DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the:	1 CA-CV 10-0832
GAINES FAMILY LIVING TRUST, Dated August 12, 1994.	DEPARTMENT A
	MEMORANDUM DECISION
	(Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)
DOUGLAS BEATY and NANCY DORENE BENITEZ,	
Petitioners/Appellants,	
v.	
SHIELDA GOOCH; PATRICIA LEONARD-TEAGUE; and EDWARD SMITH,	
Respondents/Appellees.	

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2007-001990; PB2007-050741 (Consolidated)

The Honorable Eileen S. Willett, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Douglas Beaty, Petitioner/Appellant — Alaska
In Propria Persona

Nancy Dorene Beaty, Petitioner/Appellant — Peoria
In Propria Persona

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P O R T L E Y, Judge

¶1 Douglas Beaty and Nancy Dorene Beaty (aka Nancy Harrell) (collectively "Appellants") challenge the resolution of the one issue the superior court addressed after remand, as well as the ruling that limited the evidentiary hearing to one issue.[1] For the reasons that follow, we affirm in part, reverse in part, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 When this court reviewed this case on appeal in 2009, we reversed the summary judgment granted to Appellants by the superior court's probate division. We determined that the Second Exercise of the Power of Appointment ("Second Exercise") by Lois Gaines Smith ("Lois") was valid and enforceable on

[1] Appellants also appeal from the March 12, 2010 ruling that the superior court would not consider the three issues they believed remained to be decided on remand. The ruling only became appealable after entry of the final, signed judgment. *See Walls v. Ariz. Dep't of Pub. Safety,* 170 Ariz. 591, 596–97, 826 P.2d 1217, 1222–23 (App. 1991) (citations omitted) (holding that upon entry of final judgment, an earlier unsigned ruling becomes appealable).

equitable grounds.[2] *In re Gaines Family Living Trust*, 1 CA-CV 08-0564, 2009 WL 1830721, at *5, ¶ 22 (Ariz. App. June 25, 2009) (mem. decision).

¶3 We, however, remanded the case so that the court could determine whether two assets, Lois's interest in the real property which was the subject of her "Specific Distribution of Trust Property," and the AIG annuity policy, were Trust assets. *Id.* If so, they would pass to Gooch, Leonard-Teague and Smith, Lois's cousins and husband, respectively, under the Second Exercise. *Id.* at **4-5, ¶¶ 20-22. We also instructed that, "[o]n remand, the superior court may address these and any other remaining issues related to her estate." *Id.* at *5, ¶ 22.

¶4 After the mandate issued, the superior court's civil division, which had consolidated both cases, instructed the parties to submit memoranda of law regarding the impact of our decision on the case and whether there were any issues remaining. Appellants filed a memorandum and identified three remaining issues: (1) whether Lois's trust amendment was authentic and signed by her, so that it could be given effect as an exercise of a general power of appointment; (2) whether there were assets in excess of $600,000 in the Trust estate at the

[2] Edward Smith did not participate in the first appeal.

time Calvin Gaines died; and (3) whether Edward Smith forfeited his share of trust assets by not participating in the first appeal. Gooch, Leonard-Teague and Smith, however, noted that the only remaining issue was whether the two assets were Trust assets.

¶5 The court limited the evidentiary hearing to whether the two assets were Trust assets. After the hearing, the court ruled that the two assets were part of the Trust estate and passed under the Second Exercise to Gooch, Leonard-Teague and Smith. Appellants unsuccessfully moved for a new trial from the final judgment, and then filed this appeal.[3]

DISCUSSION

¶6 Appellants present three issues for review: (1) whether we should reinstate the court's award of summary judgment in their favor because the request for equitable relief in the first appeal was made in bad faith; (2) whether the court abused its discretion by failing to allow them to present evidence that there was more than $600,000 in Trust assets at the time of Calvin Gaines's ("Calvin") death; and, (3) whether the court erred when it ruled that Lois's Second Exercise was a

[3] Appellants also challenge the denial of the motion for new trial. We need not address the issue because we are reversing the ruling that limited the issues to be determined on remand.

valid document and should be enforced based upon the decision in the first appeal.[4]

¶7 The first issue essentially asks us to reverse the decision in the earlier appeal. "It is the general rule that, in the absence of statute, an appellate court has no power to reconsider, alter or modify its decision." *Overson v. Martin*, 90 Ariz. 151, 152, 367 P.2d 203, 205 (1961) (citations omitted); *accord In re Monaghan's Estate*, 71 Ariz. 334, 336, 227 P.2d 227, 228 (1951) (citations omitted). Even if we believed we were mistaken, which we do not, we could not revisit the earlier appellate decision. *See Temp-Rite Eng'g Co. v. Chesin Constr. Co.*, 3 Ariz. App. 229, 231, 413 P.2d 288, 290 (1966) (right or wrong, an appellate decision becomes the law of the case and "is controlling in subsequent litigation").

