[Cite as *Grimes v. Grimes*, 2009-Ohio-3126.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

Lewis F. Grimes, Executor for the Estate of John H. Grimes, Sr.,	:	
Plaintiff-Appellant,	:	Case No. 08CA35
v.	:	DECISION AND
John H. Grimes, Jr.,	:	JUDGMENT ENTRY
Defendant-Appellee.	:	File-stamped date: 6-24-09

APPEARANCES:

James S. Huggins, Theisen Brock, LPA, Marietta, Ohio, for appellant.

Steven L. Story and Robert W. Bright, Pomeroy, Ohio, for appellee.

Kline, P.J.:

{¶1} Lewis F. Grimes (hereinafter "Lewis"), individually and as the executor of the estate of John H. Grimes, Sr. (hereinafter "John Senior"), appeals the judgment of the Washington County Court of Common Pleas, Probate Division, in favor of John H. Grimes, Jr. (hereinafter "John Junior"). Lewis filed suit to have four deeds rescinded and declared invalid. The deeds in question transferred real property from John Senior to John Junior. On appeal, Lewis argues that the trial court erred by granting John Junior's motion for summary judgment. Lewis contends that there are genuine issues of material fact as to whether the transfers to John Junior were invalid inter vivos gifts. However, because of the clear and unambiguous language in the deeds, we disagree and find that the deeds in question are deeds of purchase. Therefore, the properties

transferred by purchase, and Lewis's arguments regarding inter vivos gifts are either irrelevant or moot. Lewis also contends that there are genuine issues of material fact related to his claim of undue influence. We agree. Specifically, we find the following genuine issues of material fact: (1) whether John Senior was a susceptible party; (2) whether John Junior actually exerted undue influence over John Senior; and (3) in the factual allegations related to the October 13, 2002 notarization of the deeds. Therefore, a reasonable trier of fact could find that the circumstantial evidence could support a rational inference that the conveyances to John Junior were the result of undue influence. That is, construing the evidence most strongly in favor of the non-moving party, this court cannot say that reasonable minds could come to one conclusion on the evidence submitted. Accordingly, we reverse the judgment of the trial court and remand this cause to the trial court for further proceedings consistent with this opinion.

I.

{¶2} This matter is on appeal before this Court for a second time. We reversed the judgment of the trial court and remanded this matter for procedural reasons in *Grimes v. Grimes*, 173 Ohio App.3d 537, 2007-Ohio-5653. Because that decision recounts the procedural history of this case, we will not repeat it here.

{¶3} Lewis and John Junior are brothers and the adult sons of John Senior, deceased. At the time of the events in question, John Senior was 79 years old and suffering from kidney failure, cancer of the liver, and seizures. He was admitted to the hospital on September 24, 2002. After suffering a seizure on

September 29, 2002, John Senior was transferred to intensive care. He remained in intensive care until discharged from the hospital on October 4, 2002. Upon returning home, John Senior was classified as "homebound" for medicare purposes, and he required in-home medical care.

{¶4} On October 12, 2002, John Junior spent the night with John Senior at John Senior's residence. On either October 12 or October 13, 2002, John Junior called Lewis Hupp (hereinafter "Hupp") about notarizing some documents. Apparently, John Junior called Hupp because Hupp, a certified public accountant, had previously done some tax work for John Senior. Sometime in the late morning or early afternoon of Sunday, October 13, 2002, John Junior drove John Senior to meet Hupp at a parking lot near a Wal-Mart. At this meeting, Hupp notarized four deeds that transferred various properties from John Senior to John Junior.

{¶5} John Junior had prepared these deeds himself on a typewriter that he had borrowed from a friend. To obtain the necessary information for the deeds, John Junior went to the County Recorder's office and, apparently, reviewed prior deeds in the chain of title. All four deeds state that the transfers were made "in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration." Further, John Junior testified that he did indeed pay his father one dollar ($1.00) for the properties.

