IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In the Matter of:

THE ROBERT BOYDSTON AND JOAN BOYDSTON 1990 LIVING REVOCABLE TRUST, A Trust.

ELIZABETH ANN TUCKER and THOMAS A. BOYDSTON,
Petitioners/Appellants,

v.

JOHN BOYDSTON, as Successor Trustee of The Robert Boydston and Joan Boydston 1990 Living Revocable Trust, as Amended,
Respondent/Appellee.

No. 1 CA-CV 16-0074
FILED 4-11-2017

Appeal from the Superior Court in Maricopa County
No. PB2015-001210
The Honorable Lisa Ann VandenBerg, Judge *Pro Tempore*

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Margaret H. Downie delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge James P. Beene joined.

D O W N I E, Judge:

¶1 Elizabeth Ann Tucker and Thomas A. Boydston (collectively, "Appellants") challenge the probate court's dismissal of their verified petition. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 1990, Robert and Joan Boydston established "The Robert Boydston and Joan Boydston 1990 Living Revocable Trust" ("the Trust"), naming themselves as co-trustees. The Trust was later amended several times. While Robert and Joan were both alive, Appellants and their brother, John, were equal beneficiaries under the Trust.

¶3 Robert died in 2010. According to Appellants, John thereafter isolated Joan — who suffered from anxiety and paranoia — from the rest of the family. Appellants allege that Joan could not manage her own affairs and that John persuaded her to change her estate planning documents.

¶4 Joan executed a Fourth Amendment to the Trust in April 2012, naming herself as sole trustee. The Fourth Amendment also changed the beneficiary allocations: John was now entitled to receive two-thirds of the Trust assets upon Joan's death and would oversee the remaining one-third, which was to be held in trust for Thomas. Elizabeth received nothing under the Fourth Amendment. The Fourth Amendment also named John as a successor trustee.

¶5 Joan resigned as trustee in August 2013, and John accepted the appointment as successor trustee. Joan died in September 2014.

¶6 In April 2015, Appellants filed a "Verified Petition for Finding of Exploitation of a Vulnerable Adult; and Accounting." John moved to dismiss the petition, arguing that the probate court lacked personal jurisdiction over him and that Appellants could not maintain a claim under the Adult Protective Services Act ("APSA"). After the motion was briefed, Appellants sought leave to file an amended petition to add a claim for "tortious interference with expectancy of inheritance."

¶7 The probate court granted the motion to dismiss, concluding it lacked jurisdiction over John as to the accounting claim and dismissing the APSA claim under Arizona Rule of Civil Procedure ("Rule") 12(b)(6). The court later clarified that, in granting the motion to dismiss, it had considered "the information in [Appellants'] proposed amended petition."

¶8 Appellants filed a notice of appeal while John's claim for attorneys' fees was pending. We dismissed that appeal as premature. Appellants later obtained a final judgment pursuant to Rule 54(c) and filed a timely notice of appeal from that judgment. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(9).

DISCUSSION

I. Count 1

¶9 The probate court dismissed count 1 of Appellants' petition — the APSA claim — for failure to state a claim upon which relief can be granted. We review that ruling *de novo*. *See Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). We assume the truth of all well-pleaded facts, giving Appellants the benefit of all reasonable inferences arising therefrom. *Botma v. Huser*, 202 Ariz. 14, 15, ¶ 2 (App. 2002).

¶10 The APSA count alleges a violation of A.R.S. § 46-456(A), which requires individuals in positions of trust and confidence to vulnerable adults to "use the vulnerable adult's assets solely for the benefit of the vulnerable adult and not for the benefit of the person who is in the position of trust and confidence to the vulnerable adult or the person's relatives." Section 46-456(G) identifies the individuals who may file a civil action alleging exploitation of a vulnerable adult, stating, in pertinent part:

> The vulnerable adult or the duly appointed conservator or personal representative of the vulnerable adult's estate has

> priority to, and may file, a civil action under this section. If an action is not filed by the vulnerable adult or the duly appointed conservator or personal representative of the vulnerable adult's estate, any other interested person, as defined in § 14-1201, may petition the court for leave to file an action on behalf of the vulnerable adult or the vulnerable adult's estate.

