IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In the Matter of the Estate of:

RONALD E. PODGORSKI, *Deceased*.

RAYMOND PODGORSKI, *Petitioner/Appellant*,

v.

KRISTA M. JONES, *Respondent/Appellee*.

No. 1 CA-CV 19-0467
FILED 8-6-2020

Appeal from the Superior Court in Maricopa County
No. PB2018-071111
The Honorable Lori Horn Bustamante, Judge

AFFIRMED

COUNSEL

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OPINION

Judge D. Steven Williams delivered the opinion of the Court, in which Presiding Judge Michael J. Brown and Judge Paul J. McMurdie[1] joined.

W I L L I A M S, Judge:

¶1 Ronald Podgorski remained close to his two grown stepchildren after he divorced their mother, and left behind a will and trust giving his entire estate to them. Ronald's brother appeals the superior court's ruling that Arizona's revocation-on-divorce statute did not revoke the dispositions in favor of the former stepchildren. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Ronald and Patricia Podgorski married in 1987. Patricia had two children from a previous marriage, Krista Jones and Douglas Olson (the "Stepchildren"), who were 11 and 15 years old, respectively, when she married Ronald. Ronald had no children of his own and did not adopt Krista or Douglas.

¶3 Ronald and Patricia created the Ronald E. Podgorski and Patricia A. Podgorski Family Trust (the "Trust") in 2007. Ronald executed his Last Will and Testament (the "Will") at that same time. The Will nominated the Stepchildren to serve as co-personal representatives of Ronald's estate (the "Estate") and bequeathed all of the Estate to the Trust. The Trust named the Stepchildren as the sole beneficiaries and nominated them to serve as co-trustees following Ronald's death.

¶4 Ronald and Patricia divorced in December 2016. Neither the Will nor the Trust was revised after the divorce. Ronald passed away in April 2018.

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[1] Judge Paul J. McMurdie replaces the Honorable Kenton D. Jones, who was originally assigned to this panel. Judge McMurdie has read the briefs, reviewed the record, and watched the recording of the May 27, 2020 oral argument.

¶5 Krista applied for informal probate of the Will, and was appointed personal representative of the Estate.[2] Ronald's siblings, Raymond Podgorski and Barbara Fischer (the "Siblings"), petitioned for a formal determination of heirs, to remove Krista as personal representative of the Estate, and to remove the Stepchildren as co-trustees of the Trust. They contended Arizona's "revocation-by-divorce" statute, A.R.S. § 14-2804, superseded the Will's and Trust's provisions in the Stepchildren's favor, leaving the Siblings to inherit by intestate succession. *See* A.R.S. § 14-2101(A).

¶6 The parties filed cross-motions for summary judgment. There was no dispute that, as the superior court noted, Ronald "treated Krista and Doug[las] as his children" from 1987, when he married Patricia, until his death. Even after the divorce, Ronald had named the Stepchildren as the beneficiaries of his 401(k) account and continued to make monthly payments on a term life insurance policy that named the Stepchildren as contingent beneficiaries behind Patricia.[3] The court concluded these undisputed acts evinced Ronald's intent to reaffirm his dispositions to the Stepchildren and held that § 14-2804 did not apply because "[t]he relationship between [Ronald], Krista and Doug[las] continued after the divorce, with no interruption because of the divorce."

¶7 The court entered a final judgment denying the Siblings' petition and confirming that Krista would remain personal representative of the Estate and co-trustee of the Trust. The Siblings timely appealed, and Barbara later assigned her rights to Raymond. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶8 In reviewing the superior court's rulings on cross-motions for summary judgment, we consider questions of law *de novo* but review the facts in a light most favorable to the party against whom summary judgment was granted. *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 191 (App. 1994). The court should grant summary judgment only when no genuine issues of material fact exist and the moving party is entitled to

[2] Douglas declined appointment as co-personal representative and nominated Krista.

[3] Patricia waived her claim to the policy.

judgment as a matter of law. Ariz. R. Civ. P. 56(a)[4]; *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, ¶ 15 (2006).

¶9 We review issues of statutory interpretation *de novo*. *State ex rel. DES v. Pandola*, 243 Ariz. 418, 419, ¶ 6 (2018). We liberally construe probate statutes to promote the underlying purposes and policies of the probate code, which include "[t]o simplify and clarify the law concerning the affairs of decedents" and "[t]o discover and make effective the intent of a decedent in the distribution of his property." A.R.S. § 14-1102(A)(1), (2). Principles of law and equity supplement the probate and trust codes unless otherwise stated. A.R.S. §§ 14-1103, -10106(A).