{¶6} John Senior had a will, dated January 17, 2001, that would have distributed these properties between Lewis and John Junior. But as a result of

the October 13, 2002 conveyances, John Junior received all of the property in question.

{¶7} Neither John Senior nor John Junior told anybody about the conveyances. John Senior retained possession of the properties, and Lewis continued to write checks to pay John Senior's utility and insurance bills. After the October 13, 2002 conveyances, John Senior told at least two neighbors that Lewis would have some of the property in question after John Senior died.

{¶8} John Senior was readmitted to the hospital on December 10, 2002, and he died in the hospital on December 17, 2002. That afternoon, John Junior took the four deeds to the county offices to begin the process of recording them.[1]

{¶9} Lewis filed suit, claiming that the deeds should be rescinded and declared invalid. In his complaint, Lewis claimed that John Junior exerted undue influence over John Senior and that the transfers were invalid inter vivos gifts.

{¶10} After extensive discovery and a tortured procedural history, John Junior moved for summary judgment. The probate court granted his motion.

{¶11} Lewis appeals, asserting the following two assignments of error: I. "THE PROBATE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT-APPELLEE BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT." And, II. "THE PROBATE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT-APPELLEE BECAUSE DEFENDANT-APPELLEE WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW."

[1] The County Engineer's office stamped each deed on December 17, 2002. Getting approval from the engineer's office was the first step in the recording process.

II.

{¶12} In his first assignment of error, Lewis contends that the probate court erred in granting John Junior's motion for summary judgment because there are genuine issues of material fact.

{¶13} "Because this case was decided upon summary judgment, we review this matter de novo, governed by the standard set forth in Civ.R. 56." *Comer v. Risko* (2005), 106 Ohio St.3d 185, 2005-Ohio-4559, at ¶8.

{¶14} Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(A). See *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 535.

{¶15} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294, citing *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts

showing that there is a genuine issue for trial." Civ.R. 56(E). See, also, *Dresher* at 294-295.

{¶16} In reviewing whether an entry of summary judgment is appropriate, an appellate court must independently review the record and the inferences that can be drawn from it to determine if the opposing party can possibly prevail. *Morehead* at 411-412. "Accordingly, we afford no deference to the trial court's decision in answering that legal question." *Id.* at 412. See, also, *Schwartz v. Bank-One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809.

A. John Senior's Donative Intent

{¶17} Lewis contends that there is a genuine issue of material fact as to whether John Senior had the donative intent necessary to make an inter vivos gift.

{¶18} Before addressing the substance of Lewis's argument, we must first address a procedural matter. In its decision below, the probate court analyzed the conveyances as inter vivos gifts. However, John Junior argues that the transfers were not inter vivos gifts and, rather, that John Senior conveyed the properties by deeds of purchase. In response, Lewis claims that John Junior's argument is procedurally improper because he is raising it for the first time on appeal. We disagree.

{¶19} An inter vivos gift "is an immediate, voluntary, *gratuitous* and irrevocable transfer of property by a competent donor to another.'" *Jones v. Jones*, Athens App. No. 07CA25, 2008-Ohio-2476, at ¶22, quoting *Smith v. Shafer* (1993), 89 Ohio App.3d 181, 183 (emphasis added). By definition, an

inter vivos gift must be gratuitous. Paragraph twelve (12) of Lewis's complaint alleges that "[t]he purported transfers from [John Senior] to [John Junior] were gratuitous transfers." In his answer, John Junior denied that the transfers were gratuitous. As a result, John Junior did indeed raise this argument in the court below.

{¶20} We will now address the substance of Lewis's arguments regarding inter vivos gifts. "The essential elements of an *inter vivos* gift are (1) intent of the donor to make an immediate gift, (2) delivery of the property to the donee, [and] (3) acceptance of the gift by the donee." *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 161, fn. 2 citing *Bolles v. Toledo Trust Co.* (1936), 132 Ohio St. 21. Because John Senior retained possession of the house after the October 13, 2002 conveyances, Lewis argues that John Senior did not have the requisite donative intent for a valid inter vivos gift. John Junior, however, claims that Lewis's argument is irrelevant because the properties were transferred by purchase. To support this claim, John Junior points to the following language in each of the deeds: that the transfers were "in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration."

