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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1210092

Gail B. Massey

v.

Cynthia Massey Rushing and Jerri M. Statham

Appeal from Jefferson Probate Court
(19-BES-00820)

SELLERS, Justice.

Gail B. Massey appeals from a judgment of the Jefferson Probate Court ("the trial court") setting aside and voiding two deeds executed by her husband, Jack B. Massey ("Mr. Massey"), on the grounds that Mr.

Massey lacked the mental capacity to execute the deeds and that the deeds were the product of undue influence exerted by Gail. We affirm the judgment on one of two alternative grounds relied upon by the trial court.

I. Facts

The Masseys were married in 2000; both have children from previous marriages. In November 2019, Mr. Massey's children, Cynthia Massey Rushing and Jerri M. Statham ("the children"), filed a petition in the trial court, alleging that Mr. Massey was 86 years of age; that he had numerous health issues; that his health had declined both physically and mentally; and that the children had discovered financial transactions that were both uncharacteristic of the manner in which Mr. Massey conducted his financial affairs and inconsistent with a prenuptial agreement executed by the Masseys. The children specifically alleged, among other things, that, on April 19, 2019, Mr. Massey had executed a deed conveying to Gail all of his interest in income-producing property that had been in Mr. Massey's family since the 1930s. The children further alleged that, on August 19, 2019, Mr. Massey had executed another deed conveying to himself and Gail a joint tenancy with the right of survivorship in property consisting of the marital residence and

significant acreage; that acreage had also been in Mr. Massey's family for generations. The children averred that Mr. Massey had relinquished his rights to those properties despite having asserted over the years that the properties would be inherited by his descendants. The children requested that the trial court appoint a guardian and a conservator for Mr. Massey's benefit and vacate the deeds based on Mr. Massey's "vulnerable health condition." The trial court thereafter appointed a guardian ad litem, a court representative, and a temporary conservator for Mr. Massey and directed that Mr. Massey undergo a neuropsychological evaluation. Following an ore tenus hearing, the trial court entered a judgment holding the conveyances to be void and setting aside the deeds on the grounds of incapacity and undue influence. This appeal followed.

II. Standard of Review

Because the trial court conducted a bench trial at which oral testimony was given, the ore tenus standard of review applies:

"The ore tenus rule affords a presumption of correctness to a trial court's findings of fact based on ore tenus evidence, and the judgment based on those findings will not be disturbed unless those findings are clearly erroneous and against the great weight of the evidence. Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000). It is grounded upon the principle that when a trial court hears oral testimony it has an opportunity to evaluate the demeanor

and credibility of the witnesses. Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). The ore tenus rule does not cloak a trial court's conclusions of law or the application of the law to the facts with a presumption of correctness. Kennedy v. Boles Invs., Inc., 53 So. 3d 60 (Ala. 2010)."

Allsopp v. Bolding, 86 So. 3d 952, 958 (Ala. 2011). The ore tenus rule applies to "disputed questions of fact," whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence. Born v. Clark, 662 2d 669, 672 (Ala. 1995).

III. Analysis

A. Capacity

A trial court, exercising its equitable powers, may vacate a deed if the grantor lacked sufficient capacity to reasonably comprehend the nature and effect of the transaction in which he or she engaged. Ex parte Chris Langley Timber & Mgmt., Inc., 923 So. 2d 1100, 1105 (Ala. 2005). A party seeking to void a deed based on the grantor's incapacity has the burden of showing that the grantor was either permanently or temporarily incapacitated at the time of the conveyance. Id. Permanent incapacity existing before the time of the conveyance raises a presumption of incapacity at the time of the conveyance; thus, if a party seeking to void a deed establishes that the grantor suffered from a

permanent incapacity existing before the conveyance, the burden shifts to the opposing party to show by clear and convincing evidence that the conveyances occurred during a lucid interval. Id. On the other hand, proof of incapacity that occurs during intervals or that is only temporary in nature creates no presumption that the incapacity existed when the deed was executed, and the burden is on the attacking party to show incapacity at the time of the conveyance. Id.

