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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SHERYL REECE EDWARDS, Plaintiff/Appellee, v. FUENTES FAMILY TRUST, dated February 19, 2001, INGRID FUENTES and VERNON PETERSON, husband and wife, Defendants/Appellants.	2 CA-CV 2011-0043 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20098364

Honorable Paul E. Tang, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 Ingrid Fuentes appeals from the trial court's judgment in favor of appellee Sheryl Edwards. On appeal, Ingrid contends the court erred in precluding evidence of the Last Will and Testament of Anthony A. Fuentes and in "refusing to honor the power of appointment exercised therein." She also challenges the award of attorney fees to Sheryl. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 "'We view the facts in the light most favorable to sustaining the trial court's judgment.'" *Harris v. City of Bisbee*, 219 Ariz. 36, ¶ 3, 192 P.3d 162, 163 (App. 2008), *quoting Cimarron Foothills Cmty. Ass'n v. Kippen*, 206 Ariz. 455, ¶ 2, 79 P.3d 1214, 1216 (App. 2003). The facts are largely undisputed. Anthony and Bonnie Fuentes were married in September 1982. In February 2001, they created the Fuentes Family Trust naming themselves as co-trustees and beneficiaries during their lifetimes. The trust also named Bonnie's daughter, Sheryl, and three of Anthony's four children as remainder beneficiaries. The fourth child, Ingrid, was expressly excluded as a beneficiary under the terms of the trust. The same day that Bonnie and Anthony created the trust, they also executed a quitclaim deed transferring their residence at 10000 East Catalina Highway to the trust.

¶3 In May 2004, Ingrid drove Anthony to an attorney's office where he executed a Revocation of Trust Agreement and a Last Will and Testament. However, the revocation never was delivered to Bonnie. After Bonnie's death in April 2005, Anthony recorded an Affidavit Terminating Joint Tenancy and several deeds, apparently in an attempt to gain sole ownership of the residence outside of the trust.

¶4 In 2006, Sheryl filed a lawsuit to enforce the trust. She alleged Anthony no longer was capable of serving as trustee, and she sought an order imposing a constructive trust and conveying the residence to the trust. After a bench trial, the court entered judgment in favor of Sheryl. It found that the Revocation of Trust Agreement executed by Anthony in 2004 was invalid because it never had been delivered to Bonnie as required under the trust. The court also found that the deeds Anthony had recorded in an effort to transfer the residence to his sole ownership after Bonnie's death "ha[d] no legal [e]ffect on the property." In *Edwards v. Fuentes*, No. 2 CA-CV 2007-0121 (memorandum decision filed Mar. 26, 2009), this court affirmed the judgment.

¶5 After the appeal, and despite the trial court's judgment and this court's mandate, Ingrid executed a number of documents inconsistent with the trust's ownership of the residence. She purportedly was acting on Anthony's behalf under a durable power of attorney. The documents included a promissory note and deed of trust imposing a lien on the residence to secure payment of a personal loan Anthony had obtained.

¶6 Anthony died in July 2009, and Sheryl and Roland Fuentes became successor co-trustees. But Ingrid replaced Roland as co-trustee when he declined to serve and instead appointed her pursuant to Article IX(B) of the trust. Ingrid subsequently recorded a beneficiary deed purporting to transfer the home to herself. The deed contained, among other things, a handwritten note stating "Trust not valid" and "Judge was biased." Ingrid also recorded an affidavit and letter, apparently signed by Anthony, stating that the trust was invalid and that he was coerced into signing it.

¶7 In October 2009, Sheryl filed this action seeking an order removing Ingrid as co-trustee, evicting Ingrid and her husband from the residence with payment of the reasonable rental value for the time spent in the residence, and directing the sale of the residence with the proceeds divided among the beneficiaries of the trust. After a bench trial, the court entered judgment granting Sheryl the requested relief. This appeal followed.

Discussion

Appellate Jurisdiction

¶8 As a preliminary matter, we address Sheryl's contention that this court lacks jurisdiction to consider some of the issues Ingrid has raised in her opening brief because they were not contained in her notice of appeal. Rule 8(c), Ariz. R. Civ. App. P., provides that the notice of appeal "shall designate the judgment or part thereof appealed from." *See also Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982). "[O]ur review on appeal [therefore] is limited to the rulings specified in the notice of appeal." *Ruesga v. Kindred Nursing Ctrs. W., L.L.C.*, 215 Ariz. 589, ¶ 38, 161 P.3d 1253, 1263 (App. 2007).