{¶21} "The construction of written contracts and instruments, including deeds, is a matter of law." *Long Beach Assn., Inc. v. Jones* (1998), 82 Ohio St.3d 574, 576. We review questions of law de novo. Id.; *Esteph v. Grumm*, 175 Ohio App.3d 516, 2008-Ohio-1121, at ¶8. "The intent of the parties to a deed controls its interpretation." Id. at ¶9, citing *Ball v. Foreman* (1881), 37 Ohio St. 132. "When construing a deed, a court must examine the language contained

within the deed, the question being not what the parties meant to say, but the meaning of what they did say, as courts cannot put words into an instrument which the parties themselves failed to do." *McCoy v. AFTI Properties, Inc.*, Franklin App. No. 07AP-713, 2008-Ohio-2304, at ¶8, citing *Larwill v. Farrelly* (1918), 8 Ohio App. 356, 360.

{¶22} "[I]n determining whether an instrument for the conveyance of land is a deed of gift or a deed of purchase, its recitals of the payment and receipt of the consideration are material and concern the operation and effect of the deed." *Mccoy* at ¶11, citing *Patterson v. Lamson* (1887), 45 Ohio St. 77, 89-90. Therefore, "when a deed contains a recital of a valuable consideration received from the grantee, it is to be construed as a deed of purchase, and parol evidence may not be used to show that it was instead a deed of gift." *McCoy* at ¶11, citing *Groves v. Groves* (1902), 65 Ohio St. 442, syllabus. See, also, *Gardner v. Kern* (1926), 115 Ohio St. 575, 579-80; *Muckerheide v. Zink* (1964), 1 Ohio App.2d 76, 82; 43 Ohio Jurisprudence 3d, Evidence and Witnesses 513 ("Where consideration is recited, as far as the operation of the deed is concerned, [parol evidence] is not competent to show that such instrument in fact was a deed of gift rather than a deed of purchase.")

{¶23} Because of the clear and unambiguous language regarding consideration, we find that the deeds in the present case are deeds of purchase. As a result, John Senior transferred the properties to John Junior by purchase, not by gift. And therefore, John Senior's donative intent is irrelevant.

{¶24} Lewis has introduced evidence that the properties actually transferred by gift. This evidence includes the conveyance forms required by R.C. 319.202 and 319.54(F)(3)[2] and John Junior's own testimony. Lewis would have us consider this parol evidence and convert these deeds of purchase into deeds of gift, thereby changing the legal operation of the deeds. But under Ohio law, parol evidence may not be used to contradict the clear, unambiguous language that valuable consideration had been paid.

{¶25} For example, in *McCoy*, the Franklin County Court of Appeals found that a property was transferred by purchase deed, even though the parties agreed that no consideration was actually paid. The court held that "the consideration clause must be deemed conclusive as to receipt, despite the parol evidence that no consideration was ever exchanged. * * * Valuable consideration having been indicated in the deed, the operation and effect of such deed was not subject to contravention, and the property must be deemed to have passed by deed of purchase." *McCoy* at ¶13-14. We find *McCoy*'s analysis of Ohio law persuasive and apply the same reasoning to the present case.

{¶26} Lewis cites *Freedman v. Freedman* (1948), 52 Ohio Law Abs. 404, to support his argument that parol evidence is admissible in cases of undue influence. "It is only where there is an equitable ground for reformation or rescission, such as fraud, duress, undue influence or mistake, that such evidence is admissible." Id. (citation omitted). We agree that Lewis may introduce parol

[2] In at least one form that he submitted to the Washington County Auditor's Office, John Junior indicated that "No Conveyance fees shall be charged because the real property is transferred * * * (d) To evidence a gift, in any form, between husband and wife, or parent and child, or the spouse of either." Although Lewis has introduced just one of these forms, all the deeds in question are marked as exempt from the conveyance fee.

evidence to prove undue influence, which would lead to the *equitable* rescission of the deeds. See, generally, *Rutledge v. Wallace*, Carroll App. No. 02AP0770, 2002-Ohio-5372, at ¶25 ("Equity will set aside a deed that was executed as a result of undue influence."). But Lewis may not use parol evidence to try and change the *legal* operation of the deeds. *McCoy* at ¶11. And we can find no example of an Ohio court changing a deed of purchase into a deed of gift based on parol evidence and the allegations of undue influence.

