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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 02/18/2010  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In the Matter of the Estate of: ) 1 CA-CV 09-0252  
)  
WAUNEITA B. SHAIN, )  
) DEPARTMENT A  
Deceased. )  
)  
HENRY SHAIN, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
Petitioner/Appellant, ) Rule 28, ARCAP)  
)  
v. )  
)  
LOREN L. SPLITTGERBER, as )  
Personal Representative of the )  
Estate of Wauneita B. Shain, )  
)  
Respondent/Appellee. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2008-070369

The Honorable Harriett Chavez, Judge

**AFFIRMED**

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W I N T H R O P, Judge

¶1 Henry Shain ("Appellant") appeals the trial court's dismissal of his Petition for Allowance of Claim against the estate of his father's wife, and Demand for Jury Trial. For the following reasons, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 On September 9, 2008, Appellant filed a \$298,657 claim against the estate of Wauneita B. Shain. In it, Appellant asserted that Wauneita promised her husband, Harry Shain, that "if he transferred any sums of money to her on his death, and she did not use or need this money for her support after his death, she would transfer all sums received to Harry Shain's son, [Appellant], prior to or on her death." Harry Shain transferred \$344,657 to Wauneita on his death, \$46,000 of which she willed to Appellant's children on her own passing.

¶3 Loren L. Splittgerber ("Appellee"), Wauneita's nephew and the estate's personal representative, rejected Appellant's claim in full, and Appellant filed a petition for "Allowance of Claim and Demand for Jury Trial." In response, Appellee filed a motion to dismiss on the basis that Arizona Revised Statutes ("A.R.S.") section 14-2514(A) (2005) barred Appellant's claim and that "[e]ven if [Appellant's] claim were not barred by statute, he would not be entitled to a jury trial" under recent Arizona case law. See *In re Estate of Newman*, 219 Ariz. 260,

196 P.3d 863 (App. 2008). In his response, Appellant argued that an oral trust existed between Harry and Wauneita Shain and that the estate was unjustly enriched by Wauneita's failure to conform to the oral agreement she made with her late husband.

¶4 The trial court granted Appellee's motion to dismiss and denied Appellant's request for a jury trial. Appellant timely appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(J) (2003).

#### ANALYSIS

¶5 Appellant argues that the trial court improperly dismissed his claim because "[t]he facts of this case give rise to two alternative legal theories, which . . . should be allowed to be developed in discovery." We disagree.

¶6 We independently review motions to dismiss for failure to state a claim, and will sustain a dismissal only if Appellant "could not be entitled to relief under any facts susceptible of proof under the claims stated." *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 402-03, ¶ 8, 142 P.3d 708, 710-11 (App. 2006) (citation omitted); see *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996); *Menendez v. Paddock Pool Constr. Co.*, 172 Ariz. 258, 261, 836 P.2d 968, 971 (App. 1991).

¶7 Section 14-2514(A) governs contracts regarding wills, allowing a person to enter into a contract to make a will or

devise only when (1) provisions of the will state the material provisions of the contract, (2) the will contains express reference to a contract and extrinsic evidence proves the terms of the contract, or (3) when a writing signed by the decedent evidences the contract. The alleged agreement between Harry and Wauneita Shain did not meet any of these requirements, and therefore A.R.S. § 14-2514(A) bars Appellant's claim.

¶18 Appellant argues, however, that the agreement was not a will contract; rather, it was an oral trust permitted by A.R.S. § 14-10407 (Supp. 2009). Appellant asserts that the court should have allowed him the opportunity to prove that Harry created a trust when he transferred assets to Wauneita.<sup>1</sup> In the alternative, Appellant argues that the estate was unjustly enriched by Wauneita's failure to comport with the alleged oral promise she made to Harry, and urges the court to impose a constructive trust. These theories are of no avail.

¶19 Ultimately, the agreement that Harry Shain allegedly made with his wife was an agreement to make a devise - in essence, a will contract. Any argument to the contrary mischaracterizes and usurps the clear intent of A.R.S. § 12-2514(A). We view such agreements with skepticism, because "[a]n

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<sup>1</sup> Even if we found that Appellant could rely on § 14-10407, we question its applicability in this matter. Section 14-10407 became effective on January 1, 2009, after both Harry and Wauneita Shain had died, and therefore after they allegedly formed their agreement.

unscrupulous claimant, who can secure perjured evidence, can set up and prove an oral contract. The death of the promisor makes it impossible to contradict the testimony to the effect that he made such promise." *Gonzalez v. Satrustegui*, 178 Ariz. 92, 100, 870 P.2d 1188, 1196 (App. 1993), *superseded by statute on other grounds as recognized in In re Estate of Jung*, 210 Ariz. 202, 206, ¶ 22, 109 P.3d 97, 101 (App. 2005). We are not suggesting that an unscrupulous claimant is involved in this case, merely that the "requirement of written evidence of the [agreement] operates generally to prevent fraud and mistake." *Id.*

¶10 Further, "[t]he right to make a testamentary disposition of property is purely of statutory creation and is available only on compliance with the requirements of the statute." *Id.* at 101, 870 P.2d at 1197 (citations omitted); see *In re Estate of Moore*, 137 Ariz. 176, 180, 669 P.2d 609, 613 (App. 1983) (holding that "oral agreements not to revoke [a mutual or reciprocal will] are expressly made ineffective by [the previous version of A.R.S. § 14-2514]"). Section 14-2514 expressly limits the methods of imposing a contract concerning succession and simple allegations of an oral agreement are insufficient to surmount this statutory barrier.

¶11 This case involves two deceased parties - Harry Shain, the original "promisor," and Wauneita Shain, his wife - neither of whom is available to testify as to their original

understanding. As a matter of law, Wauneita's alleged oral promise to include Appellant in her will was a promise to make a testamentary disposition. Section 14-2514(A) and public policy preclude such oral promises and therefore the trial court did not err in dismissing Appellant's claim.

**CONCLUSION**

¶12 For the foregoing reasons, we affirm the trial court's dismissal of Appellant's claim.<sup>2</sup>

\_\_\_\_\_/S/\_\_\_\_\_  
LAWRENCE F. WINTHROP, Judge

CONCURRING:

\_\_\_\_\_/S/\_\_\_\_\_  
MAURICE PORTLEY, Presiding Judge

\_\_\_\_\_/S/\_\_\_\_\_  
MARGARET H. DOWNIE, Judge

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<sup>2</sup> As such, we need not decide whether the trial court erred in denying Appellant a jury trial.