NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA08-304

GREGORY MCPHAIL and Estate of THOMAS JOHN MCPHAIL, JR., Deceased
APPELLANTS

V.

MARLENE MCPHAIL SMITH and JESSICA LAY
APPELLEES

Opinion Delivered October 22, 2008

APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT, [PR2006-144; PR2007-10]

HONORABLE CHARLES E. CLAWSON, JR., JUDGE

AFFIRMED

WENDELL L. GRIFFEN, Judge

Gregory McPhail appeals from an order invalidating a trust and will that named him the sole heir of the estate of his father, Thomas McPhail, Jr. (Mr. McPhail).[1] Appellant argues that the circuit court erred in determining that his father lacked the testamentary capacity to execute the will and trust because the evidence supports that the documents were executed during a "lucid interval." We disagree and affirm the circuit court's order.

I. Background Facts

Appellant and appellee Marlene Smith are Mr. McPhail's children by his wife, the late Dorothy McPhail. Appellee Jessica Lay is Marlene's daughter. On June 8, 1995, Mr. and Mrs. McPhail established a revocable living trust, naming appellant and Marlene as co-death

[1]Although Gregory appeals both individually and as administrator for Mr. McPhail's estate, he will be referred to herein as "appellant."

trustees. On the same day, Mr. McPhail executed a will, nominating Gregory and Marlene as co-personal representatives.

Some years later, the McPhails' health began failing. In 2003, Mrs. McPhail was diagnosed with Alzheimer's Disease. At some point, Mr. McPhail suffered at least one stroke. In 2003, at age eighty three, Mr. McPhail was diagnosed with dementia. Both he and Mrs. McPhail received hospice care in their home. According to Mr. McPhail's medical records, he was "severely disabled." He remained mostly in bed and required increasing assistance in performing his activities of daily living.

On December 20, 2004, Mrs. McPhail died. Eleven days later, on December 31, 2004, Mr. McPhail executed another will in which he devised all of his estate to appellant, and expressly excluded Marlene as a beneficiary. The will "poured over" Mr. McPhail's entire estate into the trust. The trust also expressly excluded Marlene, and further provided that all trust property shall be distributed to appellant.

Mr. McPhail died on April 12, 2006, at age eighty-six. Appellant thereafter filed a petition to probate the will, requesting to be appointed as administrator of his father's estate. Appellees filed a statement and notice of will contest, contesting both the trust and the will on the grounds that the documents were procured by undue influence and that Mr. McPhail lacked the mental capacity to execute the documents. In a separate action, appellees filed a petition for declaratory relief to cancel the 2004 trust instrument and will, again based on Mr. McPhail's alleged lack of mental capacity. The circuit court consolidated the cases. It found that appellant did not procure the will, but that Mr. McPhail lacked testamentary capacity on

December 31, 2004, to execute the will and trust. This appeal followed.[2]

II. Law Regarding Testamentary Capacity

We review probate matters *de novo* but will not reverse probate findings of fact unless they are clearly erroneous. *See Fischer v. Kinzalow*, 88 Ark. App. 307, 198 S.W.3d 555 (2004). A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed. *See id.* We also defer to the superior position of the lower court sitting in a probate matter to weigh the credibility of the witnesses. *See id.*

The party challenging the validity of a will must prove by a preponderance of the evidence that the testator lacked the mental capacity or was unduly influenced when the will was executed. *See id.* Generally, mental or testamentary capacity means that the testatrix must be able to retain in his mind, without prompting, the extent and condition of his property, to comprehend to whom he is giving his property, the relation of those entitled to his bounty, and the deserts of those whom he excludes from his will. *See id.* Complete sanity in a medical sense at all times is not essential to establishing testamentary capacity, provided that capacity exists when the will is executed, during a lucid interval. *See id.* Evidence of the

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[2]Appellees do not cross-appeal from the finding that the will was not procured. They also requested that a power of attorney executed in Gregory's favor be cancelled. Appellant does not address that issue on appeal.

Additionally, we observe that while appellees requested the circuit court to reinstate the 1995 will and trust documents, the court ordered that the current "statute on decedent distribution" would govern the distribution of Mr. McPhail's estate. Appellees failed to cross-appeal from that portion of the order.

testator's mental condition, both before and after execution of the will at issue, is relevant to show his mental condition when he executed the will. *See id*.