I. Revocation-on-Divorce Does Not Apply Because the Stepchildren Continued to Have an Affinity Relationship with Ronald Following the Divorce

¶10 Arizona's revocation-on-divorce statute provides in relevant part:

> A. Except as provided by the express terms of a governing instrument, a court order or a contract relating to the division of the marital estate made between a divorced couple before or after the marriage, divorce or annulment, the divorce or annulment of a marriage:
>
> 1. Revokes any revocable:
>
> (a) Disposition or appointment of property made by a divorced person to that person's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to *a relative of the divorced person's former spouse*.
>
> . . .
>
> (c) Nomination in a governing instrument that nominates a divorced person's former spouse or *a relative of the divorced person's former spouse* to serve in any fiduciary or

[4] "The Civil Rules [of Procedure] apply to probate proceedings unless they are inconsistent with [the] probate rules or A.R.S. Title 14." Ariz. R. Probate P. 4(a)(1).

> representative capacity, including a personal representative, executor, trustee, conservator, agent or guardian.
>
> . . .
>
> C. Provisions of a governing instrument are given effect as if the former spouse and *relatives of the former spouse* disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and *relatives of the former spouse* died immediately before the divorce or annulment.
>
> . . .
>
> I.5. *Relative of the divorced person's former spouse* means a person who is related to the divorced person's former spouse by blood, adoption or affinity and who, after the divorce or annulment, is not related to the divorced person by blood, adoption or affinity.

A.R.S. § 14-2804(A)(1), (C), (I)(5) (emphasis added); *see also* A.R.S. § 14-2508 ("Except as provided in sections 14-2803 and 14-2804, a change of circumstances does not revoke a will or any part of it.").

¶11 As relevant here, absent "express terms" in a governing instrument, court order, or contract to the contrary, section 14-2804 revokes dispositions to persons who are related to a decedent's "former spouse by blood, adoption, or affinity" *and* who, after the divorce, are no longer related to the decedent "by blood, adoption, or affinity." A.R.S. § 14-2804(A), (I)(5). The Stepchildren were and are related to Patricia by blood; the question is whether they remained related to Ronald by affinity after the divorce.

¶12 Section 14-2804 does not define "affinity." Affinity was traditionally defined under common law as the "connection existing in consequence of a marriage, between each of the married persons and the kindred of the other." *Allen v. Sanders*, 237 Ariz. 93, 95, ¶ 8 (App. 2015) (quoting *State v. Ramsey*, 171 Ariz. 409, 411 (App. 1992)). When the Legislature uses a word that has a well-known common law meaning, we presume it uses it with that understanding and will construe it accordingly unless some other special meaning is clear from the text. A.R.S. § 1-213; *Allen*, 237 Ariz. at 95, ¶ 7. But *Allen* offers no guidance as to whether an affinity relationship that "exist[s] in consequence of a marriage" automatically ends upon termination of the marriage. Krista argues that,

under § 14-2804(I)(5), an affinity relationship created by marriage may continue to exist after dissolution when, as here, the divorced person continues to treat stepchildren as his own.

¶13 Raymond cites *Groves v. State Farm Life & Casualty Co.*, 171 Ariz. 191 (App. 1992), as support for his contention that "[b]ecause affinity is a relationship created by marriage, dissolution of such marriage terminates the relationship." There, we considered whether a policyholder's former son-in-law was her "relative" for purposes of an insurance policy. *Id.* at 192. The policy did not define "relative" and did not use the term "affinity." The appellant argued that because the former son-in-law continued to live with the policyholder's daughter, received mail at the policyholder's home and visited his children there, he remained a relative of the policyholder. We concluded the former son-in-law's "relationships with his children and ex-wife after the divorce were not relevant to the issue of his legal relationship to his former mother-in-law," and that "[i]n insurance cases, one not a relative by blood or marriage is not covered as a relative." *Id.*

¶14 *Groves* is distinguishable because the Stepchildren do not rely upon their relationship with other relatives of Ronald to establish affinity; they rely upon their relationships with Ronald himself. Moreover, here we interpret a statute, not the terms of an insurance policy. *See In re McGraff's Estate*, 83 N.E.2d 427, 428 (Ohio Prob. 1948) ("[Q]uestions whether persons related by affinity are entitled to the proceeds of insurance policies are questions involving the interpretation of contracts. Our question involves a question of inheritance under our statute of descent and distribution.").

¶15 The plain language of A.R.S. § 14-2804(I)(5) contemplates the possibility of an affinity relationship continuing after a marriage ends. As noted, *supra* ¶ 10, the statute defines "[r]elative of the divorced person's former spouse" as:

> a person who is related to the divorced person's former spouse by . . . affinity *and who, after the divorce . . . is not related to the divorced person by . . . affinity*.

