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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 2/28/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of:) No. 1 CA-CV 12-0262
)
JOHN D. AND JEAN MACHARDY TRUST,) DEPARTMENT E
)
Deceased.) **MEMORANDUM DECISION**
)
CRAIG MACHARDY.) (Not for Publication -
) Rule 28, Arizona Rules of
Petitioner/Appellee,) Civil Appellate Procedure)
)
v.)
)
JANE A. MUELLER,)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2009-070493

The Honorable Jose S. Padilla, Judge

VACATED AND REMANDED

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And	
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H A L L, Judge

¶1 Following a bench trial, the superior court entered a judgment finding that Jane A. Mueller (Mueller) financially exploited her parents, John MacHardy (John) and Jean MacHardy (Jean), as vulnerable adults. As a consequence, the court removed her as Co-Trustee of her parents' trust, the John D. and Jean MacHardy Trust (the Trust), held that she forfeited her interest in the Trust, and awarded judgment against her in favor of her brother, Craig MacHardy (Craig), in the amount of \$1,264,014.78, along with attorneys' fees and costs. As we explain below, because the superior court based its finding of financial exploitation on a statute that became effective after the allegedly improper actions by Mueller occurred, we vacate the judgment and remand for a determination of Mueller's liability under Arizona Revised Statutes (A.R.S.) section 46-456 (2003).

FACTUAL¹ AND PROCEDURAL BACKGROUND

¶2 In August 2009, Craig, as Co-Trustee of the Trust, petitioned for an order to show cause to compel an inventory and accounting as well as a preliminary injunction against Mueller. Thereafter, he filed an amended petition for recovery of estate

¹ We consider the facts in the light most favorable to upholding the superior court's judgment. *In re Estate of Newman*, 219 Ariz. 260, 263, ¶ 3, 196 P.3d 863, 866 (App. 2008).

assets and a complaint for financial exploitation of a vulnerable adult pursuant to A.R.S. § 46-456² (the petition) against Mueller, alleging breach of fiduciary duty, breach of statutory duty, and demanding a return of property and documents in aid of administration.³

¶13 Mueller moved to dismiss the petition, arguing that Craig lacked standing and the petition was untimely filed. Craig responded that he had standing under either A.R.S. § 46-456 (2003) as a Co-Trustee of the Trust, or A.R.S. § 46-456 (2009)⁴ as a Co-Trustee of the Trust, heir, devisee, beneficiary, and child of John and Jean. The superior court denied Mueller's motion, and found that Craig had standing "pursuant to the amended A.R.S. § 46-456."

¶14 The case proceeded to a bench trial in September 2011, and the evidence revealed that John and Jean had been living in Sun City, Arizona in 2006, when John's health rapidly began declining at the age of ninety. Jean, at the age of eighty-six, also had serious health complications and she was hospitalized

² A.R.S. § 46-456 is part of the Adult Protective Services Act (APSA), A.R.S. §§ 46-451 through -459.

³ Mueller filed a complaint against Craig in December 2010, stating that they were unable to agree how to divide real property owned by the Trust, and requesting the court to order partition and sale of the property. The superior court subsequently consolidated both actions.

⁴ We note that the 2009 version of A.R.S. § 46-456 and the current version of A.R.S. § 46-456 are the same.

with profound gastrointestinal bleeding, and was suffering from depression and fatigue. In October 2006, John and Jean were unable to care for themselves, and Craig and Mueller alternated coming to Arizona to stay with and care for them.

¶15 In November 2006, Peter Lee, M.D., certified that John was terminally ill and Mueller admitted during the trial that John was "very upset" by this certification. Dr. Lee also found that Jean was suffering from "major depression." Additionally, Jean's neurologist, Stephen Hempelman, M.D., found her to have "some amount of dementia," unable to understand straight-forward questions, and noted she was "not especially interested in cooperating" with his examination.

¶16 On November 28, 2006, one day after John entered hospice care, Mueller drove John and Jean to Wells Fargo Bank where she became John and Jean's attorney-in-fact by accepting the durable powers of attorney executed by John and Jean, and also became a joint owner of their three Wells Fargo Bank accounts.

¶17 John died on January 17, 2007, and Craig and Mueller became Co-Trustees of the Trust because Jean could no longer independently manage her affairs. Mueller admitted that she did not believe Jean "could care for her own money properly . . . because of her physical and mental impairments[.]" The

following month, Mueller moved Jean to New Jersey to live with her.

¶18 In August 2007, Mueller had Jean cash-out \$447,633.31 in Treasury Notes that were owned solely by Jean and put the proceeds into one of the Wells Fargo accounts held jointly by Jean and Mueller. Thereafter, Mueller wrote a check to herself (by making it payable to her own account at Dime Bank) in the amount of \$350,000. Jean subsequently endorsed two checks in the amounts of \$75,000 and \$30,400 to Mueller. Jean died on April 11, 2009, at the age of eighty-nine. From March 22, 2007 through July 22, 2010, Mueller admitted to withdrawing \$225,610.89 from her parents' Wells Fargo Bank account.