III. Summary of the Evidence

The medical evidence in this case consisted of Mr. McPhail's medical records, the deposition testimony of his former primary care physician, and the hearing testimony of his hospice nurse, the doctor who treated him in the eleven-month period before he died, and two doctors who testified as expert witnesses.

Mr. McPhail's former physician, Dr. William Furlow, treated Mr. McPhail from April 23, 2003, through October 20, 2003. Dr. Furlow diagnosed him with depression and mild vascular dementia, resulting from decreased blood flow to the brain secondary to Mr. McPhail suffering a stroke. Dr. Furlow said that dementia symptoms can "wax and wane"; that dementia patients are sometimes more cognizant than others; and that patients with vascular dementia can have lucid intervals where they are "fairly clear." However, Dr. Furlow also said that patients with vascular dementia eventually reach a stage where the lucid intervals "become less and less."

Dena Dunlap served as Mr. McPhail's hospice nurse beginning in May 2004. She saw Mr. McPhail once each week. Her nursing notes consistently described Mr. McPhail as having periods of increased confusion and poor short-term memory. For example, in July 2004, Mr. McPhail was found in the street in his pajamas, and he did not remember the incident. At one point, Mrs. McPhail fell and Mr. McPhail did not call for assistance. On another occasion, he was unaware of whether it was day or night. Dunlap also consistently

noted that, due to Mr. McPhail's mental state, she was unable to educate him on matters relating to his care, such as how to improve his grip on his walker.

Prior to December 31, 2004, Dunlap usually described Mr. McPhail either as being oriented "x1" (as to person only) or "x2" (as to person and place). Her progress note of December 14 is the most recent note before December 31. Dunlap's notes from that date indicate that Mr. McPhail was oriented x1, and that he had confusion during conversations and exhibited poor short-term memory. Her first report after December 31 was dated January 3, 2005. On that date, Dunlap indicated that Mr. McPhail had poor short-term memory. She again noted confusion during the conversation, yet labeled him as oriented x2. Dunlap described Mr. McPhail as oriented "x3" (as to person, place, and time) only once before December 31, 2004 – in September 2004. She also described him in that manner two times in February 2005.

Three other doctors testified. Dr. David Naylor, Jr., treated the McPhails when he was the Hospice Medical Director at a family practice clinic. He treated Mr. McPhail from February 2004 until Mr. McPhail died. Dr. Naylor is the current co-medical director for Transition Care, which deals, *inter alia*, with dementia and Alzheimer's patients.

Dr. Tim Freyaldenhoven is a practicing neurologist whose specialty is diagnosing and managing diseases of the brain and the peripheral nervous system. Dr. Karen Young specializes in geriatric psychiatry, and has treated more than 4,000 patients in ten years. Dr. Freyaldenhoven and Dr. Young, who reviewed Mr. McPhail's medical records, testified as expert witnesses.

Drs. Naylor, Freyaldenhoven, and Young agreed that Mr. McPhail suffered from progressive dementia, which began as mild and progressed to severe or "end stage." Dr. Freyaldenhoven explained that "dementia" is a generic term used to describe someone who has lost cognitive abilities. In his records, Dr. Naylor noted Mr. McPhail's increasing forgetfulness, short-term memory loss, and disruption of the ability to carry out his activities of daily living. Dr. Naylor explained that "decreased short-term memory" meant that the patient may not remember what someone said or did just five minutes before.

Drs. Freyaldenhoven and Young agreed that Mr. McPhail's condition was likely exacerbated by Alzheimer's Disease, as well as by his previous stroke. Dr. Young explained that, depending on which nerves are damaged, a person's motors skills, memory, abstract-reasoning ability, attention span, and concentration may be affected.

Each of these doctors agreed that Mr. McPhail's condition would only worsen, and that his condition did not permit lucid intervals, because the type of dementia from which Mr. McPhail suffered resulted in the irreversible death of nerves and brain tissue. Further, Dr. Young said that with Alzheimer's scar tissue develops as the tissue around the brain attempts to repair itself, also resulting in loss of brain function. Dr. Freyaldenhoven opined that Mr. McPhail suffered from "a degenerated process that would only worsen."

Each doctor also agreed that, as of May 7, 2004, if not earlier, Mr. McPhail required someone else to make his decisions for him due to his declining mental state. Despite the medical evidence showing that Mr. McPhail occasionally had "good days," each of these doctors opined that he did not possess sufficient cognitive clarity to execute a will and trust

on December 31, 2004. Dr. Naylor specifically opined that Mr. McPhail would not have been able to read the documents and understand that he was disinheriting his daughter.

