DIVISION ONE
FILED: 04/26/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| In the Matter of the Estate of: | 1 CA-CV 10-0812 |
| JOSEPH L. LOCKETT, SR., | DEPARTMENT E |
| Deceased. | **MEMORANDUM DECISION** |
| LINDA LOCKETT, | (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) |
| Appellant, | |
| v. | |
| MARY E. LOCKETT; PATRICIA LOCKETT BOWDLER; and JOSEPH L. LOCKETT, JR., | |
| Appellees. | |

Appeal from the Superior Court in Yavapai County

Cause No. V1300PB820080005

The Honorable Michael Bluff, Judge

**AFFIRMED**

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**H A L L**, Judge

**¶1** Linda Lockett (Linda) appeals from the trial court's judgment in favor of Mary Lockett, Patricia Lockett Bowdler, and Joseph L. Lockett, Jr. (Mary, Patricia, and Joe, Jr., respectively, the Appellees, collectively). For the reasons discussed below, we affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

**¶2** The following facts relevant to the issues on appeal are not disputed. Mary and Joseph L. Lockett, Sr. (Joe) married on June 19, 1965. Mary and Joe had two children, Joe, Jr. and Patricia, before divorcing on May 21, 1991. On August 26, 1990, amidst the parties' divorce negotiations, Joe sent a letter to Mary's attorney, stating:

> This letter shall serve as notice to you that I, Joseph L. Lockett intend to will upon my death: 50% of my entire estate to my children, Joseph L. Lockett Jr. and Patricia F. Lockett and 25% of my entire estate to Mary E. Lockett. The distribution of the estate is to be per stirpes.

**¶3** On October 25, 1990, Mary and Joe entered into a Marital Settlement Agreement (MSA), drafted by Mary's attorney, which contained the following provision:

> [T]he parties hereby irrevocably agree that each shall execute a Will leaving fifty percent (50%) of their

> respective estates in equal shares to the children and twenty-five percent (25%) to each other. In the event that one of the parties has predeceased the other, the share of the one so dying shall be added equally to the children's shares.

**¶4** On February 26, 2001, Mary and Joe entered into a Waiver and Modification of Certain Terms of Marital Settlement Agreement (the Modification), drafted by Joe's attorney, that stated, in relevant part:

> For good and valuable consideration, we hereby waive and modify the provision of [our] Marital Settlement Agreement regarding the twenty-five percent (25%) of each other's estates to be distributed to each other pursuant to said Marital Settlement Agreement, and direct that said twenty-five percent (25%) that was to go to each other shall be distributed equally to our children, JOSEPH L. LOCKETT JR. and PATRICIA F. LOCKETT.

**¶5** On September 29, 2001, Joe married Linda. In June 2006, Joe was diagnosed with small-cell carcinoma. On May 21, 2007, Joe executed his Last Will and Testament (the Will). The Will provides that all of Joe's personal property is to be distributed to Linda and the balance of Joe's estate is to be distributed to the Joseph L. Lockett, Sr. Trust (the Trust). The Trust, as amended on February 27, 2007, provides in relevant part:

> **3.02. Division of Trust**. Upon the death of the Trustor, the Trustee shall divide the remaining trust estate as follows:
>
> **A. Pre-Residuary Distribution to Linda Burke Lockett.** The Trustee shall distribute all of the Trust's interest in Lakin Milling, Lakin Cattle, and Lockett

> Ranches, Inc., including the real property commonly known as "Lockett Ranch," to LINDA BURKE LOCKETT, outright and free from trust. If the value of such interest is less than 25% of the Trustor's gross estate, then the Trustee shall also distribute to LINDA BURKE LOCKETT assets (or cash), of her choice, having a value of the difference between 25% of the Trustor's gross estate and the value of the interest received above. For purposes of this pre-residuary gift, the Trustee shall use the values set forth on the Trustor's federal estate tax return to determine "gross estate," the value of the shares of Lockett Ranches, Inc. and the Lockett Ranch, including the use of any special use elections and appraisal discounts. If no federal estate tax return is required to be filed, then the values shall be determined by independent, third party appraisals.
>
> **B. Residuary Distribution to Children**. After making the distributions in Section 3.02A above, the Trustee shall divide the remainder of the Trust assets into equal separate shares so as to provide one (1) share for each then living Child of the Trustor and one (1) share for each then living descendant of each deceased Child of the Trustor ("Grandchild/Grandchildren").