{¶27} Therefore, for the above stated reasons, we find that the deeds in question are deeds of purchase. And because the properties transferred by purchase, John Senior's donative intent is irrelevant.

{¶28} Further, we find Lewis's remaining arguments regarding the validity of inter vivos gifts moot and decline to address them. See App.R. 12(A)(1)(c).

B. Undue Influence

{¶29} Lewis contends that there are genuine issues of material fact as to whether John Junior exerted undue influence on John Senior.

{¶30} "A deed executed in the correct form is presumed to be valid and will not be set aside except upon clear and convincing evidence. Therefore, a party seeking rescission and cancellation of a deed because of undue influence bears the burden of proof by clear and convincing evidence." *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, citing *Weaver v. Crommes* (1959), 109 Ohio App. 470, 474-475. See, also, *Fewell v. Gross*, Butler App. Nos. CA2006-04-096, CA2006-05-103, 2007-Ohio-5788, at ¶27; *Hardy v. Fell*, Cuyahoga App. No. 88063, 2007-Ohio-1287, at ¶20.

{¶31} "The elements of undue influence are: (1) a susceptible party, (2) another's opportunity to influence the susceptible party, (3) the actual or attempted imposition of improper influence, and (4) a result showing the effect of the improper influence." *Rheinscheld v. McKinley* (Jan. 27, 1988), Hocking App. No. 453, unreported, citing *DiPietro v. DiPietro* (1983), 10 Ohio App.3d 44, 46. See, also, *Cook v. Reising*, Lorain App. No. 08CA009417, 2009-Ohio-1131, at ¶23.

{¶32} There can be no question that John Junior had the opportunity to influence John Senior during their time together on October 12 and 13, 2002. Moreover, the October 13, 2002 conveyances to John Junior can be seen as the result of potential undue influence. But John Junior argues that Lewis cannot prove the other two elements of the undue influence test.

{¶33} John Junior claims that John Senior was not susceptible to undue influence. To support this claim, John Junior points to the testimony of Dr. Terrence Gilbert. Dr. Gilbert treated John Senior during John Senior's September 24, 2002 through October 4, 2002 hospital stay. In his deposition, Dr. Gilbert testified that John Senior was competent during the month of October 2002. However, Dr. Gilbert also testified to the following: (1) that he was not John Senior's family physician; (2) that he could not determine whether John Senior was lucid on September 30, 2002; (3) that he cannot say whether he saw John Senior between October 4, 2002 and November 19, 2002; and (4) that "it's hard for me to comment on signing a deed. I don't -- there may be -- honestly,

there may be issues with that that I can't comment on. That's not my area of expertise." Deposition of Terrence Gilbert, D.O. at 28-29.

{¶34} John Junior also places substantial weight on the deposition testimony of Hupp, the notary public who acknowledged the deeds. As John Junior states, "it is clear that Hupp was and is of the opinion that [John Senior] was competent, not under undue influence and that [John Senior's] state of mind was the same at the deed signing as it had been in years before when Hupp had prepared [John Senior's] taxes." Brief on Behalf of Appellee John H. Grimes, Jr. at 21. However, Hupp guessed that his meeting with John Senior and John Junior lasted just fifteen-to-thirty minutes. And during that time, Hupp did not read the documents or discuss the substance of the documents with John Senior. "It was a, you know, in-and-out deal as [Hupp] assumed it would be." Deposition of Joseph Hupp at 28. Furthermore, the Supreme Court of Ohio has "held that an official taking an acknowledgment is not required and is not empowered to determine and certify the grantor's capacity." *Taylor v. Kemp*, Belmont App. No. 05 BE 13, 2005-Ohio-6787, at ¶53. See, also, *Truman v. Lore's Lessee* (1862), 14 Ohio St. 144, 151 ("He is not required to determine and to certify as to the *grantor's capacity*[.] * * * If the grantor acknowledges the 'signing and sealing' of the instrument, it is his duty to certify that fact, and *there his duty ends*.") (emphasis in original). Therefore, we do not find the testimony of Hupp dispositive as to John Senior's competence.[3]