Gail argues that the trial court's finding of incapacity in this case was clearly erroneous and against the great weight of the evidence because, she says, there was no evidence that Mr. Massey was either permanently or temporarily incapacitated at the time he executed the deeds. Notably, the trial court did not express whether it found Mr. Massey's incapacity to be permanent or temporary in nature:

"On March 4, 2015[,] Mr. Massey was diagnosed [with] Parkinson's disease by the Neurology Clinic at the [Veterans Administration Hospital] after he had tremors and other symptoms that were interfering with his daily life. Besides the physical symptoms it was reported that Mr. Massey had memory loss, loss of sleep and depression. For a couple of years he had similar symptoms with the depression and sleep issues continuing. As well as Parkinson's [Mr. Massey] was diagnosed [with] Parkinson's dementia. [A] November 7, 2017[,] ... Mental Health intake consult report notes his mental status changing. He had short term memory problems and paranoia. He worried about his finances and [was] scared

of being hurt by someone. The psychiatrist diagnosed [him with] anxiety disorder along [with] the Parkinson's dementia. By [January] 2018 the clinicians were noting that Mr. Massey's cognitive functioning was impaired and his judgment poor. Also, he continued to be anxious, depressed and paranoid. Throughout 2018 and into early 2019 clinicians observe[d] these same mental health problems. Mr. Massey's body during [that time] was also in decline. He suffered from falls, [urinary-tract infections] and bladder and bowel incontinence. In October 2019[, approximately two months after the execution of the August 2019 deed,] he went to rehab due to a progressive functional decline and failure to thrive. Notes from neurology say he was oriented only to place[,] and his speech was sporadic. From the diagnosis of Parkinson's dementia in 2015 to 2019 Mr. Massey has continued to decline until his present bed ridden state.

"Witnesses and documents established the [children's] averment that Mr. Massey's declining mental health and his Parkinson's dementia along with his physical decline rendered his mind unsound for making major decisions such as conveying real property."

(Emphasis added.)

The ultimate inquiry is whether the evidence supports a finding that Mr. Massey was incapacitated on the dates and times he executed the deeds, thus rendering him incapable of understanding the nature and effect of conveying the properties to Gail. Only two people testified regarding their personal observations of Mr. Massey on the dates he executed the deeds. Gail testified that she was present when Mr. Massey signed the deeds and that he was not experiencing any cognitive decline.

She also stated that, at the times Mr. Massey signed the deeds, he was still conducting his own personal business at First Financial Bank. Anna Wooten, the branch manager at First Financial Bank, testified that she notarized both deeds and that, on each occasion, Mr. Massey's demeanor seemed normal; however, she stated she was unaware of his medical diagnoses. Wooten explained that she did not initially notarize the April 19, 2019, deed because, she said, she did not believe the deed reflected what Mr. Massey wanted to accomplish. According to Wooten, Mr. Massey had told her that the deed was "changing the deed from his name to his and Gail's name." Wooten, however, said that it appeared to her that the deed transferred ownership solely to Gail, so she suggested that Mr. Massey consult the attorney who had prepared the deed. Although the trial court indicated in its judgment that "witnesses and documents" established that Mr. Massey lacked the mental capacity to execute the deeds, it appears that the trial court afforded more weight to Mr. Massey's medical records, which indicated that he suffered from various health issues, most notably Parkinson's-related dementia and memory loss. As indicated earlier in this opinion, the trial court appointed Dr. H. Randall Griffith to perform a neuropsychological evaluation of Mr.

Massey.¹ As part of that evaluation, Dr. Griffith summarized a large portion of Mr. Massey's medical records. We highlight some of the observations included in those medical records to demonstrate the fluctuations in Mr. Massey's mental status on various dates before and, although not relevant, after the execution of the deeds: (1) a psychiatry-clinic note dated January 30, 2018, described Mr. Massey's cognitive functioning as "impaired" and his insight and judgment as "poor"; (2) a psychiatry-clinic note dated July 24, 2018, described Mr. Massey's mental status as "alert and oriented x3, with recent and remote memory intact," and his insight and judgment as "fair"; (3) a January 28, 2019, neurology-clinic note indicated that Mr. Massey had "relatively stable scores on mental status exam"; (4) a January 28, 2019, psychiatry-clinic note indicated the results of a mental-status exam, which found that Mr. Massey was "fully oriented with recent and remote memory intact," that he possessed "average language and fund of knowledge," and that his

¹After evaluating Mr. Massey on August 7, 2020, Dr. Griffith opined that Mr. Massey's overall neurocognitive abilities "fell within the severely impaired range for a person of his age and education" and that he should not be making "financial or medical decisions." However, that opinion was based on the August 7, 2020, evaluation and, thus, does not speak to Mr. Massey's mental capacity on the dates he executed the deeds, April 19, 2019, and August 19, 2019.

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insight and judgment was "fair"; (5) a psychiatry-clinic note dated May 30, 2019, indicated the results of a mental-status exam, which found that Mr. Massey was "alert and fully oriented," that he had "some short-term memory problems," but that he had "intact recent and remote memory"; (6) an August 15, 2019, psychiatry-clinic note described Mr. Massey's cognitive functioning as "fully oriented, with intact attention, recent and remote memory, intelligence, and insight/judgment"; (7) a neurology inpatient progress note dated October 23, 2019, described Mr. Massey's mental status as "awake, alert, and oriented to person and year, but not oriented to place or month"; and (8) a psychiatry-clinic note dated November 6, 2019, indicated the results of a mental-status exam, which found that Mr. Massey was "alert and fully oriented," with cognitive abilities within normal limits.

The medical records, which Dr. Griffith summarized, do not conclusively establish that Mr. Massey suffered from a permanent type of incapacity either before or at the time he executed the April 2019 and August 2019 deeds. To the contrary, the medical records establish only that any incapacity suffered by Mr. Massey occurred during intervals or was temporary in nature. Accordingly, the children bore the burden of

showing Mr. Massey's incapacity at the very time of the conveyances. Ex parte Chris Langley Timber, 923 So. 2d at 1105. The children, however, failed to meet their evidentiary burden because they presented no direct evidence indicating that Mr. Massey was incapacitated on the specific dates that he executed the deeds. As indicated, only Gail and Wooten personally observed Mr. Massey on the dates he executed the deeds, and neither their testimony nor the medical records conclusively establish that Mr. Massey was incapacitated at the very times he executed the deeds. Although the evidence is undisputed that Mr. Massey was advanced in age and suffered from various mental and physical impairments, those reasons are insufficient to vacate a deed on the basis that the grantor lacked mental capacity. See Thomas v. Neal, 600 So. 2d 1000, 1001 (Ala. 1992) (noting that a grantor's "[m]ere sickness, weakness of intellect, advanced age, or mental enfeeblement are insufficient reasons to invalidate a conveyance" based on the grantor's lack of mental competency). Rather, "[t]he conveyor's mind must have been so impaired at the time of the conveyance that he was incapable of acting intelligently and voluntarily during the transaction." Id. at 1001-02 (emphasis added). Based on the foregoing, we conclude that the trial

court's judgment vacating the deeds on the ground that Mr. Massey lacked mental capacity is not supported by evidence.

B. Undue Influence

Gail challenges the trial court's finding of undue influence on both a procedural ground and on the merits. First, she argues that the trial court exceeded its discretion in granting the children's request to amend their petition to add a claim of undue influence. Rule 15(a), Ala. R. Civ. P., provides that a pleading may be amended without leave of court "at any time more than forty-two (42) days before the first setting of the case for trial." After that window closes, "a party may amend a pleading only by leave of court, and leave shall be given only upon a showing of good cause." *Id.* There is a liberal policy of allowing an amendment under Rule 15 if the amendment does not result in actual prejudice to the opposing party or cause undue delay. *Blackmon v. Nexity Fin. Corp.*, 953 So. 2d 1180, 1189 (Ala. 2006). Based on the procedural circumstances presented in this case, we conclude that the trial court did not exceed its discretion in granting the children's request to amend their petition. In their original petition, the children alleged that the Masseys had a "confidential relationship," an essential element of an undue-influence

claim. The petition then set forth specific facts that could be construed as alleging a claim of undue influence. In fact, in her answer, Gail denied that the execution of the deeds was the result of "undue influence or overreaching on her part." In support of their request to amend the petition, the children argued that Gail was on notice that the issue of undue influence would be tried because, according to the children, the issue had been specifically addressed during depositions, a fact that Gail does not deny. Despite denying the existence of undue influence in her answer and despite being on notice that the issue of undue influence would presumably be tried, Gail averred in her pretrial brief, in which she discussed the law regarding undue influence, that the children had failed to plead a specific basis for vacating the deeds. For that reason, the children, at the beginning of the first hearing on April 26, 2021, requested that they be allowed to amend their petition to clarify that they were seeking to have the deeds vacated not only on the ground of incapacity, but also on the ground of undue influence. The trial court, over Gail's objection, granted the children's oral request, directing them to file an amended petition. Notably, the issue of undue influence was not tried until the second hearing on August 23, 2021. Based on the

circumstances presented, we conclude that the children showed good cause for the amendment and that Gail suffered no prejudice because of it. Accordingly, the trial court did not exceed its discretion in allowing the children to amend their petition under Rule 15(a) to assert undue influence as a ground for vacating the deeds.

A person claiming undue influence with respect to a deed must demonstrate only "that the donor and the donee were in a confidential relationship and that the donee was the dominant party in the relationship." Beinlich v. Campbell, 567 So. 2d 852, 853 (Ala. 1990). If a person claiming undue influence makes such a prima facie showing, "the donee must either refute the proof that he was the dominant party in a confidential relationship or show that the transaction was 'fair, just, and equitable in every respect.'" Id. (quoting Brothers v. Moore, 349 So. 2d 1107, 1109 (Ala. 1977)). "It is well established that what constitutes undue influence to procure a deed depends on the facts and circumstances of each case." Brothers, 349 So. 2d at 1109. "The law raises a presumption of undue influence when an inter vivos gift is made to the dominant party in a confidential relationship." Beinlich, 567 So. 2d at 853.

Gail does not dispute that she was in a confidential relationship with Mr. Massey. See Mitchell v. Brooks, 281 So. 3d 1236, 1244 (Ala. 2019) (noting that "'[t]he relation of husband and wife is per se a confidential relation'" (quoting Rash v. Bogart, 226 Ala. 284, 287, 146 So. 814, 816 (1933))). Accordingly, this Court must determine only whether the evidence supports a finding that Gail was the dominant party in her relationship with Mr. Massey when Mr. Massey executed the deeds conveying the properties to her. As indicated, the children averred in their petition that Mr. Massey's conveyance of his two most valuable pieces of realty was both uncharacteristic of how he conducted his financial affairs and inconsistent with a prenuptial agreement executed by the Masseys. The prenuptial agreement executed by the Masseys was introduced into evidence. That agreement provided that, in the event Mr. Massey predeceased her, Gail would receive a life estate in the marital residence purchased by Mr. Massey. The agreement did not preclude Gail or Mr. Massey from making gifts to each other or from creating a joint tenancy with the right of survivorship in property. Gail testified about the deeds. She stated that the April 2019 deed conveyed to her Mr. Massey's interest in property that had been in his family for generations;

located on that property was a grocery store and a cellular-telephone tower, both of which generated income. Gail said that she had talked to Mr. Massey about the property on four or five occasions and that he had told her "to take care of it." Gail, however, could not recall when those conversations had taken place. According to Gail, Mr. Massey wanted her to have the property because it would provide her with income to manage the marital residence. Gail stated that her son's attorney prepared the April 2019 deed, that Mr. Massey never consulted with the attorney about the deed, that Mr. Massey never read the deed, that she drove Mr. Massey to the bank to have the deed notarized, and that she recorded the deed. Gail testified that she had also arranged for same the attorney to prepare the August 2019 deed, which conveyed to her and Mr. Massey a joint tenancy with the right of survivorship in the marital residence; the marital residence was situated on approximately 88 acres of "farm-type" land that had also been in Mr. Massey's family for several generations. Gail said that Mr. Massey neither consulted with the attorney about the deed nor read it. According to Gail, Mr. Massey had asked the children if, after he died, they wanted to live on the property on which the marital residence was located, and, she said, they had responded "no." Gail

stated that Mr. Massey then proclaimed that, when he died, he would give the property to a church and that she had responded that, if he was going to give the house away, he should give it to her. Gail stated that, after the children had filed their petition seeking to, among other things, set aside the deeds, she threatened to leave Mr. Massey on two occasions because, she believed, people were trying "control" the house that belonged to her and Mr. Massey. The trial court's judgment references a video, which presumably was filmed after the deeds had been executed, in which, the trial court describes, Gail is seen harassing Mr. Massey, i.e., telling him to "do something about his daughters or buy her a new house." Wooten, who notarized the deeds, testified that, although she did not notice anything different about Mr. Massey's demeanor on the dates she notarized the deeds, she, nonetheless, had concerns about the deeds because, she said, she had previously observed transactions that she described as being uncharacteristic of the way in which Mr. Massey conducted his banking business. Wooten explained that, before the times she notarized the deeds, the Masseys had made frequent visits to Mr. Massey's safety deposit box and that Gail had made large withdrawals from Mr. Massey's accounts, causing overdraft fees. The trial court also

heard evidence in support of the children's contention that Mr. Massey intended to leave the property that had been in his family for several generations to his descendants. Bruno Tropeano, the temporary conservator of Mr. Massey's estate, testified that he and Mr. Massey had been friends since 2000, that they had talked at least once a year about Mr. Massey's estate, and that Mr. Massey had always told him that he wanted the children to inherit all of his property. William A. Parsons, Jr., Mr. Massey's accountant and long-time friend of 60 years, testified that he and Mr. Massey had routinely talked about Mr. Massey's assets and that Mr. Massey had indicated that he wanted the children to inherit all of his property. Finally, the trial court heard evidence that, in 2019, Gail had been the victim of a scam and that she had had Mr. Massey sign five checks payable to her from an account in his and the children's names to help cover her losses; Gail also said that, on several occasions, she had taken Mr. Massey to their bank to retrieve cash from his safety deposit box to cover her losses from the scam. After hearing the testimony, the trial court entered its judgment concluding that Gail had unduly influenced Mr. Massey in executing the deeds:

"Testimony revealed that Gail Brunson knew [Mr. Massey] for all her adult life. His first wife, Peggy Massey,

was her first cousin and [Gail was] a bridesmaid in their wedding. After Peggy's death Gail and [Mr. Massey began] seeing each other and later married in 2000. They executed a pre-nuptial agreement [in January 2000]. During the above described mental and physical decline of Mr. Massey the financial situation of the Masseys also took a decline. [Gail] was a victim of a scam where she would mail money to someone in hopes of winning a large sum of money. The Masseys had separate bank accounts and [Gail] testified that she had Mr. Massey sign 5 checks totaling \$21,750 to help cover these losses. In total [Gail] testified that in 2019 she lost \$80,000 in this scam. This was happening the year Mr. Massey's mental and physical health was declining. The medical records in fact indicate Mr. Massey suffered [with] anxiety with regards to their financial situation. Caregivers have been brought in to help [with] Mr. Massey's care. Testimony [from] Carnita Williams who coordinates and provides care for Mr. Massey testified to [Gail's] verbal aggression and tormenting of Mr. Massey. During Carnita Williams's testimony a video was entered into evidence of [Gail's] harassing Mr. Massey as he lay bedridden. She demands that [Mr. Massey] do something about his daughters or buy her a new house. Clearly undue influence was exercised over Mr. Massey by Gail. This undue influence led to the execution of these deeds. ... In the instant case the parties clearly had a confidential relationship and [Gail] dominated and coerced Mr. Massey during this time of his physical and mental decline."

After reviewing the record, we conclude that the circumstances surrounding the execution of the deeds warrant a finding that the deeds were the product of undue influence exerted by Gail. The evidence specifically demonstrates that Gail was active in procuring the deeds during a time when Mr. Massey was experiencing a decline in health,

mentally, physically, and emotionally. As indicated, Gail had her son's attorney prepare the deeds, and Mr. Massey neither spoke to that attorney nor read the deeds before signing them. The evidence also suggests that the conveyances were inconsistent not only with the prenuptial agreement between the Masseys, but also with Mr. Massey's desire that the children inherit the property that had been in his family for several generations. Accordingly, Gail did not meet her evidentiary burden of showing that she did not exercise dominance over Mr. Massey or that the conveyances to her were fair, just, and equitable. Although Gail provided reasons as to why Mr. Massey wanted her to have the properties, the trial court was free to disregard that testimony based on other circumstances surrounding the execution of the deeds. Accordingly, the trial court's findings and its judgment holding the conveyances to be void and setting aside the deeds on the basis of undue influence are not against the great weight of the evidence or manifestly unjust, and we affirm the judgment on that basis.²

²Because we affirm the judgment of the trial court vacating the deeds on the ground of undue influence, we pretermitt Gail's arguments relating to the lease of the income-producing property and her entitlement to any rent.

IV. Conclusion

Based on the foregoing, we affirm the trial court's judgment vacating the deeds.

AFFIRMED.

Bolin, Wise, and Stewart, JJ., concur.

Parker, C.J., concurs in part and concurs in the result, with opinion.

PARKER, Chief Justice (concurring in part and concurring in the result).

I concur in affirming the judgment because I agree with the main opinion on the issues of leave to amend and undue influence. As to incapacity, however, I do not believe that the circuit court erred, if the ore tenus standard of review is properly applied to the evidentiary framework for proving incapacity.

The main opinion correctly identifies our standard of review as ore tenus and not de novo. Under the ore tenus standard, "'this Court will not disturb the trial court's conclusion [on an issue of fact] unless it is clearly erroneous and against the great weight of the evidence.'" Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000) (quoting Raidt v. Crane, 342 So. 2d 358, 360 (Ala. 1977)). And as laid out in the main opinion, the evidentiary framework for proving a grantor's incapacity requires the party attacking the deed to prove either permanent or temporary incapacity. If the attacker proves permanent incapacity, the party defending the deed can nevertheless defeat the attack by proving a lucid interval (i.e., temporary capacity at the time of the deed). See Ex parte Chris Langley Timber & Mgmt., Inc., 923 So. 2d 1100, 1105 (Ala. 2005).

Here, the probate court did not state whether it based its conclusion of incapacity on a finding of permanent incapacity or a finding of temporary incapacity. Thus, we must assume that the court found both, in the alternative. Cf. Daugherty v. Miller, 549 So. 2d 65, 66 (Ala. 1989) ("Although the judgment does not set out the basis for the trial court's holding ..., '[i]t is well settled that when it cannot be determined on what ground or theory judgment was rendered, the finding of the trier of fact is referred to the theory supported by the evidence.'" (citation omitted)). Hence, to establish that the court should not have voided the deeds on the basis of incapacity, appellant Gail Massey must show that both findings were clearly erroneous or against the great weight of the evidence.

I cannot conclude that Gail has shown that. As summarized by the probate court's judgment and the main opinion, there was significant evidence that the grantor, Jack B. Massey, had impaired cognitive function. And that evidence showed Mr. Massey's mental condition at various points in time both before and after he signed the deeds. Beginning in 2015, Mr. Massey was diagnosed with Parkinson's disease and had memory loss, loss of sleep, and depression. At some point, he was

diagnosed with dementia related to the Parkinson's. By 2017, he had short-term-memory problems and paranoia, and he was diagnosed with anxiety disorder. By 2018, he had impaired cognitive function and poor judgment. Clinicians observed the same mental problems into early 2019. By October 2019, he was oriented only to place, and his speech was sporadic. In August 2020, a neuropsychological evaluation revealed that his overall neurocognitive abilities were severely impaired. Notably, I do not believe that the evidence of Mr. Massey's mental function after he signed the second deed was irrelevant to permanent or temporary incapacity. That evidence was relevant to creating an inference of incapacity in the recent past, as well as to showing the trajectory of Mr. Massey's mental condition and the consistency of impairment of his mental condition across the overall time frame from 2015 to 2020.

Certainly, there was also evidence that Mr. Massey's incapacity was not permanent. Clinic notes from July 2018 and January, May, August, October, and November 2019 indicated a more normal mental condition. But that was for the probate court to weigh against the conflicting evidence. In light of all the evidence summarized above, I simply cannot conclude that the contrary clinic notes caused the court's

finding of permanent incapacity to be clearly erroneous or against the great weight of the evidence.

Moreover, the evidence of lucid intervals summarized in the main opinion likewise did not require the probate court to decline to find incapacity. Gail testified that Mr. Massey was not experiencing any cognitive decline at the time he signed the deeds, and a bank manager testified that his demeanor seemed normal. But the court was entitled to weigh that evidence against the overall evidence of long-term incapacity. In other words, the mere existence of evidence of lucid intervals did not suddenly render the evidence of long-term incapacity irrelevant or insufficient. Rather, the probate court remained free to weigh all the evidence in determining whether Mr. Massey lacked capacity at the time he signed the deeds. In addition, the court was entitled to discount Gail's and the bank manager's testimony based on the court's assessment of credibility. The court could easily have disregarded Gail's testimony -- that Mr. Massey was not experiencing any cognitive decline -- as eminently self-interested and contrary to the great weight of the other evidence. And the bank manager admitted both that she did not know about Mr. Massey's diagnoses and that he had misunderstood the effect

of the April 2019 deed. Therefore, the testimony about lucid intervals did not trump the rest of the evidence in a way that rendered the probate court's conclusion of incapacity clearly erroneous or against the great weight of the evidence. Notably, relatives and friends who are present at a deed signing often have strong interests in the validity of the deed, especially if they are grantees. Indeed, they are sometimes the very people who are being accused of undue influence. If their testimony that the signer had capacity were automatically conclusive in the absence of contrary testimony from someone else who was present at the signing, then the door would be open wide for mischief. In my view, that cannot be the law.

Under the ore tenus standard, we have to look at the evidence through the following lens: We must view all the evidence, in the light most favorable to the trial court's finding, and ask whether that finding crosses the high bar of being clearly erroneous or against the great weight of the evidence. This standard does not require that the attacker of the deed have conclusively established incapacity by a particular portion of the evidence. It also does not require that the attacker have presented direct evidence of temporary incapacity; it merely requires evidence

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(direct or circumstantial) from which it could be reasonably inferred that the signer lacked capacity on the date of the deed. Here, Mr. Massey's children met that requirement by presenting evidence of Mr. Massey's overall declining mental condition in the years before and after the deeds. In short, our standard of review here is *ore tenus*, not *de novo*, and under the *ore tenus* standard, I believe that we cannot fault the probate court for finding incapacity.