In contrast to all of the medical testimony is the testimony of Doug Jones, the attorney who drafted the will and trust documents, and who provided the only testimony regarding Mr. McPhail's mental state on the date the documents were executed. Jones drafted the original will and trust documents in 1995. He said that in 2004, he spoke with Mr. McPhail on three occasions concerning the new will and trust. First, in September 2004, before Mrs. McPhail died, Jones met with Mr. McPhail, appellant, and Marlene. Jones said that Mr. McPhail told him that he was "mulling over" making some changes and that they spoke about "some funding issues" involving the trust. The next contact was by telephone. Jones said that Mr. McPhail called him "a couple of weeks" before December 31 and that they had a ten-to-fifteen minute discussion about the changes that he wanted to make. Jones said the "one primary change" was to disinherit Marlene. They set the next meeting for December 31.

Appellant brought Mr. McPhail to Jones's office on December 31. Appellant was present during the meeting but Jones said that appellant was not "an active participant" in the discussion. Jones said that one of the "big reasons" for the meeting was that Mr. McPhail wanted to "cut Marlene out." He characterized the process as merely a "reinstatement" because the trust had already been funded.

Further, Jones asserted that, as a probate attorney, he had seen a lot of people with dementia or Alzheimer's. He believed that on December 31, 2004, Mr. McPhail had the

testamentary capacity to execute a will and trust. He said that Mr. McPhail was "certainly with it that day." He further said that Mr. McPhail did not appear to be confused, did not appear to be drugged or lethargic, and appeared as if he knew what was going on. To the contrary, Jones said that he and Mr. McPhail spoke for approximately one hour, that they discussed "the whole thing," and that Mr. McPhail looked at the documents and asked questions. For example, Jones said that Mr. McPhail asked a question when he saw that Marlene was listed as a "child." He stated that there was no question in his mind that Mr. McPhail "knew exactly what he was doing."

Yet, Jones admitted that he was not aware that Dr. Naylor said that Mr. McPhail could no longer handle his affairs as of May 2004, and that, had he known, he would have questioned Mr. McPhail more carefully. He also said that appellant never told him that Mr. McPhail was being treated for dementia, and that, had he been told, he would have wanted to talk to Dr. Naylor.

IV. Testamentary Capacity

Appellant argues that the circuit court erred in finding that Mr. McPhail lacked the testamentary capacity to execute a will and trust on December 31, 2004, because the evidence supports that he executed the documents during a lucid interval. In its letter opinion, the circuit court explained its findings regarding mental capacity, as follows:

> The record is replete with testimony from treating physicians, including a letter from Dr. David Naylor dated May 7, 2004, and numerous progress reports from office visits and contacts between the doctor and Mr. McPhail. In each one of those exhibits... there are references to Thomas McPhail's mental capacity. Each contained a reference to his orientation and some of those are x2, indicating orientation as to person and place, some are x1 and there are some that indicate orientated x3. *Almost*

all indicate very poor short term memory and confusion and these reports cover the period from March 2004 up through January of 2005. Those closest in time to the date of the execution of the will and living trust, January 3, 2005, indicates he has poor short term memory, noted confusion during the conversation, however he is oriented x2 and the progress note of December 14th… indicates that he was oriented x1, had confusion during conversations and poor short-term memory.

There is also testimony from consultants, Dr. Karen Young and Dr. Tim Freyaldenhoven and from the hospice nurse, Dena Dunlap, regarding his condition and the dementia from which he suffered.

This case, but for the testimony of attorney Douglas Jones, would require very little consideration. However, attorney Jones clearly testified that the man he talked to seemed to understand what he was doing, why he was in his office, and had communicated to him what changes he wanted to make to his estate. *This clearly does not seem to be the man visited by the physicians and nurse on December 14th or seen by a hospice worker on January 3rd. In both instances, he is noted to be severely disabled. The Court does find it interesting that the respondent, Greg McPhail, never notified the attorney that the late Mr. McPhail suffered from dementia.... The respondent contends that Mr. McPhail on December 31, 2004, had a lucid interval and as a result was able to execute the documents. To rely on such would also require a finding that he had two other lucid intervals when he talked to Mr. Jones on the phone…[D]uring the preceding eight months when visited by healthcare professionals [he] never exhibited a lucid interval, nor following the execution of the will on December 31st seemed to have any other lucid intervals. In fact, in most instances, he was aware only of who he was, not where he was, and there is no indication that he knew what he had or how he wanted to dispose of it at the time of his death.* The medical testimony is not contradicted that the dementia from which Mr. McPhail suffered was organic. That is, his dementia was a result of the death of brain cells. Such cells would not regenerate of "get better." *The fact that, on occasion, he knew who he was and where he was does not seem to come up to the level of lucidity and understanding as required....*

(Emphasis added.)

