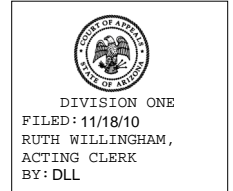


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



IN THE MATTER OF THE ESTATE OF:) No. 1 CA-CV 09-0627
)
DAVID JAMES GRIBBIN, SR.,) DEPARTMENT E
)
Deceased.) **MEMORANDUM DECISION**
)
IN THE MATTER OF THE ESTATE OF:) (Not for Publication
) Rule 28, Arizona Rules
LINA FRANCES GRIBBIN,) of Civil Appellate Procedure)
)
Deceased.)
)

DAVID J. GRIBBIN, JR. and KATHY)
J. GRIBBIN,)
)
Petitioners/Appellants,)
)
v.)
)
A. MICHAEL GRIBBIN,)
Individually and as Personal)
Representative,)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause Nos. PB2006-002650 and PB2007-002440 (Consolidated)

The Honorable Lindsay Best Ellis, Commissioner (Retired)

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Ehmann Deciancio, PLLC
By Christopher Robbins
Attorneys for Petitioners/Appellants

Tempe

Warner Angle Hallam Jackson & Formanek PLC

Phoenix

By Jerome K. Elwell
J. Brent Welker
Phillip B. Visnansky

and

Jaburg & Wilk, PC

Phoenix

By Lauren L. Garner
Attorneys for Respondent/Appellee

H A L L, Judge

¶1 David J. Gribbin, Jr. (David Jr.) and Kathy J. Gribbin (collectively, Petitioners) appeal from the probate court's judgment denying their petitions to remove their brother, Adam Michael Gribbin (Michael), as personal representative of their parents' estates and to appoint a special administrator to investigate claims of financial exploitation. Additionally, Petitioners challenge the denial of their motions to compel production of documents and their motion to amend the petitions. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 In February 2005, David J. Gribbin, Sr. (David Sr.) and his wife, Lina Gribbin, (collectively, the Gribbins) executed estate planning documents including the Gribbin Family Trust (Family Trust) and individual pour-over wills prepared by attorneys at the law firm Jaburg & Wilk, P.C. The Family Trust provided that upon the survivor's death, the trust estate was to be distributed to the Gribbin's four children in the following percentages: forty percent to Michael, twenty percent to David Jr., twenty percent to Kathy, and twenty percent to Karen DeHay.

¹ Preliminarily, Petitioners contend Michael concedes Petitioners' statement of facts in the opening brief is "sufficient and correct" because Michael does not present his own statement of facts. See Arizona Rule of Civil Appellate Procedure (ARCAP) 13(b)(1) (a statement of the facts "need not be included" in the appellee's brief "unless the appellee finds the statements of the appellant to be insufficient or incorrect"). Michael's brief, however, presents over five pages of facts with citations to the record labeled "Statement of the Case." A statement of the case generally indicates the basis of jurisdiction, nature of the case, course of the proceedings, and disposition, whereas a statement of facts contains information relevant to the issues presented for review with citation to the record. ARCAP 13(a)(3), (4). Although labeled "Statement of the Case," Michael's brief contains a statement of facts. Accordingly, Michael did not concede Petitioners' facts are correct. Additionally, Michael argues Petitioners' opening brief contains factual allegations without citation to the record and that other allegations cite to documents that would be inadmissible. We disregard those facts without appropriate citation to the record. *State Farm Mut. Auto Ins. Co. v. Arrington*, 192 Ariz. 255, 257 n.1, 963 P.2d 334, 336 n.1 (App. 1998). We can, however, consider any documents that were properly before the probate court. See *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 4-5, 795 P.2d 827, 830-31 (App. 1990).

Additionally, Michael was to receive a house located in Scottsdale. Michael was nominated as successor trustee of the Family Trust and alternate personal representative in each will, after the surviving spouse. David Jr. was named as second successor trustee and second alternate personal representative.

¶13 David Sr. died on June 18, 2006.² Lina submitted David Sr.'s will for probate and was appointed personal representative of David Sr.'s estate on September 19, 2006.

¶14 On June 12, 2007, Lina executed the Lina Gribbin Revocable Trust (Lina's Trust) and a corresponding pour-over will (2007 Will) prepared by Jaburg & Wilk. Lina's Trust estate was to be distributed forty percent to Michael and twenty percent to each of Michael's three children. Lina expressly disinherited her other children and grandchildren. Michael was named as co-trustee with Lina during Lina's lifetime, and as sole trustee upon Lina's death. Additionally, Michael was nominated as personal representative in the will.