¶8 Appellants had a remedy if they disagreed with the decision in the first appeal. They could have filed a motion for reconsideration, filed a petition for review to the Arizona Supreme Court, or both. They did neither. As a result, the appellate decision, which determined that the Second Exercise was valid and enforceable, is the law of the case. We cannot alter that determination.

[4] We note that Appellants have not challenged the court's determination that the two assets were part of the Trust estate, and we affirm the ruling.

¶9 Appellants' third issue is another attack on the earlier appellate decision. They challenge the propriety of our ruling that the Second Exercise is valid and enforceable. Because our ruling is final and is the law of the case, the court had no authority to reconsider the resolved issue, and it properly followed our instructions and applied our decision on remand. *See Harbel Oil Co. v. Superior Court of Maricopa Cnty. (Stevens)*, 86 Ariz. 303, 306, 345 P.2d 427, 429 (1959) (citation omitted). Thus, the court did not err by complying with the appellate decision.

¶10 Finally, we address whether the court abused its discretion when it refused to consider the value of any assets that may have been in the Trust estate at the time of Calvin's death.[5]

¶11 Generally, a case remanded to the trial court is limited by the terms of the mandate. *Sun City Water Co. v. Ariz. Corp. Comm'n*, 113 Ariz. 464, 466, 556 P.2d 1126, 1128 (1976) (citations omitted) (distinguishing a remand from a modification). However, "[i]n the absence of a mandate or

[5] If the assets in the Trust estate exceeded $600,000 on the date of Calvin's death, any excess assets should have been placed in the Family Trust, over which Lois had a limited power of appointment. If she did not exercise her limited power of appointment over such assets, then all such assets would pass to Appellants under the terms of the Trust.

opinion to the contrary, the fact that the matter has been on appeal does not prevent an enlargement or restriction of the issues after the case has been remanded for new trial." *Harbel Oil Co. v. Steele*, 1 Ariz. App. 315, 317, 402 P.2d 436, 438 (1965). Here, the mandate did not preclude a determination about the value of the Trust estate at the time of Calvin's death. *See Gaines*, 1 CA-CV 08-0564, at **2-5, ¶¶ 13-22.

¶12 Gooch, Leonard-Teague and Smith argue that Appellants conceded that the Trust estate was valued at less than $600,000 in connection with the cross-motions for summary judgment, and that the concession is now the law of the case. The record is clear, however, that Appellants only agreed to the valuation for the limited purpose of allowing the court to decide the cross-motions for summary judgment about the validity of Lois's Trust amendments. They stated that:

> [T]he Petitioners have advised the Court that they have no independent knowledge of the assets owned by Calvin and Lois at Calvin's death, and **for purposes of the Motion**, have accepted the Respondents' claim that the value of the assets owned by Calvin and Lois at Calvin's death were less than the amount that would be required to fund the Family Trust. **This argument has no bearing on the validity of the trust amendments and/or the validity of the exercises of a power or appointment.**

(Emphasis added.)

¶13 The valuation of the trust was not material to the court's ruling. The issue was not litigated or decided. In fact, the superior court's probate division made no finding about the value of the Trust estate at the time of Calvin's death. The court only found that under the terms of the Trust, the Marital Trust would be funded with the first $600,000 in the Trust estate, plus Lois's share of the community property and her sole and separate property, and any remaining funds would fund the Family Trust. The value of the Trust estate was not established by the court.

¶14 Although the appellate decision noted that "there was very little property in the Trust at Calvin's death," *Gaines*, 1 CA-CV 08-0564, at *4, ¶ 21, we did not focus on the value of the Trust estate. We were merely addressing, and rejecting, the argument that we would thwart the original intent of the Trust if we affirmed the Second Exercise. Even assuming the language could be construed as an adjudication of the value of the Trust, in light of Appellants' clearly delineated agreement to value for purposes of the summary judgment motion only, we decline to invoke law of the case because it would be unfair to do so. *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 279, 860 P.2d 1328, 1332 (App. 1993) (citation omitted) ("Because of the potentially harsh nature of the [law

of the case] doctrine, we will not apply it if doing so would result in a 'manifestly unjust decision.'").

¶15 Because the value of the Trust estate was immaterial to the superior court's decision and to our decision, the valuation did not become law of the case and could have been addressed on remand.

CONCLUSION

¶16 Based on the foregoing, we affirm the ruling that there were two assets in the Trust estate, reverse the ruling that the trial court could only address the one issue, and remand for a determination of the value of the estate at the time of Calvin's death, and any other remaining issues.[6]

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Judge

/s/
_____
ANDREW W. GOULD, Judge

[6] We remand to the superior court's probate division because both cases were transferred to that division for resolution under the PB cause number.