¶9 Ingrid's notice of appeal states that she "specifically appeals the award of attorney's fees and the refusal of the trial court to admit into evidence the will of Anthony A. Fuentes, and[its] refus[al] to honor the power of appointment exercised therein." But in her opening brief, Ingrid also argues the court erred in removing her as trustee and in ordering her to pay rent to the trust. Ingrid maintains these additional issues are "reasonably subsumed in the issues actually noticed." We disagree. *See Baker v.*

Emmerson, 153 Ariz. 4, 8, 734 P.2d 101, 105 (App. 1986) (appellate court construes notice liberally, but "may not . . . read into the notice something that is not there"). Because they were not raised in the notice of appeal, we do not have jurisdiction to consider the additional issues Ingrid raises in her opening brief. *Premier Fin. Servs. v. Citibank*, 185 Ariz. 80, 87, 912 P.2d 1309, 1316 (App. 1995) (no jurisdiction to review rulings not contained in notice of appeal).

Evidentiary Ruling

¶10 Ingrid contends the "[trial c]ourt erred in not admitting the Last Will of Anthony Fuentes into evidence, and erred in it's [sic] treatment of the Power of Appointment therein." She argues that Anthony, as the surviving trustor, had a power of appointment over the survivor's trust and, despite the disinheritance clause contained in the trust, also had the right to exercise that power in Ingrid's favor. "We deferentially review a trial court's evidentiary rulings; we affirm unless we find (1) clear abuse of discretion or legal error and (2) prejudice." *Gasiorowski v. Hose*, 182 Ariz. 376, 382, 897 P.2d 678, 684 (App. 1994). "Exclusion of evidence, though improper, is not grounds for reversal if 'in all probability its admission would not have changed the result.'" *Id.*, *quoting Graham v. Vegetable Oil Prods. Co.*, 1 Ariz. App. 237, 243, 401 P.2d 242, 248 (1965).

¶11 At trial, Ingrid offered Anthony's will into evidence on the basis that "it exercises a power of appointment that Anthony Fuentes had under the Trust, which would effectively remove [fifty] percent ownership of the Trust assets to his estate." Sheryl objected to the admission of the will, arguing that Judge Bernini, the judge

previously assigned to the case, had found Anthony's revocation "invalid because there was never notice . . . to Bonnie" and that Ingrid was attempting "to use a Will of Mr. Fuentes to do the same thing that Judge Bernini said could not be done through a revocation." The trial court agreed and excluded the will.

¶12 We consider the trial court's ruling on the admissibility of Anthony's will in light of Bonnie's and Anthony's intentions pursuant to the trust. "The overriding goal in the interpretation of a trust document is to ascertain the intent of the trustor[s]." *In re Estate of Zilles*, 219 Ariz. 527, ¶ 8, 200 P.3d 1024, 1027 (App. 2008); *see also* A.R.S. § 14-1102(B)(2) (purpose of probate code to discover and make effective decedent's intent). The intent of the trustors is best determined by the language of the trust, and only if that language is ambiguous will we look beyond it. *State ex rel. Goddard v. Coerver*, 100 Ariz. 135, 141, 412 P.2d 259, 262-63 (1966). "[W]e consider the text of the trust 'as a whole and, when appropriate, the circumstances at the time it was executed.'" *Zilles*, 219 Ariz. 527, ¶ 8, 200 P.3d at 1027, *quoting In re Estate of Pouser*, 193 Ariz. 574, ¶ 10, 975 P.2d 704, 708 (1999) (interpreting a will).

¶13 Article V(C) of the trust provides that "[o]n the death of either Trustor, the Trustee shall divide the trust estate into separate trusts to be designated as 'Survivor's Trust', 'Decedent's Trust', and 'Qualified Election Trust.'" The survivor's trust consisted of the survivor's separate property and community interest in trust property, and the survivor was granted unlimited rights to income and principal during his or her life. Anthony, as the survivor, was also granted a power of appointment over the survivor's trust assets. Article V(D)(4) provides:

> On the death of the Surviving Trustor, Trustee shall pay the then remaining principal and undistributed income [of the Survivor's Trust] to such person or persons or to the estate of Surviving Trustor in such amounts or proportions and in such amounts or proportions and in such manner, including outright or in trust, as Surviving Trustor shall appoint by Last Will if such makes specific reference to the exercise of this power.

The trust further provides that if the survivor failed to exercise the power of appointment, the trustee was directed to add whatever remained in the survivor's trust to the decedent's trust and to pay the balance to the trust beneficiaries.

¶14 "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. And Rule 402, Ariz. R. Evid., provides that "[a]ll relevant evidence is admissible, except as otherwise provided" by law or rule. Under the plain language of the trust, evidence of Anthony's will clearly meets the threshold relevancy requirement, and the trial court therefore erred in refusing to admit the will.

¶15 Nevertheless, even though the will should have been admitted into evidence, we conclude the trial court's error was harmless because its admission would not have affected the outcome in any event. As the trial court noted in its judgment, Ingrid "is not a beneficiary of the trust." We cannot ignore the explicit provisions of Article V(L) of the trust:

> Notwithstanding any of the provisions of this Trust Agreement, the Trustee is directed not to make any distributions of assets to INGRID FUENTES. It is the express desire and intent of the Trustors that INGRID

> FUENTES shall be specifically disinherited and for the purposes of this Trust Agreement, shall be considered to have predeceased the Trustor without living issue.