¶15 Lina died on July 5, 2007. Michael submitted Lina's 2007 Will for informal probate and was appointed personal representative of Lina's estate. Additionally, Michael was

² Karen predeceased David, Sr. leaving her children, Marika DeHay and Rayme DeHay, as beneficiaries to receive her share of the Family Trust.

appointed alternate personal representative of David Sr.'s estate.

¶16 Petitioners filed objections to informal probate and petitions to remove Michael as personal representative of both estates. Petitioners asserted Michael breached his fiduciary duties to each decedent before their deaths by transferring assets to himself and by subsequently failing to gather, control, manage and protect estate assets. Additionally, Petitioners contested the validity of the 2007 Will and Lina's Trust, alleging Michael exercised undue influence over Lina and that the documents were not validly executed. The two estate matters were consolidated.

¶17 After two status conferences, Petitioners moved to file an amended petition, expanding upon the grounds to remove Michael as personal representative. Petitioners then filed a motion for partial summary judgment to remove Michael as personal representative and to appoint an independent personal representative. Petitioners argued Michael had conflicts of interest, as did his attorneys at Jaburg & Wilk³, Michael withheld information concerning administration of the two estates, and there was hostility between the parties. The court denied summary judgment. Thereafter, Petitioners filed three

³ Jaburg & Wilk represents Michael in his capacity as personal representative and as trustee. Michael is represented by separate counsel in his individual capacity.

motions to compel seeking medical authorizations from Michael, Jaburg & Wilk's file on the Gribbins, and the file from a doctor who conducted a neuropsychological evaluation of Lina in August 2006.

¶18 On March 31, 2009, Petitioners filed a motion to appoint a special administrator to investigate claims that Michael financially exploited, abused, and neglected the Gribbins in violation of Arizona's Adult Protective Services Act (APSA). Michael responded the two-year statute of limitations expired on those claims. After oral argument, the court declined to appoint a special administrator finding the statute of limitations expired on Petitioners' APSA claims. Further, the court denied Petitioners' motion to amend and motions to compel finding such requests related to claims that would be time-barred.

¶19 The court entered final judgment and Petitioners timely appealed.⁴ We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-2101(B), (J) (2003).

DISCUSSION

I. Michael's Conflicts of Interest

¶10 Petitioners first argue the probate court erred by not removing Michael as personal representative in light of his

⁴ To allow entry of a final judgment, Petitioners withdrew the supposed remaining issue concerning whether Lina's 2007 documents were validly executed.

conflicts of interest. In denying Petitioners' motion for partial summary judgment, the court found:

In this case no conflict of interest has been proven that would justify the removal of the personal representative. To the contrary, no facts have been presented by the Petitioners that if true would necessitate the removal of their brother as Personal Representative.

The Motion for Partial Summary Judgment is denied as material issues of fact have been presented by [Michael] to counter any assertions by [Petitioners] that removal is justified or required.

The court ultimately denied both petitions for removal in the final judgment. By denying the petitions for removal, the court implicitly granted summary judgment to Michael on this issue.

¶11 We review a court's ruling on a motion for summary judgment de novo including whether any issue of material fact exists and whether the court properly applied the law. *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, 249, ¶ 14, 129 P.3d 966, 971 (App. 2006). We view the facts in the light most favorable to the party against whom summary judgment was entered. *Mousa v. Saba*, 222 Ariz. 581, 585, ¶ 15, 218 P.3d 1038, 1042 (App. 2009).

¶12 Petitioners allege Michael's personal interests conflict with the interests of the beneficiaries of the Family Trust. Because Michael has a greater beneficial interest in Lina's Trust than the Family Trust, Petitioners contend Michael

wants to "push" all assets from the Family Trust into Lina's Trust and is essentially self-dealing. Therefore, Petitioners argue Michael cannot be personal representative of both estates.