Because the medical experts agreed that the only way to determine whether Mr. McPhail had a lucid interval on December 31, 2004, was to be present when he executed the document, appellant emphasizes Jones's testimony. He also relies on the fact that the medical witnesses testified that Mr. McPhail had "good days" and "bad days"; that Dr. Furlow stated that, with vascular dementia, a person can experience lucid intervals; and that there was one

occasion before the will was executed, in September 2004, and several occasions after, when he was "oriented x3." The fatal error in appellant's argument is that it would have us conclude that a "good day" was a day when Mr. McPhail possessed the requisite testamentary capacity to execute a will and a trust document disinheriting his daughter. The medical evidence does not support this conclusion.

First, the circuit court weighed the replete, consistent medical evidence regarding Mr. McPhail's *diminished* and *diminishing* mental capacity against Mr. Jones's singular testimony that Mr. McPhail was sufficiently lucid on December 31, 2004 (as well as two other occasions) to possess the requisite sufficient testamentary capacity to execute a will and trust. The medical evidence supports that Mr. McPhail maintained a baseline level of confusion that rose as his condition progressed. Rather than experiencing lucid intervals during which somehow he was *less* confused, Mr. McPhail was *more* confused at times, and then seemed "clearer" *by comparison* when he *returned to his previous baseline level of confusion*. Thus, he never went from being "confused" to being "lucid." He only experienced periods of greater or lesser confusion.

Accordingly, even if Mr. McPhail occasionally experienced "good" days, the medical evidence supports that, by December 31, 2004, his mental capacity on those good days did not rise to the level of having a lucid interval sufficient to sustain testamentary capacity. Notably, Mr. McPhail had no lucid intervals documented by his caregivers. Rather, the medical records in the months and weeks immediately preceding December 31, 2004, consistently indicate that Mr. McPhail experienced periods of increasing confusion, and that

he was usually oriented as to person only or as to person and place. In fact, he was oriented as to person only on December 14, 2004, and oriented to only time and place on January 3, 2005. On those occasions nearest to the date of the December 31 execution of the documents, Mr. McPhail again exhibited confusion and poor short-term memory.

Appellant argues that the same man who did not remember that he was found in the streets in his pajamas, who did not have the presence of mind to telephone for assistance when his wife fell, and whose mental condition thereafter *progressively deteriorated*, nonetheless had *three* subsequent lucid intervals which happened to occur when he wanted to change his will and trust. To be clear, Mr. McPhail was not required to have understood the niceties of the operation of a trust versus that of a will or to have understood precisely how the trust agreement would be carried out. *See Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). But he was required to understand the essentials of the transaction, that by signing the documents, he was disinheriting his only daughter. *See Fischer*, *supra*.

While Jones characterized the execution of the documents as a mere "reinstatement" that involved only the additional term of disinheriting Marlene, the disinheriting of an heir is a serious matter. By December 31, 2004, Mr. McPhail was in end-stage dementia, which was likely complicated by Alzheimer's, according to the medical evidence. The medical evidence supports the conclusion that by that point, Mr. McPhail's permanent brain damage would have progressed so much that, even on a good day, he would not have experienced a lucid interval sufficient to permit him to understand that he was disinheriting his daughter by executing the will and trust.

In short, to validate the will would require us to believe, in the face of contrary medical evidence, that Mr. McPhail was able to *sustain* a *third* lucid interval for an hour, while discussing weighty legal matters, when he otherwise became increasingly confused during simple conversations with his nurse and could not retain simple information related to his care. If Mr. McPhail was incapable of making his own legal decisions in May 2004, then the subsequent *progression* of his dementia leads to the inescapable conclusion that seven months later, on December 31, 2004, he was even *less* capable of making those decisions.

On these facts, we are not left with a definite and firm conviction that the circuit court erred in finding that Mr. McPhail lacked the testamentary capacity to execute a will and trust on December 31, 2004.

Affirmed.

BIRD and GLOVER, JJ., agree.