[3] As we discuss later, there are many conflicting statements regarding the meeting between Hupp and John Senior.

{¶35} Despite the opinion of Dr. Gilbert and the testimony of Hupp, we find a genuine issue of material fact regarding John Senior's susceptibility to undue influence. It is undisputed that John Senior was 79 years old and suffered from seizures, kidney failure, and cancer of the liver. Additionally, there is evidence that John Senior was homebound, knew that he was dying, and had a history of noncompliance with his medication. Construing all inferences in Lewis's favor, we find that genuine issues of material fact exist as to whether John Senior was a susceptible party.

{¶36} There is also a genuine issue of material fact as to whether the conveyances to John Junior were actually the result of undue influence. "Undue influence occurs when the wishes and judgment of the transferor are substituted by the wishes and judgment of another." *Logan v. Williams* (June 10, 1993), Cuyahoga App. No. 62748, unreported, citing *Henkle* at 736. See, also, *Carr v. Carr* (Nov. 20, 1996), Athens App. No. 95CA1702, unreported. Here, there is evidence that John Senior told his friends that Lewis would receive a share of the property after John Senior's eventual death. These statements conflict with the result of the October 13, 2002 conveyances to John Junior.

{¶37} John Senior told his neighbor, Dennis Berga, that Lewis would have some share of the property after John Senior eventually died. For several years, Berga had stored farm equipment on John Senior's property. In October or November 2002, Berga asked John Senior about storing the equipment on the property after John Senior's eventual death. John Senior told Berga "not to worry, that [John Senior] and Lewis had talked about it and that [Berga] 'could

get it off Lewis'; that it (the land) would be Lewis's when John died." Affidavit of Dennis Berga. Just nine days before John Senior's death, John Senior reassured Berga "that it would not be a problem – that [Berga] should talk with Lewis about it – it would be his property." Id. These statements conflict with the October 13, 2002 conveyances to John Junior. Therefore, there is a genuine issue of material fact as to whether the October 13, 2002 conveyances were in accordance with John Senior's true wishes and judgment.

{¶38} John Senior told another friend and neighbor, Stan Vollmar, that Lewis would probably sell Vollmar some of the property in question after John Senior eventually died. Vollmar had discussed buying property from John Senior for several years. The last time Vollmar discussed the matter with John Senior was sometime after the October 13, 2002 conveyances. According to Vollmar, John Senior "knew he was in failing health and told me that this would be [Lewis's] property, and that he was sure that Lewis would sell some ground to me[;] he thought I should talk with Lewis." Affidavit of Stan Vollmar. Again, this statement raises a genuine issue of material fact as to John Senior's true wishes and judgment regarding the property.

{¶39} Finally, John Junior emphasizes that Lewis has no personal knowledge of any undue influence exerted by John Junior. Regardless, "[i]t has been held that issues relating to undue influence are generally determined upon circumstantial evidence and inferences drawn from a full presentation of facts which may be inconclusive when taken separately, and a wide range of inquiry is, therefore, permitted to bring before the jury facts and influences bearing on the

preparation of the instrument." *Rheinscheld*, citing *Rich v Quinn* (1983), 13 Ohio App. 3d 102, 104. See, also, *Fisher v. Jewell* (Jan. 8, 2002), Jackson App. No. 01CA9, 2002-Ohio-418, unreported, citing *Bd. of Edn. v. Phillips* (1921), 103 Ohio St. 622, 626.