¶13 Upon petition by a person interested in an estate, a court may order removal of a personal representative. A.R.S. § 14-3611(A) (2005). There are several possible grounds for removing a personal representative, including if "removal would be in the best interest of the estate," or if the personal representative disregards a court order, has mismanaged the estate or failed to perform any duty. A.R.S. § 14-3611(B)(1)-(3). When someone files a petition to remove a personal representative, "the court shall fix a time and place for a hearing." A.R.S. § 14-3611(A). Here, there was no hearing on removal.⁵

¶14 Moreover, whether a conflict of interest exists justifying removal is determined on a case by case basis. See

⁵ At oral argument concerning the motion to appoint a special administrator, motions to compel, and motion for jury trial, Petitioners' attorney stated "We're not moving under the statute [A.R.S. § 14-3614(B)] for a special administrator to basically administer the estate. That's what the personal representative is doing, and the Court has already ordered the personal representative, Michael, can continue doing that and presumably fulfilling his fiduciary duties even as we speak, and everything is fine and good there." At the end of oral argument, however, Petitioners' attorney stated there were grounds for an evidentiary hearing for removing Michael as personal representative of Lina's estate. Michael does not argue Petitioners waived their claim to remove Michael as personal representative based on conflicts of interest.

Matter of Nelson's Estate, 134 Ariz. 439, 442, 657 P.2d 430 (App. 1982). It is not always necessary to establish actual harm resulting from a conflict of interest as opposed to potential harm. See, e.g., *Shriners Hospitals for Crippled Children v. Gardiner*, 152 Ariz. 527, 531, 733 P.2d 1110, 1114 (1987) (noting "[t]he conflict between personal responsibilities and trust obligations is obvious and great" and a trustee "must refrain from placing himself in position where his personal interest does or may conflict with interest of beneficiaries") (emphasis added) (citation omitted); *In re CVR 1997 Irrevocable Trust*, 202 Ariz. 174, 177-78, ¶¶ 20-22, 42 P.3d 605, 608-09 (App. 2002) (trustee resolved potential conflict of interest by applying for and obtaining instructions from the probate court).

¶15 Nonetheless, Petitioners allege facts that, if true, would support a finding of actual harm to the beneficiaries of David Sr.'s estate. Specifically, David Jr. submitted an affidavit attesting that certain property Michael allocated between the two estates was David Sr.'s sole and separate property and should have been allocated entirely to David Sr.'s

estate.⁶ Michael asserted he was not aware of information establishing the property as separate and placed half in Lina's Trust. If the property was David Sr.'s separate property, Michael deprived the Family Trust beneficiaries of property and benefitted himself and his family. See, e.g., A.R.S. § 14-3713 (2005) ("[A]ny transaction which is affected by a substantial conflict of interest on the part of the personal representative, [] is voidable by a person interested in the estate[.]"). Accordingly, there exists a disputed issue of material fact necessitating an evidentiary hearing on Michael's purported conflicts of interest.

⁶ Michael argues David Jr.'s affidavit is "filled with irrelevant and unsubstantiated accusations" and Petitioners merely offered "biased opinions and hearsay speculations." David Jr., however, explained in his affidavit that he assisted his parents in their real estate business for over thirty years and the property at issue was always held by David Sr. as his separate property. Because David Jr. apparently had personal knowledge, such statement would not be excluded from evidence on the grounds Michael raises. *Villas at Hidden Lakes Condo. Ass'n v. Geupel Constr. Co.*, 174 Ariz. 72, 81, 847 P.2d 117, 126 (App. 1992) (affiant must have personal knowledge and have competency to testify about the subject matter). Thus, we reject Michael's argument that there is no admissible evidence of a specific act or harm giving rise to a conflict of interest.

¶16 Therefore, we remand this matter for an evidentiary hearing to determine whether Michael has any conflict of interest compelling his removal as personal representative.⁷

II. Attorneys' Conflicts of Interest

¶17 Petitioners also argue Michael's attorneys have a conflict of interest and must be disqualified as Michael's counsel. Although Petitioners raised this argument in their motion for partial summary judgment, they never petitioned the court to have Jaburg & Wilk removed as Michael's counsel. Petitioners only requested that Michael be removed as personal representative, and alternatively a special administrator be appointed to access "all information withheld by Michael and his attorneys." As Michael correctly notes, any conflict of interest Jaburg & Wilk has does not constitute grounds for removing Michael as personal representative.

¶18 An attorney owes a client "a duty of undeviating and single allegiance." *In re Estate of Shano*, 177 Ariz. 550, 556,

⁷ To the extent Petitioners argue hostility between Michael and the rest of the family is a sufficient ground for Michael's removal as personal representative, we disagree. "[T]he decedent's preference for a personal representative is given great deference." *In re Estate of Newman*, 219 Ariz. 260, 270, ¶ 39, 196 P.3d 863, 873 (App. 2008); see also Restatement (Third) of Trusts § 37, cmt. e(1) (2003) ("Friction between the trustee and some of the beneficiaries is not a sufficient ground for removing the trustee unless it interferes with the proper administration of the trust."). Accordingly, hostility between Michael and the rest of the family by itself is not a sufficient ground for removal.

869 P.2d 1203, 1209 (App. 1993). A beneficiary, however, is not a client of the personal representative's attorney. *In re Estate of Fogleman*, 197 Ariz. 252, 257, ¶ 11, 3 P.3d 1172, 1177 (App. 2000). Thus, the personal representative's attorney owes a beneficiary "the lesser duty of fairness and impartiality." *Id.* Petitioners do not specify what conflict is created by Jaburg & Wilk having represented the Gribbins for their estate planning, Lina individually for her estate planning, and Michael as personal representative and trustee of the Gribbins' estates.⁸ Further, Petitioners do not explain how Jaburg & Wilk violated any duty of fairness and impartiality to them.

¶19 Petitioners do contend, however, that Jaburg & Wilk will be "key witnesses" in this matter in violation of Ethical Rule (E.R.) 3.7. Subject to certain exceptions, a lawyer "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Ariz. R. Sup. Ct. 42, E.R. 3.7. If Petitioners are still challenging the execution of Lina's 2007 documents, the lawyers at Jaburg & Wilk might be necessary witnesses. Based on the record before us, however, it is not

⁸ Petitioners argue Jaburg & Wilk never sent Petitioners drafts of their parents' 2005 estate planning documents in violation of the firm's retention letter. Petitioners, however, do not challenge the validity of the 2005 documents, have not filed an action against Jaburg & Wilk, and do not explain how this creates a conflict of interest. Accordingly, this argument has no merit.

clear whether Petitioners preserved this issue and/or intend to urge it on remand.⁹ If the issue is preserved and any attorneys at Jaburg & Wilk will be necessary witnesses, those witnesses should be removed as Michael's counsel.

III. Statute of Limitations

¶20 Next, Petitioners argue the court erred by denying their motion to appoint a special administrator to investigate Michael for alleged APSA violations. The court denied the motion, concluding the statute of limitations on the APSA claims expired prior to filing the motion and "transactions that occurred in the past outside of that timeline cannot be the subject for removal of the personal representative." Petitioners contend the statute of limitations did not commence because they had no standing to pursue claims for financial exploitation, abuse, and neglect.

¶21 Petitioners asserted Michael should be removed as personal representative in part because Michael could not investigate himself for APSA violations. Thus, Petitioners requested that a special administrator be appointed to investigate Michael for APSA violations as grounds for removing

⁹ Petitioners initially said they "waived" this issue to allow entry of final judgment, but preserved the issue if the case was remanded. Petitioners later said they "voluntarily withdraw" this ground for removing the personal representative under Arizona Rule of Civil Procedure 41(a).

him as personal representative. See A.R.S. § 14-3614(B) (2005) (appointment of a special administrator may be appropriate if necessary to preserve or secure proper administration of an estate when a personal representative should not act).

¶122 Whether grounds exist to appoint a special administrator for purposes of investigating a personal representative is distinct from initiating a civil action. The relevant two-year statute of limitations applies only to bar filing an untimely civil action. A.R.S. § 46-455(K) (Supp. 2009). A personal representative, however, may be removed "for cause at any time." A.R.S. § 14-3611(A) (2005). Moreover, allegations of financial exploitation, abuse, and neglect are relevant to determine whether removal of a personal representative would be in the best interests of an estate. A.R.S. § 14-3611(B)(1). Therefore, the court should not have declined to appoint a special investigator based on its belief that the statute of limitations had expired. Accordingly, we remand this matter to the probate court with instructions to consider the APSA allegations in determining whether Michael's removal is in the best interests of the estates and whether the appointment of a special administrator is justified.

IV. Motion to Compel

¶123 Next, Petitioners argue the court erred by refusing to grant their motions to compel. We review the probate court's

decision on a motion to compel for an abuse of discretion. See *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, 519, ¶ 45, 144 P.3d 519, 533 (App. 2006).

¶24 “[P]arties may obtain discovery regarding any matter not privileged which is relevant to the subject matter of the pending action.” *Ornelas v. Fry*, 151 Ariz. 324, 329, 727 P.2d 819, 824 (App. 1986); Ariz. R. Civ. P. 26(b)(1)(A). Here, the probate court denied all three motions to compel based on its determination that the motions related to APSA claims were time-barred.