¶11 Appellants are not Joan's "duly appointed conservator or personal representative," they did not obtain leave of court to bring their APSA claim, and they are not seeking to recover damages on behalf of Joan or her estate. Appellants cite no authority, and we are aware of none, extending APSA's reach to individuals aggrieved by lost inheritances. *See* A.R.S. § 46-456(B) ("A person who violates subsection A . . . shall be subject to actual damages and reasonable costs and attorney fees in a civil action *brought by or on behalf of a vulnerable adult* . . . .") (emphasis added); *In re Estate of Wyttenbach*, 219 Ariz. 120, 126, ¶ 27 (App. 2008) ("A personal representative is permitted to bring a claim under the APSA on behalf of the incapacitated or vulnerable adult. The statute, however, does not provide for claims by others."). Under these circumstances, the probate court properly dismissed count 1 for failure to state a claim upon which relief can be granted.

II. Count 2

¶12 Count 2 of the petition is captioned "Accounting/Report." Citing A.R.S. §§ 14-10813(A) and (C), Appellants allege John "has failed to keep the qualified beneficiaries of the Trust reasonably informed about the administration of the Trust and of the material facts necessary for them to protect their interests." They also allege John "has failed to produce an acceptable inventory, accounting or report."

¶13 As a threshold matter, we agree that only Thomas has standing to maintain this claim. Elizabeth is not a beneficiary under the Fourth Amendment and thus is not owed the duties alleged in count 2.

¶14 We next consider John's contention that count 2 is moot, obviating the need to resolve the personal jurisdiction issue. We may dismiss an appeal that raises a moot issue. *See Dougherty v. Ellsberry*, 45 Ariz. 175, 175 (1935) (dismissing appeal because the issue of whether to recall a director was moot once the director's term of office expired). When circumstances in a case change to the extent that a reviewing court's action

would have no effect on the parties, the issue becomes moot for purposes of appeal. *Vinson v. Marton & Assocs.,* 159 Ariz. 1, 4 (App. 1988).

¶15 Considering the complaint in the light most favorable to Thomas, count 2 sets forth claims unrelated to and in addition to the demand for an accounting. Additionally, although John avows that he has provided the required accounting, the appellate record includes no documentation that would permit us to review that assertion. We therefore deny John's Motion to Dismiss Issue on Appeal.

¶16 We review the probate court's jurisdictional determination *de novo*. *See Hoag v. French*, 238 Ariz. 118, 122, ¶ 17 (App. 2015). To survive a motion to dismiss based on Rule 12(b)(2), Thomas was required to make a *prima facie* showing of jurisdiction. *Beverage v. Pullman & Comley, LLC*, 232 Ariz. 414, 417, ¶ 10 (App. 2013), *aff'd as modified,* 234 Ariz. 1 (2014).

A. Statutory Jurisdiction

¶17 A trustee submits to personal jurisdiction in Arizona "[b]y accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, or . . . by declaring that the trust is subject to the jurisdiction of the courts of this state." A.R.S. § 14-10202(A). Personal jurisdiction over a trustee is "tied to the principal place where the trust is currently being administered." *Hoag*, 238 Ariz. at 121, ¶ 14. Comments to the Uniform Trust Code provision upon which § 14-10202 is based state that "[a] trust's principal place of administration ordinarily will be the place where the trustee is located." Unif. Tr. Code § 108, Comment (2000); *see also May v. Ellis*, 208 Ariz. 229, 232, ¶ 12 (2004) (When "a statute is based on a uniform act, we assume that the legislature intended to adopt the construction placed on the act by its drafters, and commentary to such a uniform act is highly persuasive.").

¶18 Although Thomas contends John lives in Arizona for six months each year and that a Scottsdale brokerage firm holds Trust assets, he did not make a *prima facie* showing that the Trust is *administered* in Arizona. Meanwhile, John submitted an affidavit stating, as relevant here, that: (1) when he accepted the appointment as successor trustee and "at all relevant times," he has resided primarily in Maine, spending "time off from work" in Arizona; (2) he has been employed for 36 years by the State of Maine as a park ranger; (3) he files taxes in Maine; and (4) he holds a Maine

driver's license.[1] In addition, the record reflects that the Scottsdale brokerage firm sends Trust account information to:

> JOHN BOYDSTON TTEE
> U/A DTD JUN 20, 1990
> ROBERT BOYDSTON & JOAN BOYDSTON
> 1990 LIVING REVOCABLE TRUST
> PO BOX 73
> GREENVILLE ME 04441-0073737

The record before the probate court established that the Trust is administered in Maine, not Arizona.