**¶6** Joe died on December 22, 2007. During the eighteen-month time period following his diagnosis and preceding his death, Joe made several non-probate transfers of assets to Linda (these assets included the marital residence, Lockett Ranches, and multiple bank accounts). The cumulative value of these assets exceeded $2,500,000.

**¶7** On November 19, 2009, Mary, Joe, Jr., and Patricia filed a claim against Joe's estate for "an amount of not less than 75% of the gross estate of the Decedent, less administration costs" as provided for in the October 25, 1990 MSA and the February 26, 2001 Modification. In their petition,

the Appellees asserted that Joe's Will and Trust did not comply with the terms of the MSA and Modification. The Appellees also claimed that Joe's non-probate transfers to Linda were made to circumvent the MSA and Modification and were thus in bad faith and invalid.

**¶8** The matter proceeded to a two-day bench trial. At trial, Linda conceded that the Trust, which provided her a pre-residuary distribution of assets with a combined value substantially in excess of twenty-five percent of Joe's estate, did not comport with the MSA and Modification. She maintained, however, that Joe's transfer of assets to her before his death did not violate the agreements because they occurred outside of probate.

**¶9** The trial court found that the MSA and Modification required Joe to convey 75% of his entire estate to Joe, Jr. and Patricia and concluded that the cumulative value of Joe's transfers to Linda rendered them unreasonable as a matter of law. Accordingly, the trial court ordered that the assets Joe transferred to Linda during the eighteen months preceding his death be returned to the estate and that the Trust be distributed seventy-five percent to Joe, Jr. and Patricia and twenty-five percent to Linda.

**¶10** Linda timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

## DISCUSSION

**¶11** On appeal, Linda contends the trial court erred by determining that the assets Joe transferred to her before his death were subject to the MSA and Modification. She argues that the term "estate," as used within those documents, referred only to Joe's assets at the time of his death and therefore the MSA and Modification did not restrict his ability to transfer and dispose of his assets during his lifetime. Additionally, Linda asserts that, because Joe, Jr. and Patricia received substantial assets from Joe's estate notwithstanding the non-probate transfers, the trial court erred by finding Joe's transfers were made in bad faith. We address each issue in turn.

### I. Definition of Estate

**¶12** Linda contends that the term "estate," as used in the MSA and Modification, is "confined to the probate estate." Mary, Joe, Jr., and Patricia argue, on the other hand, that the term "estate" is ambiguous and that extrinsic evidence of Mary and Joe's intent at the time they entered into those agreements demonstrates that the term was intended to include Joe's entire estate.

**¶13** We review the interpretation of a contract de novo. *Rand v. Porsch Fin. Servs.*, 216 Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007). General contract principles govern the construction and enforcement of a settlement agreement. *Emmons*

*v. Superior Court*, 192 Ariz. 509, 512, ¶ 14, 968 P.2d 582, 585 (App. 1998). When the terms of an agreement are clear and unambiguous, we give effect to the agreement as written. *Goodman v. Newzona Inv. Co*., 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966).

**¶14** If the terms of the agreement are ambiguous, "parol evidence may be used to explain [the ambiguity], but in the absence of fraud or mistake, it may not be used to change, alter or vary the express terms in a written agreement." *Brand v. Elledge*, 101 Ariz. 352, 358, 419 P.2d 531, 537 (1966). When parties submit competing interpretations of a contract's meaning, the court should consider "the offered evidence and, if [the court] finds that the contract language is reasonably susceptible to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties." *Taylor v. State Farm Mut. Automobile Ins. Co*., 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993) (internal quotation omitted). "Whether contract language is reasonably susceptible to more than one interpretation so that extrinsic evidence is admissible is a question of law." *Id.* at 158-59, 854 P.2d at 1144-45.