¶19 Mueller testified that she was a fiduciary for John and Jean, and that she understood that her responsibilities were "[t]o ensure that my mother's or my father's funds [we]re taken care of, that no one [took] advantage of them, that no one [took] any money from them, that the money [was] used for their benefit." Mueller stated that after Jean died, \$350,000 that had been in Jean's name in a money market and certificate of deposit was transferred into Mueller's name by the bank.⁵ Mueller admitted although she did not own the money, she "used [the \$350,000] to live on" for her own benefit and "took that

⁵ This is contrary to the evidence and findings made by the trial court.

money for" herself for living expenses, heat, food, taxes, clothes, and charity because she was no longer employed. Mueller also conceded that since 2007, she spent approximately \$475,000 of the \$575,610.89 that John and Jean owned. Mueller explained that she had been told by both a financial planner and an attorney that the money was hers and not part of the estate or the Trust.

¶10 The superior court found that Mueller "financially exploited John & Jean MacHardy pursuant to A.R.S. § 46-456 *et seq.* by appropriating their financial resources for her own use and benefit and not for the benefit of John & Jean MacHardy[.]" The court applied the 2009 version of A.R.S. § 46-456(A), and quoted its language: "A person who is in a *position of trust and confidence* to a *vulnerable adult* shall use the vulnerable adult's assets **solely** for the benefit of the vulnerable adult and not for the benefit of the person who is in the position of trust and confidence to the vulnerable adult or the person's relatives." (Emphasis added in ruling.) The court further removed Mueller as a Co-Trustee of the Trust and appointed Craig as the sole Trustee. It also found that Mueller forfeited any and all interest in the Trust. The court awarded judgment in favor of Craig, and against Mueller, in the amount of \$1,264,014.78. It also awarded Craig \$88,977.33 in attorneys' fees and \$4388.47 in costs.

¶11 Mueller timely appeals and argues: (1) Craig lacked standing to file suit under the 2003 version of A.R.S. § 46-456; (2) the superior court erred in applying the current version of A.R.S. § 46-456; and (3) the court erred by imposing double damages against Mueller because she is not liable for damages under A.R.S. § 46-456 (2003).

¶12 We have jurisdiction pursuant to A.R.S. § 12-2101(B) (Supp. 2012).

DISCUSSION

¶13 In reviewing the findings of fact and conclusions of law, we are bound by the superior court's findings, unless those findings are clearly erroneous. *In re Estate of Fogelman*, 197 Ariz. 252, 256 n.4, ¶ 8, 3 P.3d 1172, 1176 n.4 (App. 2000). We review questions of law, such as whether a party has standing, de novo. *Id.*; *Ctr. Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 356, ¶ 15, 153 P.3d 374, 377 (App. 2007).

¶14 The first two issues raised by Mueller on appeal both involve questions regarding which version of § 46-456 applies under the circumstances of this case. The superior court found that the 2009 version of § 46-456 granted Craig standing to file the amended petition in November 2009. The court further applied the 2009 version in determining that Mueller's actions in 2006 and 2007 were improper and subjected her to liability

for appropriating her parents' financial resources for her own use and benefit.

¶15 As to the first issue, we conclude that the standing granted to Craig as "an interested person" pursuant to the 2009 version of § 46-456(G) did not affect Mueller's vested rights when it became effective on September 30, 2009.⁶ See *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 205, ¶ 15, 972 P.2d 179, 189 (1999) ("legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events"). A vested right "is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 140, 717 P.2d 434, 444 (1986). The addition of subsection G left entirely unchanged the substantive rules governing Mueller's liability under APSA. Anything that Mueller could have done lawfully regarding her parents' assets was not made unlawful by subsection G. Therefore, the procedural change in standing requirements did not affect Mueller's substantive vested rights, and was properly relied on by the superior court. See *Starfish Condo. Ass'n v. Yorkridge Serv. Corp.*, 458 A.2d

⁶ The effective date for non-emergency legislation enacted by the Forty-ninth legislature, first regular session, which is the legislature that amended A.R.S. § 46-456 (2009), is September 30, 2009.

805, 811 (Md. App. 1983) (lack of standing defect was procedural and cured by amendment to a legislative act); see also *In re Tobacco II Cases*, 207 P.3d 20, 30 (Cal. 2009) (procedural changes affecting class-action standing did not change substantive rules by making that which was previously lawful now unlawful). Moreover, because subsection G, which Mueller acknowledges granted Craig standing, was in effect when Craig filed the amended petition in November 2009, the superior court did not apply it retroactively.

¶16 Our conclusion that the superior court correctly applied the 2009 version of § 46-456 in determining that Craig had standing to file an action under APSA does not resolve the question whether the 2009 version could properly be applied as a basis for finding Mueller liable under § 46-456(A). “[I]n Arizona, statutes dealing with civil matters may not be applied retroactively in the absence of a specific provision to that effect.” *Hall*, 149 Ariz. at 139, 717 P.2d at 443; see also A.R.S. § 1-244 (Supp. 2012). Thus, “statutes which retroactively affect substantive rights are prohibited.” *Hall*, 149 Ariz. at 139, 717 P.2d at 443; see also *San Carlos Apache Tribe*, 193 Ariz. at 205, ¶ 15, 972 P.2d at 189. The superior court is therefore not permitted to apply a current statute to conduct that was legal prior to the enactment of or amendment to a statute.

¶17 Section 46-456(A), as amended in 2009, requires a person in a position of trust and confidence to a vulnerable adult to use "the vulnerable adult's assets *solely* for the benefit of the vulnerable adult and not for the benefit of the person who is in the position of trust and confidence" unless it is approved by the superior court or is specifically authorized by the vulnerable adult in a valid durable power of attorney or trust instrument. In comparison, § 46-456(A) (2003) states that "[a] person who is in a position of trust and confidence to an incapacitated or vulnerable adult shall act for the benefit of that person to the same extent as a trustee." (Emphasis added.) Under the 2003 version of § 46-456, a trustee was permitted to engage in transactions with the beneficiary benefiting the trustee if the beneficiary consented and was not under an incapacity at the time of such consent. See Restatement (Second) of Trusts § 216 (Consent of Beneficiary) (2012).⁷

⁷ Section 216, insofar as relevant provides:

(1) Except as stated in Subsections (2) and (3), a beneficiary cannot hold the trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary prior to or at the time of the act or omission consented to it.

(2) The consent of the beneficiary does not preclude him from holding the trustee liable for a breach of trust, if

(a) the beneficiary was under an incapacity at the time of such consent or of such act or omission; or

Subsection A of § 46-456, which forbade the trustee from any use of a vulnerable adult's assets for the benefit of the trustee, constitutes a significant change in the substantive law because it renders unlawful conduct that may have been lawful before its effective date. See Restatement cmt. b ("Thus, if the trustee sells trust property to himself individually with the consent of the beneficiary, the beneficiary cannot hold the trustee liable for breach of trust, except under the circumstances stated in Subsections (2) and (3)."). Because the transactions by Mueller that allegedly violated APSA occurred before the effective date of the amended statute, the legality of Mueller's actions is governed by the former version of the law. Accordingly, the superior court erred in applying the 2009 version of § 46-456(A) to find Mueller liable.⁸

¶18 "To justify the reversal of a case, there must not only be error, but the error must have been prejudicial to the substantial rights of the party." *Creach v. Angulo*, 189 Ariz.

(b) the beneficiary, when he gave his consent, did not know of his rights and of the material facts which the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew; or

(c) the consent of the beneficiary was induced by improper conduct of the trustee.

⁸ We note that Mueller engaged in some transactions after the effective date of A.R.S. § 46-456 (2009). To the extent that those transactions are alleged to have violated the APSA, Mueller's liability would be determined according to the 2009 version of A.R.S. § 46-456.

212, 214, 941 P.2d 224, 226 (1997). On this record, however, we are not inclined to engage in a harmless error analysis for several reasons. First, Craig does not argue on appeal that any error was harmless under the circumstances of this case. Second, although the parties litigated the physical and mental capacities of John and Jean to engage in the transactions at issue, the superior court found that the issue of whether the parents suffered from a lack of capacity at the time of the November 28 transactions was "render[ed] moot" by the court's finding that they were vulnerable adults when those transactions occurred. Moreover, the court emphasized that a person could be classified as a "vulnerable adult" based on either "physical or mental impairment." (Emphasis in original.) See A.R.S. § 46-451(9) (Supp. 2012). Third, even though the evidence arguably supports a finding that Mueller's actions violated the 2003 version of § 46-456, we cannot know whether the court's evaluation of the evidence might have changed, or in what manner it might have changed, had it correctly applied the law. Accordingly, we vacate the superior court's ruling and remand for it to apply the correct statute, A.R.S. § 46-456 (2003),⁹ in determining Mueller's liability. We leave it to the superior

⁹ Because we are vacating and remanding the case to the superior court, we need not consider whether the superior court erred by imposing double damages against Mueller.

court on remand to determine whether it should hold any further evidentiary proceedings.

¶19 Craig requests attorneys' fees pursuant to A.R.S. § 46-455 (Supp. 2012) and Arizona Rules of Civil Appellate Procedure 21. We deny that request.

CONCLUSION

¶20 For the foregoing reasons, we vacate the judgment and remand the matter to the superior court for further proceedings consistent with this decision.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
MARGARET H. DOWNIE, Presiding Judge

_____/s/_____
MAURICE PORTLEY, Judge