¶19 Thomas also relies on A.R.S § 14-10108(B), which places trustees under "a continuing duty to administer the trust at a place appropriate to its purposes, its administration and the interests of the beneficiaries." Thomas, however, has not demonstrated factually or legally how this statute required John to administer the Trust in Arizona, especially when neither the purported beneficiaries nor the trustee resides in Arizona.

¶20 The probate court did not acquire personal jurisdiction over John pursuant to A.R.S. § 14-10202(A).

B. Constitutional Jurisdiction

¶21 Section 14-10202(A) is not the exclusive means of obtaining personal jurisdiction over a trustee. A.R.S. § 14-10202(C). "Arizona courts may exercise personal jurisdiction to the maximum extent allowed by the United States Constitution." *Planning Group of Scottsdale, L.L.C. v. Lake Mathews Mineral Props., Ltd.*, 226 Ariz. 262, 265, ¶ 12 (2011). "Personal jurisdiction may be either general or specific." *Hoag*, 238 Ariz. at 122, ¶ 19.

1. General Jurisdiction

¶22 If general jurisdiction exists, a non-resident may be sued on virtually any claim — even claims unrelated to the defendant's forum activities. *Austin v. CrystalTech Web Hosting*, 211 Ariz. 569, 574, ¶ 17 (App. 2005). "The level of contact required to show general jurisdiction is quite high." *Williams v. Lakeview Co.*, 199 Ariz. 1, 3, ¶ 6 (2000). "For an individual, the paradigm forum for the exercise of general jurisdiction is the

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[1] The probate court could consider the parties' affidavits and exhibits without converting the motion to dismiss into one for summary judgment. *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 506 (App. 1987).

individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011); *cf. Daimler AG v. Bauman*, 134 S. Ct. 746, 760–61 (2014) (Declining to extend *Goodyear* to hold that general jurisdiction exists "in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.'").

¶23 Even accepting as true Thomas's allegations that John spends six months of the year in Arizona, hired an Arizona attorney to handle estate-related matters, and committed tortious acts in this state, such contacts are insufficient to confer general jurisdiction on Arizona courts. The undisputed evidence establishes that John has been employed by the State of Maine for 36 years, files his taxes in Maine, and holds a Maine driver's license. Nothing in the record suggests Arizona is John's domicile. *See, e.g., Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 367 (1975) ("To be domiciled in this state a person must possess the requisite intent to permanently remain and be physically present."); *DeWitt v. McFarland*, 112 Ariz. 33, 34 (1975) (two requisites for establishing domicile are physical presence and intent to abandon former domicile and remain for an indefinite period of time); *Clark v. Clark*, 71 Ariz. 194, 197 (1950) (a person may have only one domicile at any given time).

¶24 The probate court properly declined to exercise general jurisdiction over John.

2. Specific Jurisdiction

¶25 A court may assert specific jurisdiction over a party if that party's forum-related activities gave rise to the claims being asserted and minimum contacts between the party and the forum state exist, making the exercise of jurisdiction reasonable and just. *Hoag*, 238 Ariz. at 122, ¶ 19. Due process is satisfied if: (1) the defendant performed some act or consummated some transaction with Arizona by which he purposefully availed himself of the privilege of conducting activities in this state; (2) the claim arises out of or results from the defendant's Arizona-related activities; and (3) the exercise of jurisdiction is reasonable. *In re Consol. Zicam Prod. Liab. Cases*, 212 Ariz. 85, 90, ¶ 10 (App. 2006).

¶26 Count 2 alleges that John failed to produce "an acceptable inventory, accounting or report" or a proposed distribution of Trust assets. But Thomas has identified no Arizona-related conduct or contacts giving rise to the count 2 allegations. John's interactions with and conduct toward Joan and the circumstances leading up to her execution of the Fourth

Amendment all predate Joan's death. The duties alleged in count 2 arose only after her death. As such, the probate court did not have specific jurisdiction over John with respect to count 2.

III. Tortious Interference with Expectancy of Inheritance

¶27 Appellants also contend they should have been permitted to amend their petition to assert a claim for tortious interference with expectancy of inheritance. We review the denial of a motion for leave to amend for an abuse of discretion. *Timmons v. Ross Dress for Less, Inc.*, 234 Ariz. 569, 572, ¶ 17 (App. 2014). Denying leave to amend is proper if the proposed amendment would be futile. *See Bishop v. State*, 172 Ariz. 472, 474–75 (App. 1992).

¶28 Arizona has not recognized a cause of action for tortious interference with expectancy of inheritance. Appellants, however, urge us to adopt Restatement (Second) of Torts § 774B, which states:

> One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.

¶29 Other jurisdictions are split on whether to recognize such a cause of action. *Compare Harmon v. Harmon*, 404 A.2d 1020, 1023 (Me. 1979) ("If the law protects a person from interference with an opportunity to receive a benefit by entering into contractual relations in the future, the same protection should be accorded to a person's opportunity to receive a benefit as a prospective legatee.") *with Litherland v. Jurgens*, 869 N.W.2d 92, 96 (Neb. 2015) (declining to recognize the tort and citing cases). States that *do* recognize the tort generally do so only if the petitioner lacks an adequate remedy through probate proceedings. *Litherland*, 869 N.W.2d at 96 (collecting cases); *see also Jackson v. Kelly*, 44 S.W.3d 328, 331–34 (Ark. 2001); *DeWitt v. Duce*, 408 So.2d 216, 218 (Fla. 1981); *In re Estate of Roeseler*, 679 N.E.2d 393, 406 (Ill. Ct. App. 1997); *Plimpton v. Gerrard*, 668 A.2d 882, 886 (Me. 1995); *Brandin v. Brandin*, 918 S.W.2d 835, 840 (Mo. Ct. App. 1996); *Wilson v. Fritschy*, 55 P.3d 997, 1001 (N.M. Ct. App. 2002).

¶30 Appellants have neither alleged nor established the lack of an adequate remedy via probate proceedings. The probate code authorizes the court to "intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law." A.R.S. § 14-10201(A). It also empowers the court to void a trust if its

creation was "induced by fraud, duress, or undue influence," which is what Appellants have alleged. A.R.S. § 14-10406. Appellants could have sued in probate court to void the Fourth Amendment, and, if successful, could have restored their "proper inheritance as illustrated by the estate planning documents prior to John . . . interfering with [Appellants'] right to the inheritance." This is true notwithstanding the Trust's no-contest clause. *See In re Shaheen Tr.*, 236 Ariz. 498, 500, ¶ 6 (App. 2015) (no-contest provision in trust held invalid where probable cause existed to bring the challenge); *see also Munn v. Briggs*, 110 Cal. Rptr. 3d 783, 793–94 (Cal. Ct. App. 2010) (rejecting tortious interference claim because petitioner had adequate probate remedy notwithstanding no-contest clause).

IV. Attorneys' Fees

¶31 We deny Appellants' request for an award of attorneys' fees pursuant to A.R.S. § 14-11004(B). John requests fees pursuant to A.R.S. § 14-11004. Section 14-11004(A) permits a trustee to be reimbursed from the trust for "reasonable fees, expenses and disbursement, including attorney fees and costs, that arise out of and that relate to the good faith defense or prosecution of a judicial or alternative dispute resolution proceeding involving the administration of the trust, regardless of whether the defense or prosecution is successful."

¶32 John asserts, and we agree, that he defended these proceedings in good faith, and this action clearly arises out of his administration of the Trust. *See In re Estate of King*, 228 Ariz. 565, 572-73, ¶ 29 (App. 2012). We therefore award John reasonable fees and taxable costs incurred on appeal. John does not contend Appellants personally should bear his fees and costs. *See* A.R.S. § 14-11004(B) (Court may order that fees "be paid by any other party or the trust that is the subject of the judicial proceeding."). We therefore order that the fees and costs ultimately awarded may be recovered from the Trust. John's entitlement to these sums is contingent on his compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶33 For the foregoing reasons, we affirm the judgment of the probate court.

AMY M. WOOD • Clerk of the Court
FILED: AA