"'We are not at liberty to disregard plain words and say they are meaningless, unless, after careful consideration of the entire instrument, it is not possible to give them any meaning.'" *In re Rowlands' Estate*, 73 Ariz. 337, 342, 241 P.2d 781, 784 (1952), *quoting In re Mayer's Estate*, 137 A. 627, 628 (Pa. 1927). Because this clause expressly limits Anthony's ability to exercise the power of appointment in her favor, Ingrid cannot demonstrate she was prejudiced by the court's ruling excluding the will or that its finding that the power of appointment exercised in Ingrid's favor was invalid.

¶16 In support of her argument, Ingrid cites the Restatement (Second) of Property (Donative Transfers) § 20.1 cmt. b (1986), which provides:

> *General powers.* A general power under which the donee is free to appoint by deed to himself or herself or by will to his or her estate has no non-object. Even if the instrument creating such a general power expressly excludes certain persons as objects of the power, a direct appointment of a beneficial interest can be made in favor of such excluded persons, because the power could be exercised in favor of the donee or the donee's estate and then disposed of by the donee by deed or by will to the excluded persons (see § 19.1).

¶17 A power of appointment "is general if the donee may exercise it in favor of anyone he or she chooses and specific if the donee may exercise it only in favor of a particular person or class of persons." *Wetherill v. Basham*, 197 Ariz. 198, ¶ 12, 3 P.3d 1118, 1123 (App. 2000). "A general power of appointment . . . is an extraordinary power, and the law tolerates only limited ambiguity when determining whether such power exists." *In re Estate of Krokowsky*, 182 Ariz. 277, 280, 896 P.2d 247, 250 (1995).

"In order to grant such an extraordinary power, the law requires that the grantor must (1) intend to create a power, (2) indicate by whom the power is held, and (3) specify the property over which the power is to be exercised." *Id.*; *see also* Restatement (Second) of Property (Donative Transfers) § 12.2 (1986) (scope of donee's authority unlimited except if donor manifests an intent to impose limits).

¶18 Considering the trust in its entirety, we conclude that, when they created the trust, Anthony and Bonnie did not intend for the power of appointment to be exercised generally in favor of anyone. The trust provided that Ingrid was "specifically disinherited" and "shall be considered to have predeceased." This language is inconsistent with the grant of a general power of appointment—by Anthony's will or otherwise. *See Krokowsky*, 182 Ariz. at 280, 896 P.2d at 250. In short, despite the trust's seemingly broad power-of-appointment language in Article V(D)(4), that same article prohibits the exercise of the power in favor of Ingrid—foreclosing the possibility that the trust granted Anthony a general power of appointment.

¶19 We decline Ingrid's request to apply comment b of Restatement (Second) of Property (Donative Transfers) § 20.1, and § 19.1,[1] to the facts of this case. We are not bound by the Restatement and will follow it only "if its view 'is logical, furthers the

[1]Section 19.1 provides:

> A donee of a general power under which an appointment can be made outright to the donee or outright to the donee's estate is permitted to make any appointment directly that could be made indirectly by appointing to the donee or the donee's estate and then disposing of the appointive assets as owned property.

interests of justice, is consistent with Arizona law and policy, and has been generally acknowledged elsewhere.'" *Wetherill*, 197 Ariz. 198, ¶ 13, 3 P.3d at 1123, *quoting Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, ¶ 26, 972 P.2d 658, 665 (App. 1998). Allowing Anthony to exercise the power of appointment in favor of Ingrid would not serve those purposes in light of the trust's unequivocal disinheritance clause, Ingrid's blatant disregard for court orders as determined by the trial court, and the harm to the other beneficiaries of the trust if Ingrid were permitted to share in the trust assets. *See In re Herbst*, 206 Ariz. 214, ¶¶ 20-21, 76 P.3d 888, 891-92 (App. 2003) (trustor bound by limiting language in trust and beneficiaries entitled to compliance with terms of trust to protect their interests). We therefore find no reversible error.

Attorney Fees

¶20 In her notice of appeal, Ingrid asserts she is challenging the trial court's award of attorney fees to Sheryl. However, Ingrid does not advance this argument in her opening brief and refers to it only in one conclusory statement in her reply brief. She has therefore waived appellate review of this issue. *See* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument constitutes waiver on appeal).

Attorney Fees on Appeal

¶21 Sheryl and Ingrid have requested attorney fees and costs on appeal pursuant to A.R.S. § 14-11004(B). In our discretion we grant Sheryl's request, upon her compliance with Rule 21, Ariz. R. Civ. App. P., and order that the fees and costs shall be paid by Ingrid and not the trust. *See* § 14-11004(B).

Disposition

¶22 For the reasons set forth above, we affirm.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge