IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In the Matter of the Estate of:

FENTON LEE MAYNARD,

Deceased.

In the Matter of the:

RAYMOND JAMES IRA.

ST GEORGE ANTIOCHIAN ORTHODOX CHURCH, *Appellant*,

v.

DAVID JENSEN, as Personal Representative of the Estate of Fenton Lee Maynard; UNIVERSITY OF ARIZONA FOUNDATION, *Appellees.*

No. 1 CA-CV 12-0663
FILED 11-21-2013

Appeal from the Superior Court in Maricopa County
No. PB 2009-001721
The Honorable Andrew G. Klein, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Margaret H. Downie delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

D O W N I E, Judge:

¶1 St. George Antiochian Orthodox Church ("St. George") appeals from the entry of summary judgment against it and from the denial of its motion for new trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Fenton and Margaret Maynard married in 2001.[1] They began estate planning soon thereafter and established the Margaret and Fenton Maynard Trust (the "Trust"). Margaret introduced Fenton to Louis Joe, her long-time financial advisor, who was working at Salomon Smith Barney ("Smith Barney"). Joe helped Fenton establish multiple accounts at Smith Barney, one of which was an IRA (the "Smith Barney IRA"). Fenton designated Margaret as the primary beneficiary of the Smith Barney IRA and named the Trust as the contingent beneficiary.

¶3 Joe's relationship with the Maynards developed over the years. He often took the couple to lunch, met them on their birthdays, visited their home, and had frequent telephone conversations with them. Joe became familiar with the Maynards' financial and estate planning goals.

¶4 The Maynards restated the Trust in nearly its entirety on June 1, 2005 (the "First Amendment"). Under the First Amendment, the Trust was freely amendable until the death of either Fenton or Margaret. When one spouse died, the Trust would divide into two shares. The deceased spouse's share would be distributed in accordance with instructions contained in the First Amendment. The surviving spouse's share would be "held as the Survivor's Trust as provided in Article 2" of the First Amendment.

¶5 Article 2 contained distribution instructions to be triggered by the death of the second spouse. Paragraph 2.6 was the operative provision should Fenton survive Margaret. Paragraph 2.6 recited several specific distributions, including a $100,000 grant to St. George. Under the First Amendment, the residue of the Survivor's Trust was to be "allocated to the Charitable Trust held under Article 8."

¶6 Article 8 of the First Amendment, entitled "Charitable Trust," was designed to hold and periodically disburse funds for the benefit of five named charitable organizations referred to as "Qualified Charities." To ensure that the Trust received certain tax benefits, Article 8

[1] We refer to the Maynards by their first names when necessary to distinguish between them.

precluded distributions to organizations not retaining their tax-exempt status. St. George was not a named charitable organization in Article 8.

¶7 Fenton frequently instructed Joe to change the beneficiaries of his accounts. After several such requests, Joe recommended that Fenton design a more flexible estate plan — one that would permit him to change account beneficiaries by simply amending the Trust. Fenton agreed. Accordingly, on August 2, 2005, Fenton signed a Smith Barney IRA beneficiary designation change form. He maintained Margaret as the primary beneficiary, but changed the contingent beneficiary to the "Maynard Charitable Trust as specified in Maynard Rev Trust UAD 11/12/01 as restated 6/1/05." Joe and Fenton believed this designation would permit Fenton to change his contingent beneficiary by amending the Trust, without the necessity of completing new beneficiary designation forms for each account.

¶8 Margaret died of breast cancer on October 23, 2006. Fenton thereafter removed her as primary beneficiary of the Smith Barney IRA, substituting the "Maynard Charitable Trust as specified in para 8 of Maynard Rev Trust uad 11/12/2001 restated 6/1/2005." Fenton and Joe believed this designation would allow Fenton to continue making changes to the Smith Barney IRA beneficiary by modifying the Trust.

¶9 In February 2009, Joe moved to the brokerage firm of Raymond James and Associates and began the process of transferring Smith Barney clients to his new employer. Fenton agreed to move his accounts to Raymond James. When Fenton and Joe met to sign the necessary paperwork, Fenton was in a poor state of health and could not engage in detailed discussion of his estate plans. Joe hurriedly completed the documentation, which Fenton signed.

¶10 The beneficiary designation at issue in this appeal appears on a Raymond James document titled, "IRA Application & Agreement to Participate" (the "Application").[2] The beneficiary listed on the Application is: "The charitable organizations as called out in the Fenton Lee Maynard Survivors Trust UAD 6-1-2005." Joe used the phrase "called out" to mean "identified." The beneficiaries would now be paid directly upon Fenton's death instead of channeling the IRA proceeds through the Trust. Joe and Fenton intended, however, that the ultimate beneficiaries

[2] Hereafter, we refer to the IRA at Raymond James as "the IRA."

would remain the same as the beneficiaries of the Smith Barney IRA and did not discuss changing them.

¶11 Fenton amended the Trust on June 8, 2009 ("Third Amendment"). The Third Amendment deleted references to the Charitable Trust and substituted, as sole residual grantee, the University of Arizona Foundation (the "Foundation") for the "Margaret E. and Fenton L. Maynard Excellence in Breast Cancer Research Endowment Fund."

¶12 Fenton died on July 19, 2009. His nephew, David Maynard Jensen, was appointed Personal Representative (the "PR") of Fenton's estate. St. George received the $100,000 distribution specified in the Trust. St. George thereafter asserted entitlement to the IRA proceeds as well.

¶13 The trial court denied St. George's motion for summary judgment and granted the PR's cross-motion for summary judgment, ruling the Foundation was the sole beneficiary of the IRA. St. George filed a motion for new trial, which the trial court denied. St. George timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) and -2101(A)(1) and (A)(5)(a).

DISCUSSION

¶14 We review a grant of summary judgment *de novo*. *See Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, 353, ¶ 2, 132 P.3d 290, 292 (App. 2006) (citation omitted). A court may grant summary judgment only if there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law.[3] *Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 118, 575 P.2d 315, 317 (1978) (citations omitted). We view the facts and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was entered. *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 315, ¶ 2, 965 P.2d 47, 49 (App. 1998) (citation omitted).

I. Beneficiary Designation

¶15 The parties dispute whether Fenton's intent is relevant to an analysis under the probate code. They disagree about the IRA's status as

[3] St. George acknowledged below that there were no material factual issues in dispute.

an "account," as defined by the probate code. *See* A.R.S. §§ 14-1102 (courts liberally construe probate code provisions "[t]o discover and make effective the intent of a decedent in distribution of his property"), -6201(1) (defining "account"), -6214 (transfer of POD account upon death of owner not "subject to chapters 1 through 4 of this title"). Ultimately, though, we need not resolve this question because under well-established contract principles, Fenton's intent is relevant.

¶16 According to St. George, the IRA is a non-probate asset that must be transferred "in accordance with the terms of the contract, being the IRA Application dated February 17, 2009." St. George contends the IRA "is a contractual obligation between Fenton and Raymond James" (hereafter, the "Contract Parties") and that St. George's "rights as a beneficiary are determined by the express language of the account agreement between the account holder, Fenton, and the financial institution, Raymond James."

¶17 We reject St. George's contention that it is clearly and unambiguously identified as the IRA beneficiary, rendering the Contract Parties' intent irrelevant. Had the beneficiary designation read (as did the $100,000 grant); "ST. GEORGE ANTIOCHIAN ORTHODOX CHURCH, of Phoenix, Arizona," St. George would have a compelling argument. But the language at issue here is susceptible of differing interpretations that do not clearly contradict or vary the terms of the contract language. And St. George conceded at oral argument before this Court that evidence of the parties' intent could properly be considered if the beneficiary designation were ambiguous.

¶18 The authorities cited by St. George do not preclude inquiry into the decedent's intent when necessary to determine the identity of the actual beneficiary. *See, e.g., Jordan v. Burgbacher*, 180 Ariz. 221, 227, 883 P.2d 458, 464 (App. 1994) (where ex-wife was named beneficiary of POD account, decedent's purported intent to change the beneficiary prior to his death was immaterial). Unlike *Jordan*, appellees are not attempting here to contradict an express, unambiguous beneficiary designation through reliance on extrinsic evidence.

¶19 As noted *supra*, the named beneficiary is: "The charitable organizations as called out in the Fenton Lee Maynard Survivors Trust UAD 6-1-2005." The Contract Parties obviously intended something other than the literal meaning when referring to the "Fenton Lee Maynard Survivors Trust UAD 6-1-2005." No such document exists. The First

Amendment includes an article denominated "Survivor's Trust." But that article does not relate exclusively to Fenton. And although one might construe the language at issue as intending to refer to article 2.6, entitled "Distribute Survivor's Trust if Fenton Lee Maynard is the Surviving Grantor," such an interpretation is far from clear and unambigous.[4]

¶20 When parties to a contract "use language that is mutually intended to have a special meaning, and that meaning is proved by credible evidence, a court is obligated to enforce the agreement according to the parties' intent, even if the language ordinarily might mean something different." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993). This tenet of construction exists because the court's fundamental goal is to "ascertain and give effect to the intention of the parties at the time the contract was made." *Id.*

¶21 In interpreting a contract, a court must determine whether the contract language is "reasonably susceptible" to the interpretation asserted, which is a question of law for the court. *Id.* at 154, 158-59, 854 P.2d at 1140, 1144-45. At this juncture, the court may consider the proffered evidence on the issue of the parties' intent. *Id*. at 154, 854 P.2d at 1140 (citations omitted). If the court concludes that the evidence does not "vary or contradict the meaning of the written words," the evidence may be considered in determining the parties' intended meaning. *Id*. at 153-54, 854 P.2d at 1139-40.

¶22 Applying the above-stated principles, we conclude that the superior court properly considered extrinsic evidence, including evidence regarding the Contract Parties' intent. The IRA designation is susceptible of varying interpretations, including the interpretation urged by appellees. And when extrinsic evidence is considered, reasonable minds could reach only one conclusion: that the Foundation was the sole beneficiary of the IRA at the time of Fenton's death.

¶23 The only competent evidence regarding the Contract Parties' intent was provided by Joe, who was involved with Fenton's estate

[4] Joe testified that no charity besides St. George was listed by name in paragraph 2.6 and that the IRA designation read "charitable organizations," not "charitable trust." But Joe's testimony was unwavering that the designated beneficiary was the same as the Smith Barney IRA beneficiary.

planning for over a decade. Joe drafted the language at issue after considering Fenton's desires. Nothing in the record suggests Fenton ever wanted Joe to draft the designation such that St. George would be a beneficiary of the IRA. Indeed, the Contract Parties never discussed naming St. George as an IRA beneficiary at all. And neither party intended that the language Joe penned would make St. George a beneficiary. The record instead makes clear Fenton's intent to provide St. George with a sum certain distribution of $100,000 — nothing more.

¶24 The superior court could also properly consider the fact that the beneficiary designation read in the plural ("charitable organizations"), lending further credence to the notion that the residuary charitable grantees were the intended beneficiaries when the Raymond James IRA was opened. And "charitable organizations" can plausibly be read to refer to those entities specifically called charities in the residuary clause, as opposed to an individual, sum-certain grantee that happens to be a charity, but is neither named as such nor required to maintain tax-exempt status.

¶25 Summary judgment is appropriate "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). A "scintilla" of evidence is insufficient to withstand a motion for summary judgment. *Id.*

¶26 St. George has identified no competent, non-speculative evidence from which reasonable minds could conclude that the Contract Parties intended for it to be a beneficiary of the IRA. Fenton's contributions to St. George during his lifetime have no probative value vis-à-vis the Contract Parties' intentions regarding the IRA beneficiary designation. *See Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 472, 799 P.2d 810, 813 (1990) (summary judgment appropriate when "tendered evidence is too incredible to be accepted by reasonable minds"). Under these circumstances, the superior court properly ruled that the Foundation was the sole beneficiary of the IRA.

II. Controlling Amendment

¶27 St. George contends the Third Amendment cannot control the IRA's distribution because Raymond James was not notified of that amendment before Fenton's death via an approved writing. It relies on

A.R.S. § 14-6213(A) and the IRA Agreement and Disclosure Statement ("the Agreement").

A. Section 14-6213(A)

¶28 St. George argues the Third Amendment constituted a change to the IRA beneficiary such that A.R.S. § 14-6213(A) required Fenton to provide notice of that amendment to Raymond James before his death. Section 14-6213(A) provides:

> Rights at death under § 14-6212 [for transfers of POD accounts upon death of owner] are determined by the type of account at the death of a party. The type of account may be altered by written notice given by a party to the financial institution to change the type of account or to stop or vary payment under the terms of the account. The notice shall be signed by a party and received by the financial institution during the party's lifetime.

¶29 Even assuming that the IRA is an "account" as defined by the probate code, § 14-6213(A) did not require Fenton to give Raymond James notice of the Third Amendment. The statute requires notice "to stop or vary payments under the terms of the account." Here, however, neither the beneficiary designation nor the terms of the IRA changed. The superior court correctly determined that Fenton was not required to provide written notice of the Third Amendment to Raymond James.

B. Notice

¶30 St. George also contends the Agreement required Fenton to notify Raymond James of beneficiary designation changes using forms approved by Raymond James. It relies on Article VIII, Part 4 of the Agreement ("Part 4"), which states:

> A Depositor may designate a Beneficiary or Beneficiaries to receive any assets remaining in the Depositor's [IRA] upon his or her death. The Depositor may also change or revoke a prior Beneficiary designation at any time. A Depositor designates a Beneficiary (or changes

> or revokes a prior designation) by completing and submitting the form provided by [Raymond James] for this purpose or by submitting such other documentation as may be acceptable to [Raymond James].

¶31 But as previously noted, Fenton neither changed nor attempted to change his IRA beneficiary designation. His designated beneficiary remained the same, and Part 4's requirement was thus never triggered.[5]

III. Attorneys' Fees and Costs on Appeal

¶32 Because it is not the successful party, we deny St. George's request for an award of appellate costs. Both the Foundation and the PR timely requested attorneys' fees incurred on appeal pursuant to A.R.S. § 12-341.01.[6] *See* ARCAP 21(c). In the exercise of our discretion, we will award the Foundation some measure of its reasonable fees upon compliance with ARCAP 21(c). We deny the PR's request for fees. Both the Foundation and the PR are entitled to recover their appellate costs upon compliance with ARCAP 21(a).

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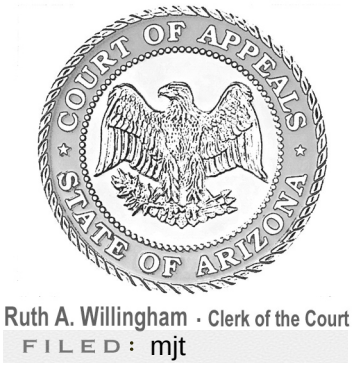
[5] The notification issue is addressed in the "Required Information" section of the Agreement. That section states that the account holder must provide sufficient information to Raymond James for it to ascertain the identity of the beneficiary as of the date of death, which may include an external document containing distribution instructions. *See also* A.R.S. § 14-6101(B) (permitting beneficiary designations in account instruments or separate writings executed after the account designation).

[6] The Foundation also seeks a fee award under A.R.S. § 12-349(A)(1) and (3) – a request we deny. Although we disagree with St. George's substantive legal positions, we do not conclude that its appeal was brought without substantial justification or for purposes of delay or harassment.

CONCLUSION[7]

¶33 For the reasons stated, we affirm the judgment of the superior court.



[7] Because St. George makes no independent argument regarding the denial of its motion for new trial, we do not address it. "Issues not clearly raised and argued in a party's appellate brief are waived." *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996); *see also MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 305 n.7, ¶ 19, 197 P.3d 758, 766 n.7 (App. 2008) (arguments not developed on appeal are deemed waived). We also do not consider St. George's argument, raised for the first time in a motion for new trial, that it and the Foundation should equally share the IRA proceeds. *See Conant v. Whitney*, 190 Ariz. 290, 293, 947 P.2d 864, 867 (App. 1997) (argument raised for first time in motion for new trial is waived for purposes of appeal).