(Emphasis added). If all affinity relationships created by marriage terminated automatically upon divorce, the legislature would have had no need to include the additional statutory language "and who, after the divorce . . . is not related to the divorced person by . . . affinity." *See Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11 (2019) ("A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and

provision so that no word or provision is rendered superfluous."). Thus, it appears our legislature contemplated the possibility that an affinity relationship might survive divorce and intended to exclude such a relationship from automatic revocation-on-divorce.

¶16 Raymond argues, to the contrary, that the clause "and who, after the divorce, . . . is not related to the divorced person by . . . affinity" was intended to apply to situations in which multiple marriages of family members create multiple affinity relationships, only one of which is terminated by the decedent's divorce.[5] None of Raymond's hypothetical scenarios, however, contemplate a single affinity relationship created by marriage like this case. The statute simply does not require revocation of a disposition to anyone with whom the decedent had an affinity relationship which continues independently after dissolution of the marriage that created it. If the Legislature wanted to make that distinction, it could have done so. *See State Farm Mut. Auto. Ins. Co. v. White*, 231 Ariz. 337, 341, ¶ 14 (App. 2013) ("We 'will not read into a statute something which is not within the manifest intent of the legislature as indicated by the statute itself.'") (quoting *City of Tempe v. Fleming*, 168 Ariz. 454, 457 (App. 1991)).

¶17 Raymond also contends § 14-2804 "expressly bars consideration of extrinsic evidence to determine and effectuate a decedent's intent regarding revocation on divorce." In support of this argument, Raymond points to no "express bar" language in the statute, but instead cites *Lazar v. Kroncke*, 862 F.3d 1186 (9th Cir. 2017). There, the Ninth Circuit determined:

> Arizona's interest in its [revocation-on-divorce] statute is not merely to effectuate a donor's probable intent, but also to provide clarity and avoid litigation. Even the statutory exception demonstrates this desire for clarity, because doing so requires either an express provision ex-ante that the

[5] Raymond offers the following hypotheticals in support of his argument: (1) "if Ronald had a son from a prior marriage and that son was married to Krista at the time of divorce, Ronald would still be related to Krista by affinity after his divorce from Krista's mother (i.e., he would continue to be Krista's father-in-law);" and/or (2) "during or prior to Ronald and Patricia's marriage, Patricia's sister married Ronald's brother. As a result of Ronald's brother's marriage to Patricia's sister, Patricia's sister is Ronald's sister-in-law, and she would remain so even after Ronald and Patricia's divorce . . . [thus] Patricia's sister would remain related to Ronald by affinity."

> designation will apply in the event of divorce or an ex-post reaffirmation.

Id. at 1195. *Lazar* is not on point because it did not address the meaning of "affinity relationship" in § 14-2804(I)(5), but instead concerned a disposition to a former spouse, which the statute plainly revokes.[6] *Id.* at 1194-95.

¶18 As discussed, *supra* ¶ 10 and ¶ 15, § 14-2804(I)(5) contemplates the possibility of an affinity relationship created by marriage continuing after divorce, and specifically excludes from revocation-on-divorce dispositions to those who remained in such a relationship with the decedent after the divorce. When § 14-2804 is invoked during the probate of an estate, therefore, the court must consider evidence of a continuing affinity relationship before revoking dispositions to relatives of an ex-spouse. *See Friedman v. Hannan*, 987 A.2d 60, 70 (Md. App. 2010) (holding that courts may decline to apply revocation-on-divorce statute if "the evidence shows that the testator formed a close personal relationship with the legatee and likely desired to provide for him or her regardless of whether the marriage continued").

¶19 Raymond also cites *Estate of Hermon*, 39 Cal. App. 4th 1525 (1995), for the proposition that Uniform Probate Code ("UPC") § 2-804, upon which § 14-2804 is based, "provide[s] certainty for the courts and would also align the law with the general perception that any interest an ex-spouse's family might have had in their former relative's estate is terminated after the dissolution." *Hermon*, 39 Cal. App. 4th at 1532; *see also In re Estate of Rodriguez*, 215 Ariz. 358, 362, ¶ 11 (App. 2007) (noting the Legislature adopted § 14-2804 from the UPC). *Hermon* did not directly address revocation-on-divorce; nor was it applying the UPC provision at issue here. Instead, that case resolved a dispute over whether the phrases "my spouse's children" and "my spouse's issue" in a will included children of the decedent's former spouse. *Hermon*, 39 Cal. App. 4th at 1531. Here, in stark contrast, Ronald expressly provided for the Stepchildren in the Will and the Trust.