¶25 Petitioners filed a motion to compel Michael to sign medical authorizations for the Gribbins. Regarding David Sr., Petitioners alleged “he was mentally incompetent for as long as twenty years before signing the Gribbin Family Trust in February 2005.” David Sr.’s competence is irrelevant concerning the Family Trust because Petitioners are not challenging the validity of the 2005 documents. David Sr.’s health condition is relevant, however, concerning the APSA allegations insofar as Petitioners seek grounds to remove Michael as personal representative. As for Lina, Michael should be compelled to sign the medical authorizations as Petitioners were challenging the validity of the 2007 documents and the APSA allegations are relevant to removing Michael.

¶126 Petitioners also filed a motion to compel Jaburg & Wilk to produce its entire file pertaining to the Gribbins. The court properly denied this motion. Pursuant to the attorney-client privilege, an attorney cannot be required to disclose any communication between the attorney and the client unless the client so consents. A.R.S. § 12-2234(A) (2003); *Samaritan Foundation v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1993). This privilege generally survives the death of the client. *State v. Macumber*, 112 Ariz. 569, 571, 544 P.2d 1084, 1086 (1976). Thus, Jaburg & Wilk cannot be compelled to disclose privileged information. Additionally, contrary to Petitioners' argument, the privilege was not waived based on Jaburg & Wilk's retention letter as there is no indication the Gribbins ever signed and agreed to the discussion in that letter and because agreeing to send drafts of documents to Petitioners does not waive the privilege. Finally, Jaburg & Wilk's file on the Gribbins is irrelevant regarding whether Michael should be removed as personal representative and Petitioners never specified what documents they sought.

¶127 Petitioners also filed a motion to compel the doctor who evaluated Lina in August 2006 to produce her file on Lina. The doctor's evaluation of Lina is irrelevant regarding the validity of the 2007 documents. Specifically, Lina was evaluated to "confirm Lina's testamentary capacity with regard

to her Will and Trust that were executed in February, 2005 and to confirm that the documents were not the product of undue influence or duress." Thus, the doctor's evaluation has little or no bearing on the validity of the 2007 documents. Nonetheless, to the extent Michael and/or the court uses or relies on the evaluation on remand, Petitioners should be permitted to receive non-privileged information. See *Sun Health Corp. v. Myers*, 205 Ariz. 315, 318-19, ¶ 11, 70 P.3d 444, 447-48 (App. 2003).

V. Motion to Amend

¶128 Last, Petitioners contend the court erred by delaying ruling on their motion to amend the petitions for twelve months and then denying the motion. Leave to amend should be granted liberally. *Owen v. Superior Court*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982). "Amendments will be permitted unless the court finds undue delay in the request, bad faith, undue prejudice, or futility in the amendment." *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996). We review the court's denial of a motion to amend for an abuse of discretion. *Romo v. Reyes*, 26 Ariz.App. 374, 375-76, 548 P.2d 1186, 1187-88 (1976).

¶129 Generally, a motion to amend should be granted if the amendment merely seeks to add a new legal theory supported by factual issues already in the case. See *Walls v. Ariz. Dep't of*

Pub. Safety, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (App. 1991). In their proposed amended petition, Petitioners expanded upon the grounds to remove Michael as personal representative, but did not add a new legal theory, nor change the relief requested. Thus, the amended petition was unnecessary and the court did not abuse its discretion by delaying ruling and subsequently denying Petitioners' motion to amend their petitions. See, e.g., *Matter of Torstenson's Estate*, 125 Ariz. 373, 377, 609 P.2d 1073, 1077 (App. 1980) (leave to amend is appropriately denied "when the proffered amendment could not affect the outcome of the litigation.").

CONCLUSION

¶130 For the foregoing reasons, we remand this matter to the probate court with instructions to hold an evidentiary hearing regarding whether Michael should be removed as personal representative based on his purported conflicts of interest. Further, the court should take into account the alleged APSA violations in determining whether Michael's removal is appropriate and whether a special administrator should be appointed. To the extent Petitioners seek discovery concerning issues properly before the court, any non-privileged relevant documents should be disclosed. Finally, we affirm the denial of the motion to amend the petitions.

/s/
PHILIP HALL, Presiding Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Judge

/s/
PETER B. SWANN, Judge