See Beverly Enterprises – Ark. Inc. v. Thomas*, 370 Ark. 310, __ S.W.3d __ (2007). Moreover, we do not address arguments raised for the first time in a reply brief. *See Abdin v. Abdin*, 94 Ark. App. 12, 223 S.W.3d 60 (2006). In this case there may have been evidence that William procured the deed. But there was also evidence to the contrary, given William's testimony that he was not involved in the decision to execute the will or deed, and merely provided the transportation to the attorney's office. *See Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984)(driving testator to the lawyer's office and participating in initial discussions concerning the will did not constitute procurement). At any rate, this issue was not presented to the trial court and as such the trial court made no finding on the issue of procurement. Therefore, the burden of proof in this case remained with Jerry, as the party challenging the deed, to prove by a preponderance of the evidence that the testator lacked the requisite mental capacity or was the victim of undue influence. *See Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992)(reciting the rule in a typical will contest).

The questions of undue influence and mental capacity are so closely interwoven that they are sometimes considered together. *In Re Conservatorship of Kuetman*, 309 Ark. 546, 832 S.W.2d 234 (1992). Testamentary capacity means that the testator must be able to retain in

his mind, without prompting, the extent and condition of her property, to comprehend to whom she is giving it, and relations of those entitled to her bounty. *Daley v. Boroughs*, 310 Ark. 274, 835 S.W.2d 858 (1992). In *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997), our supreme court wrote:

> Complete sanity in the medical sense is not required if the power to think rationally existed at the time the will was made. Furthermore, our own law is clear that despite any mental impairment, the testator may execute a will if he is experiencing a lucid interval. The time to look at a testator's mental capacity is at the time the will is executed. However, proof may be taken as to the testator's condition both before and after the will's execution as being relevant to his condition at the time the will was executed. This court has upheld mental competency at the time of the execution of a will even in the wake of evidence of some mental deterioration.

Id. at 665-66, 956 S.W.2d at 176 (citations omitted).

In the case at bar, Jerry argues that while Ms. Marek was suffering from illness and hospitalization, William unduly influenced her into executing the April 19, 2002 deed under circumstances showing that Ms. Marek was incompetent. In support of appellant's claim of incompetency, he notes that on the same day the deed was signed Dr. Rogers issued a letter expressing his belief that Ms. Marek was unable to manage her affairs due to progression of her chronic intoxication. Jerry asserts that after William arrived in Arkansas in April 2002, William accomplished the following: he gave his mother alcohol while in the hospital; his mother checked out of the hospital without medical approval; he inspected his mother's lock box and found the prior deed; he badgered his mother into buying him a van against her wishes; he transported his mother to the attorney's office to prepare the new deed without disclosing the prior deed; and he offered a share of the property to Ms. King in the event his efforts were successful. As further substantiation of her incompetency, Jerry directs us to the

letter Ms. Marek signed three days later in Mr. Foster's office, wherein she indicated she did not fully remember signing the deed. Because Ms. Marek could not pass any reasonable test of competency on April 19, 2002, Jerry argues that the second deed is invalid, and that the first deed of January 5, 2000, vested full title of the property in him upon Ms. Marek's death.

We do not agree that the trial court committed error in upholding the deed of April 19, 2002. While there was evidence tending to demonstrate Ms. Marek's lack of competence, there was also evidence that she was at least having a lucid interval wherein she executed the deed of her own willful and competent volition. Dr. Manis testified that when Ms. Marek was sober, she was able to dispose of her property and make her own decisions. William testified that while he gave his mother alcohol in the hospital, it was only a relatively small amount on one occasion. There were five witnesses to the execution of the deed who indicated that Ms. Marek appeared mentally capable of conducting the transaction. In particular, Ms. Ferguson testified that Ms. Marek was very alert and seemed mentally fine, and that Ms. Marek explained that she wanted to leave the Polk County property to William because property in Illinois had already been transferred to Jerry. There was conflicting testimony on Ms. Marek's mental capacity, and it was the trial court's duty to weigh the testimony and resolve the conflicts. Upon our de novo review, we hold that the trial court did not clearly err finding that Ms. Marek was mentally competent and free of undue influence at the time she signed the deed.

Jerry next argues that Ms. Marek's mental impairment, when coupled with inadequate consideration for the deed, provides equitable grounds for relief from the trial court's error.

He acknowledges that insufficiency of consideration, alone, is not grounds for setting aside a deed. *See Bryant v. Bryant*, 239 Ark. 61, 387 S.W.2d (1965). Nonetheless, he relies on *Barner v. Handy*, 207 Ark. 833, 183 S.W.2d 149 (1944), where the supreme court held that insufficiency of consideration, when coupled with mental impairment, may provide equitable grounds for relief, even if the mental impairment does not rise to the level of incompetency. Jerry maintains that the record is saturated with evidence of Ms. Marek's mental impairment, and asserts that when coupled with the mere ten dollars William paid in exchange for the property, the deed was invalid.

Jerry's second argument is without merit. In *Barner v. Handy*, *supra*, the appellee was a woman who rendered herself penniless by conveying property from which she might have received $7500 in bauxite royalties for the sum of ten dollars. The chancellor had found that the appellee did not have the capacity to comprehend the nature of her transaction, that undue influence had been exerted, and that no consideration was paid. In affirming the chancellor's decision, the supreme court noted that the appellee was "inexperienced, illiterate, and enfeebled," and that the circumstances as a whole showed an absence of conscious volition or understanding. By contrast, there was evidence in the present matter from which the trial court could reasonably conclude that, despite her ailing health, Ms. Marek understood and appreciated her decision to convey her property to one of her sons, while reserving in herself a life estate, and in fact explained her decision for doing so to the notary who prepared the deed and thought Ms. Marek to be competent. Under the circumstances of this case, the lack of consideration provides no basis for reversing the trial court's decision.

Jerry's remaining argument is that because William was not a bona fide purchaser, he has no claim to the property. A bona fide purchaser is one who takes property in good faith, for valuable consideration, and without notice of a prior interest. *Bill's Printing, Inc. v. Carder*, 357 Ark. 242, 161 S.W.3d 803 (2004). Jerry submits that because his deed predates William's deed, and because William had actual notice of the prior deed when he checked the lock box, Jerry has superior title and should be declared owner of the property. Jerry further contends that William was not a bona fide purchaser because he paid no consideration.

This argument is misplaced. William was not claiming status as a bona fide purchaser below, as to defeat a prior interest in property conveyed to Jerry. At the time the April 19, 2002, deed was executed, Ms. Marek still owned the property as joint tenants with Jerry, and retained an interest in the property that she had a right to convey. When Ms. Marek conveyed her interest in the property to William, William became a tenant in common with Jerry. *See Jackson v. O'Connell*, 1777 N.E.2d 194 (Ill. 1961); *In Re Estate of Thomann*, 649 N.W.2d 1 (Iowa 2002); *Boissonnault v. Savage*, 625 A.2d 454 (N.H. 1993). Because William made no challenge to the share of the property conveyed to Jerry through execution of the January 5, 2000, deed, there is no issue pertaining to William's status as a bona fide purchaser. The trial court correctly concluded that each party has a one-half interest in the property as tenants in common.

We recognize that the trial court's order recites that Jerry's one-half interest was acquired by virtue of the April 23, 2002 will, when in fact his one-half interest arose from the January 5, 2000 deed. Nonetheless, the trial court reached the right result even though it

announced the wrong reason, and in such cases we may affirm. *See Alphin v. Alphin*, 364 Ark. 332, 219 S.W.3d 160 (2005).

Affirmed.

VAUGHT, J., agrees.

GRIFFEN, J., concurs.