{¶40} Here, the conveyances were secret, done without the assistance of counsel, and notarized in a parking lot. John Senior was terminally ill, less than two weeks removed from intensive care, and there is evidence that John Senior knew that he was dying. Furthermore, although John Junior had the opportunity to record the deeds – even by mail – after the October 13, 2002 conveyances, he did not begin to do so until just hours after John Senior's death. And finally, "[t]he existence of a family or a confidential or quasi-confidential relationship between the grantor and the grantee in a deed is an important factor in determining the presence of undue influence." 35 Ohio Jurisprudence 3d, Deeds 79. Taken together, the circumstantial evidence in this case could support a rational inference that the conveyances to John Junior were the result of undue influence. See, e.g, *Thorp v. Cross* (Oct. 16, 1998), Portage App. No. 97-P-0079, unreported ("These facts, taken together, could logically support a rational inference that appellee exerted undue influence upon appellee.").

C. The October 13, 2002 Meeting With Hupp

{¶41} "A genuine issue as to a material fact exists whenever the relevant factual allegations in the pleadings, affidavits, depositions or interrogatories are in conflict." *Murray v. Murray* (1993), 89 Ohio App.3d 141, 145. See, also, *St. Joseph's Hosp. v. Hoyt*, Washington App. No. 04CA20, 2005-Ohio-480, at ¶39,

citing *Shiffer v. Safeway Tire Co.* (May 9, 1991), Cuyahoga App. No. 58527, unreported; *Hritz v. United Steel Workers of Am., AFL CIO*, Warren App. No. CA2002-10-108, 2003-Ohio-5284, at ¶39.

{¶42} Here, we find substantial conflicts between John Junior's account of the October 13, 2002 meeting and Hupp's recollection of that same event. This is especially relevant because John Junior's version of the meeting tends to support a finding of no undue influence. On the contrary, Hupp's version, when viewed with the other circumstantial evidence in this case, could support a rational inference that John Junior exerted undue influence over John Senior.

{¶43} John Junior and Hupp disagree as to whether the deeds were signed before the meeting or signed in Hupp's presence. John Junior testified as follows: "And then he [Hupp] said -- in a little bit he said, 'Come on back.' And he said, 'Your dad wants to sign these deeds.' And he said, 'I Don't think I need you as a witness to see that, but,' he said, 'you can sign it anyway as a witness, just to say even that you were here.' And so [John Senior] signed them, [Hupp] notarized them, I signed them, however, it kind of went around and round." Depostion of John H. Grimes, Jr. at 43-44. John Junior's later testimony emphasizes his belief that John Senior signed the deeds during the meeting, in the car, and in Hupp's presence.

{¶44} Q: And then tell me again what happened then when you approached the car. Now [John Senior] is still sitting in the car, right?

{¶45} A: Yes.

{¶46} Q: Okay. What happened then?

{¶47} A: [John Senior] was signing the deeds. Okay. And then he give [sic] them to [Hupp] and I signed them and [Hupp] notarized them and [John Senior] had them. And then when it was all done, then he passed them to me. Id. at 46.

{¶48} Hupp, however, has stated that the deeds were signed *before* the meeting. "After my friendly discussion with [John Senior], he pointed to the documents to notarize. The documents were already signed[,] and I asked him if he had signed each of them. [John Senior] nodded his head in the affirmative. I then notarized the documents." Affidavit of Joseph B. Hupp. Hupp also testified as follows:

{¶49} Q: Okay. Walk me through the mechanics. You have testified that the instruments were signed --

{¶50} A: Yes.

{¶51} Q: -- before you looked at them. You didn't see anybody -- did you see John [Senior] or you did not see John [Senior] sign anything; correct?

{¶52} A: That's correct.

{¶53} Q: Did you see [John Junior] sign anything?

{¶54} A: No.

{¶55} A: Okay. So even though [John Junior] has signed as a witness, you don't recall him doing that in front of you?

{¶56} Q: I do not recall, no. Deposition of Joseph B. Hupp at 31-32.