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[6] Raymond's reliance on *Sveen v. Melin*, 138 S.Ct. 1815 (2018), *Buchholz v. Storsve*, 740 N.W.2d 107 (S.D. 2007), and *Hertzske v. Snyder*, 390 P.3d 307 (Utah 2017), is misplaced for the same reason, as each case involved a designation to an ex-spouse. *Sveen*, 138 S.Ct. at 1820 (interpreting Minnesota law); *Buchholz*, 740 N.W.2d at 109; *Hertzske*, 390 P.3d at 312-13.

¶20 Finally, Raymond contends courts should not perform "a case-by-case factual analysis to determine whether an affinal relationship between former step relatives survives divorce," citing the Legislature's intent to "simplify and clarify the law concerning the affairs of decedents." A.R.S. § 14-1102(B)(1). But the Legislature also stated its intent to "discover and make effective the intent of a decedent in distribution of his property." A.R.S. § 14-1102(B)(2). Raymond does not dispute the Stepchildren's contention that their relationships with Ronald "continued unabated after the divorce and until [he] died."

¶21 We, therefore, affirm the superior court's summary judgment ruling.

II. Attorney Fees on Appeal

¶22 Both Raymond and Krista request attorney fees incurred in this appeal under A.R.S. §§ 12-341.01(A) and 14-11004.

¶23 Section 12-341.01(A) permits a discretionary award to the successful party in an action arising out of a contract. An action arises out of contract when the duty allegedly breached was created by the contractual relationship and would not have existed but for the contract. *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, 220, ¶ 12 (App. 2012). There is no contract between Raymond and Krista. And "suits that arise out of a trust relationship are not suits arising out of a contract for purposes of A.R.S. § 12-341.01(A)." *Owner-Operator Indep. Drivers Ass'n v. Pac. Fin. Ass'n, Inc.*, 241 Ariz. 406, 416, ¶ 39 (App. 2017); *In re Naarden Tr.*, 195 Ariz. 526, 527, ¶ 2 (App. 1999). Section 12-341.01(A) does not authorize a fee award here.

¶24 Section 14-11004(A) authorizes a trustee or a person nominated as a trustee to receive reimbursement from the trust for:

> reasonable fees, expenses and disbursement, including attorney fees and costs, that arise out of and that relate to the good faith defense or prosecution of a judicial or alternative dispute resolution proceeding involving the administration of the trust, regardless of whether the defense or prosecution is successful.

A.R.S. § 14-11004(A). Krista is a co-trustee of the Trust, and Raymond was nominated to be a trustee should the Stepchildren be removed. Subsection (B) authorizes the court to order that "fees, expenses and disbursements pursuant to subsection A" be paid by "any other party or the trust that is

the subject of the judicial proceeding." A.R.S. § 14-11004(B). In our discretion, we decline to award fees or costs to either side under this statute.

¶25 Krista also seeks attorney fees and costs in her capacity as personal representative under A.R.S. § 14-3720. That statute allows a personal representative who "defends or prosecutes any proceeding in good faith, whether successful or not . . . to receive from the estate [her] necessary expenses and disbursements including reasonable attorneys' fees incurred." A.R.S. § 14-3720. We determine good faith objectively and consider all relevant circumstances. *In re Estate of Gordon*, 207 Ariz. 401, 406, ¶¶ 24-25 (App. 2004). And we may consider whether the litigation benefited the Estate in deciding whether the personal representative litigated in good faith. *Id.* at 406, ¶ 25; *see also In re Estate of Friedman*, 217 Ariz. 548, 558, ¶ 40 (App. 2008) (declining to award fees under § 14-3720 because the appeal was taken for the party's benefit, not the benefit of the estate).

¶26 "Because a probated will presumptively reflects the wishes of the decedent, a personal representative's attempt to defend that will by definition benefits the estate." *Gordon*, 207 Ariz. at 406, ¶ 28. As such, while Krista's efforts in this case benefited her, they also benefited the Estate. We award Krista her reasonable fees incurred in this appeal in her role as personal representative, to be recovered from the Estate, subject to compliance with ARCAP 21. She may not recover fees incurred in her personal capacity.

¶27 Finally, Raymond requests fees under § 14-1105(A), which allows an estate or trust to recover professional fees or expenses from a party who acts unreasonably. Assuming *arguendo* that Raymond has standing to pursue an award under § 14-1105(A), we deny his request because Krista did not act unreasonably in this appeal. We further deny Raymond's request for costs under § 12-341.

CONCLUSION

¶28 We affirm. Krista may recover her reasonable attorney's fees and taxable costs as personal representative from the Estate upon compliance with ARCAP 21.