**¶15** When the meaning of a contractual provision remains unclear after consideration of the parties' intentions, "a secondary rule of construction requires the provision to be

construed against the drafter." *MT Builders, L.L.C. v. Fisher Roofing, Inc*., 219 Ariz. 297, 302, ¶ 10, 197 P.3d 758, 763 (App. 2008). We do not resort to this secondary rule "unless other interpretive guides fail to elucidate a clause's meaning." *First Am. Title Ins. Co. v. Action Acquisitions, L.L.C*., 218 Ariz. 394, 397, ¶ 8, 187 P.3d 1107, 1110 (2008); *see also Taylor*, 175 Ariz. at 158 n.9, 854 P.2d at 1144 n.9 (explaining that the rule that ambiguities should be construed against the drafter "is subordinate to the rule that the intent of the parties should govern"). Finally, we uphold a superior court's ruling if it is correct for any reason. *See Earthworks Contracting, Ltd. v. Mendel-Allison Constr*., 167 Ariz. 102, 109, 804 P.2d 831, 838 (App. 1990).

**¶16** As set forth in A.R.S. § 14-2514(A)(3) (2005), a contract to make a will may be evidenced by "a writing signed by the decedent evidencing the contract." On appeal, the parties do not dispute that the MSA and Modification are valid documents that required Joe to execute a will.

**¶17** Linda asserts, however, that pursuant to A.R.S. § 14-2514 and the limiting provisions contained within the documents, any interpretation as to the scope of the duties and obligations of the parties is limited to the four corners of the agreements. Applying the language of the documents, Linda argues that the

meaning of the term "estate" is necessarily limited to "probate estate." We disagree.

**¶18** As Linda notes, paragraph four of the MSA states that Mary and Joe each "retain[ed] [their] separate property free from any claim" of the other. Paragraph fifteen of the MSA required Mary and Joe to execute a will conveying 50% of their estate to their children and 25% to each other. Interpreting these two provisions together, paragraph four secured each party's post-settlement property as sole and separate and free from a subsequent challenge that the MSA's allocation of the parties' assets was inequitable or otherwise improper, and paragraph fifteen established an enforceable contract requiring each party to execute a will leaving 50% of their estate to their children and 25% to each other. Paragraphs four and fifteen need not be interpreted as competing provisions, and to the extent Linda argues paragraph four necessarily limits the scope of paragraph fifteen, such claim is without merit.

**¶19** Paragraph nineteen of the MSA affirms that the document represents the parties' entire agreement and states that "there are no collateral agreements or understandings not otherwise provided for which are inconsistent with the terms of the [MSA.]" Contrary to Linda's argument, this provision does not bar the use of parol evidence to interpret an ambiguous term of the agreement. Rather, the provision prevents a party from

presenting extrinsic evidence of an understanding or agreement that is contrary to the unambiguous terms of the MSA.

**¶20** Likewise, the cases Linda primarily relies upon for the proposition that parol evidence may not be considered to interpret "estate," *Gonzalez v. Satrustregui*, 178 Ariz. 92, 870 P.2d 1188 (1993), and *Estate of Moore v. Schwartz*, 137 Ariz. 176, 669 P.2d 609 (App. 1983), do not prohibit the consideration of parol evidence to interpret an ambiguous term in a valid contract to execute a will. The issue presented in those cases was whether a decedent's execution of a reciprocal will constitutes a "writing signed by the decedent evidencing [a] contract" to create a will. *Gonzalez*, 178 Ariz. 99-100, 870 P.2d at 1195-96; *Moore*, 137 Ariz. 178-79, 669 P.2d at 611-12. We held that a contract to make a will must be unambiguous and therefore a party's intention to contractually obligate himself to execute a will must be clear from the contract and may not be proven through parol evidence. *Gonzalez*, 178 Ariz. at 99-100, 870 P.2d at 1195-96; *Moore*, 137 Ariz. at 179, 669 P.2d at 612. In addition, we held that omitted terms may not be supplied by parol evidence. *Id.* Accordingly, in both cases, we concluded that the execution of a reciprocal will did not constitute a contract to make a will. *Id*. Neither case stands for the proposition that a court is barred from considering parol evidence to interpret an ambiguous term in a valid contract to

make a will. Moreover, as explained in the comment to Uniform Probate Code § 2-514 (1997) and Section 3.8 of the Arizona Probate Code Practice Manual (4th ed. 2000), extrinsic evidence may be presented to establish the terms of a contract when there is an express reference to a contract in a will under A.R.S. § 14-2514(A)(2), and we find no basis for prohibiting such evidence when the intent to contractually obligate oneself to execute a will is evident under A.R.S. § 14-2514(A)(3). Furthermore, even under the statute of frauds, A.R.S. § 44-101 (2003), when the terms of a contract are ambiguous, the contract does not necessarily fail and parol evidence may be admitted to resolve the ambiguity. *See Maslin v. Rucker*, 7 Ariz.App. 257, 259, 438 P.2d 326, 328 (1968).

**¶21** Linda next asserts that because the MSA requires each spouse to execute a complying Will to effectuate the prescribed conveyances, the scope of the MSA is necessarily limited to a "probate" estate, that is, assets that are governed by a Will. We reject this argument. The MSA requires the parties to "execute a Will leaving fifty percent (50%) of *their respective estates* in equal shares to the children and twenty-five percent (25%) to each other." (Emphasis added). Thus, as set forth in the document, the scope of the assets to be conveyed is defined by the parties' respective estates. The term "Will," as used in

this provision, identifies only the vehicle of the conveyance and is not used to limit the scope of the relevant assets.

**¶22** Finally, Linda contends that the term "estate" is limited to "probate estate" by statute. Pursuant to A.R.S. § 14-1201(16) (2005), "estate" includes "only the separate property and the share of the community property belonging to the decedent." The definition of "estate" set forth in A.R.S. § 14-1201(16) governs the meaning of "estate" as it is used throughout Title 14. Contrary to Linda's claim, however, the statutory definition of estate does not apply to contracts between private parties unless that is the parties' intent, and Linda failed to present any evidence that Mary and Joe intended the statutory definition to control here.[1]

**¶23** Because the term "estate," as used in the MSA and Modification, is neither defined within the documents nor

[1] Linda also argues that, pursuant to A.R.S. § 14-6214 (2005), the disposition of non-probate assets is statutorily excluded from an "estate." The Appellees counter that Linda waived this argument by failing to raise it in the trial court. In response, Linda asserts that she presented the issue in her Trial Memorandum. We have reviewed the record and did not find this argument raised until Linda submitted her proposed Findings and Conclusions post-trial. Because this argument was not timely raised in the trial court, we decline to consider it. *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc*., 215 Ariz. 103, 109-10, ¶ 17, 158 P.3d 232, 238-39 (App. 2007) ("[A] party must timely present his legal theories to the trial court so as to give the trial court an opportunity to rule properly.") (quotation omitted). In any event, although non-probate transfers are deemed "not testamentary" pursuant to A.R.S. § 14-6214, we conclude the statute would not limit the scope of the "estate" unless that was the parties' intent.

governed by statute, we conclude that the term is ambiguous and reasonably susceptible to both interpretations advocated by the parties. Had the term "estate" been modified by the term "probate," Joe's non-probate transfers would have unquestionably been permissible. As written, however, the parties' intent is unclear. *See Taylor*, 175 Ariz. at 155 n.3, 854 P.2d at 1141 n.3 (explaining an agreement is ambiguous if it is "capable of being understood in two or more possible ways") (internal quotation omitted). The trial court therefore appropriately considered parol evidence to discern its intending meaning.

**¶24** At trial, Mary testified that she and Joe intended the term "estate" to mean their entire respective estates. More importantly, the Appellees submitted the August 26, 1990 letter Joe wrote to Mary's attorney stating his "inten[t] to will upon [his] death: 50% of [his] entire estate to [Joe, Jr. and Patricia] and 25% of [his] entire estate to [Mary]," as well as the signed Term Sheet Mary and Joe executed during their divorce negotiations in which they agreed that 50% of each of their "existing estates" was to "go to [their] children and 25% to each other." These documents and Mary's testimony are consistent with the Appellees' interpretation of "estate." We therefore conclude that the term "estate" as used in the MSA and Modification referred to the entirety of Joe's assets and the trial court correctly found that Joe's Will and Trust, to the

extent they bequeath more than 25% of Joe's assets to Linda, are invalid.

## II. Transfers in Bad Faith

**¶25** *Citing Becchelli v. Becchelli*, 17 Ariz.App. 280, 497 P.2d 396 (App. 1972), Linda nonetheless argues that, during his lifetime, Joe was free to transfer and dispose of his assets without restriction. Thus, she contends that the trial court erred by finding that Joe's non-probate transfers to her were made in bad faith as an attempt to defeat the terms of the MSA and Modification.