{¶57} Other substantial conflicts exist between the testimony of John Junior and Hupp. Although John Junior claims the meeting lasted at least an hour and a half, Hupp guessed that the meeting probably lasted between fifteen-and-thirty

minutes. When asked if the meeting could have lasted an hour, Hupp responded "[o]h, no." Id. at 29. John Junior described the meeting in the following way: "He [Hupp] got out, I got out. And we talked a minute or two and then he said -- well, I remember him saying, 'I want to talk to your dad.' I said, 'Okay.' I said, 'He's right there.' He said, 'Well, I mean kind of by ourselves.' So I said, 'Okay.' So I kind of stepped away." Deposition of John H. Grimes, Jr. at 43. In contrast, Hupp testified that he did not ask John Junior to leave the area. Hupp further testified that he did not believe he said anything to John Junior except for maybe waving or saying hello. And while John Junior testified that Hupp knew the documents were deeds – even said "[y]our dad wants to sign these deeds" – Hupp testified that he did not review the substance of the documents.

{¶58} Q: You didn't know what they [the documents] were?

{¶59} A: No.

{¶60} Q: Did he know what they were? He being [John Senior].

{¶61} A: [John Senior], I didn't ask him. I don't know. Deposition of Joseph B. Hupp at 33.

{¶62} Therefore, we find substantial conflicts in the relevant factual allegations surrounding the October 13, 2002 meeting. Furthermore, Hupp's version of that meeting, taken together with the other circumstantial evidence in this case, could support a rational inference that John Junior exerted undue influence over John Senior.

D. Conclusion

{¶63} We find the following genuine issues of material fact: (1) whether John Senior was a susceptible party; (2) whether John Junior actually exerted undue influence over John Senior; and (3) in the factual allegations related to the October 13, 2002 notarization of the deeds. Therefore, we find that a reasonable trier of fact could find that the circumstantial evidence could support a rational inference that the conveyances to John Junior were the result of undue influence. That is, construing the evidence most strongly in favor of the non-moving party, this court cannot say that reasonable minds could come to one conclusion on the evidence submitted.

{¶64} Accordingly, for the above stated reasons, we sustain Lewis's first assignment of error.

III.

{¶65} In his second assignment of error, Lewis contends that John Junior was not entitled to judgment as a matter of law. Based on our resolution of Lewis's first assignment of error, we find this assignment of error moot and decline to address it. See App. R. 12(A)(1)(c).

IV.

{¶66} In sum, we conclude that John Senior transferred the properties to John Junior by purchase. And because these transfers were not inter vivos gifts, John Senior's donative intent is irrelevant. However, we also find the following genuine issues of material fact: (1) whether John Senior was a susceptible party; (2) whether John Junior actually exerted undue influence over John Senior; and (3) in the factual allegations related to the notarization of the deeds. Therefore,

construing the evidence most strongly in favor of the non-moving party, this court cannot say that reasonable minds could come to one conclusion on the evidence submitted.

{¶67} As a result, the probate court erred by granting John Junior's motion for summary judgment.

{¶68} Accordingly, we sustain Lewis's first assignment of error, reverse the judgment of the trial court, and remand this cause to the trial court for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

McFarland, J., concurring in part and dissenting in part:

I concur with the majority opinion as it relates to the existence of genuine issues of material fact as to whether John Junior exerted undue influence on John Senior in relation to the deeds in question.

However, I respectfully dissent from the majority's conclusion that John Senior transferred the properties in question by purchase. This is because a close examination of the four corners of the deeds in question reveal an "Exempt" stamp on the deeds and also that no conveyance fee was paid. This stamp was placed on the deeds from the County Auditor's office before it was recorded and is clearly inconsistent with deeds that are transferred by a sale. Because of this conflict on the deed, I find a genuine issue of material fact exists as to the status of the transfer.

As such, I cannot conclude as a matter of law that the deeds in question were deeds by purchase.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE BE REMANDED, and Appellee pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas, Probate Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Part and Dissents in Part with Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.