**¶26** We defer to a trial court's findings of fact unless they are clearly erroneous, but review conclusions of law de novo. *Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, 47, ¶ 9, 156 P.3d 1149, 1152 (App. 2007). We view the evidence and all reasonable inferences in the light most favorable to sustaining the trial court's ruling. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992).

**¶27** In *Becchelli*, husband and wife took title to two parcels of land during their marriage as "tenants in common." 17 Ariz.App. at 282, 497 P.2d at 398. The parcels were primarily purchased, however, with husband's separate funds. *Id*. As part of the parties' subsequent divorce proceedings, the trial court held that the parcels were husband's separate property. *Id*. On review, we noted that "no law in Arizona

restrict[s] a spouse in dealing with his separate property in any lawful way that he or she desires during coverture." *Id*. We held, accordingly, that "husband can make a gift of his separate property to his wife," and the "intention of the parties is controlling." *Id*. at 282-83, 497 P.2d at 398-99. Thus, we concluded that the trial court erred by awarding title to the properties to husband as his sole and separate property. *Id*. at 285, 497 P.2d at 401.

**¶28** *Becchelli* does not support Linda's position. Rather, the case stands for the proposition that Arizona law does not restrict a spouse's ability to deal with his separate property and his intent, instead, controls. Here, Joe entered into a contract to make a will and the intent of the contracting parties, as discussed above, was that Joe and Mary would each bequeath 50% of their entire, respective estates to their children and 25% of their entire, respective estates to each other. The Appellees are not arguing that Arizona law limited Joe's ability to transfer his assets during his lifetime; rather, they assert, correctly, that Joe voluntarily restricted his ability to dispose of his assets by entering the contract to make a will.[2]

[2] Linda also cites *Estate of Beauchamp v. Eichenberger*, 115 Ariz. 219, 220, 564 P.2d 908, 909 (App. 1977), for the proposition that Joe was free to dispose of his assets, during his lifetime, as he saw fit. We conclude *Beauchamp* is inapposite. In that

**¶29** Arizona law implies a covenant of good faith and fair dealing in every contract. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 490, ¶ 59, 38 P.3d 12, 28 (2002). "The implied covenant of good faith and fair dealing prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement." *Id*.

**¶30** As found by the trial court, Joe retained the authority to use his assets during his lifetime for his personal benefit and to make gifts. Indeed, the Appellees acknowledge that Joe had the authority to expend his assets for his medical care and also to maintain a life insurance policy for Linda's benefit. They argue, however, that the duty of good faith and fair dealing required Joe's use of his assets to be reasonable and the trial court found the cumulative value of Joe's non-probate transfers patently unreasonable.

**¶31** In a similar case involving a contract to make a will, the Kansas Supreme Court stated:

> With uniformity[,] courts have recognized the duty of good faith to be implicit in agreements to devise property in a certain way, whether that agreement is reached in an antenuptial agreement or a different type of contract, and under this duty it is generally recognized that the promisor may not "thwart the

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case, the parties' contract to make a will contained an express provision allowing each party "an immediate right" to transfer or dispose of their existing assets, as well as future acquisitions, in any manner they chose. *Id*.

> expectation of the promisee by squandering his assets irresponsibly or by making gifts of them to other persons. The promisor maintains his *power* to dispose of his assets, but he has no *right* to do so in a manner which will frustrate the purposes of his contract."

*Estate of Draper v. Bank of Am., N.A.*, 205 P.3d 698, 710 (Kan. 2009) (quoting Rheinstein, *Critique: Contracts to Make a Will*, 30 N.Y.U. L.Rev. 1224 (1955)).

**¶32** Here, Joe transferred assets with a value of more than $2,500,000, greater than one-third of his entire estate, to Linda after he was diagnosed with terminal cancer. We conclude, as did the trial court, that these non-probate transfers were made with the purpose of circumventing the terms of the MSA and Modification and were thus in bad faith. Notwithstanding that substantial assets remained in Joe's estate to fund the trust distributions to Joe, Jr. and Patricia, Joe's conduct prevented his children from receiving the full benefits and entitlements of the contract. *See Wells Fargo Bank*, 201 Ariz. at 490, ¶ 59, 38 P.3d at 28. Therefore, the trial court did not err by ordering Linda to return to the estate Joe's non-probate asset transfers.

## CONCLUSION

**¶33** For the foregoing reasons, we affirm.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
JOHN C. GEMMILL, Judge