

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 5/14/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In Re the Matter of:) No. 1 CA-CV 12-0454
)
THE LORETTA Z. BOWER REVOCABLE) DEPARTMENT C
TRUST)
_____)
GARY CHENAULT,)
Plaintiff/Appellant,)
v.)
CHRISTINA SCHONES and STEPHEN)
CHENAULT,)
Defendants/Appellees,)
TERRY CHENAULT, Trustee of the)
Loretta Z. Bower Revocable Trust,)
Appellee.)
_____)

MEMORANDUM DECISION

(Not for Publication -
Rule 28, Arizona Rules of
Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-000603; PB2009-070612

The Honorable Jacki Ireland, Commissioner

AFFIRMED

Padish & Wells, PLLC
By James E. Padish
and

Scottsdale

Gorman & Jones, PLC
By Andrew F. Gorman

Sun City

Mathew M. Jones
Attorneys for Plaintiff/Appellant

Frazer, Ryan, Goldberg & Arnold, L.L.P.
By John R. Fitzpatrick
Joshua D. Moya
Attorneys for Defendants/Appellees

Phoenix

Quindry Koniuszy Follett & Styskal, LLP
By Stephen W. Follett
Attorneys for Trustee/Appellee

Mesa

J O H N S E N, Judge

¶1 This is a dispute between family members over numerous issues surrounding the administration of a decedent's trust. Gary Chenault appeals the superior court's rulings in favor of a trustee, Terry Chenault, and two beneficiaries, Terry's children Stephen Chenault and Christina Schones. Gary also appeals the court's imposition of sanctions against him. For the following reasons, we affirm the court's rulings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Gary and Terry are the only children of Loretta Z. Bower. With his wife Cheryl, Gary has two children, David and Charles. On March 22, 2003, Loretta executed the Loretta Z. Bower Revocable Trust, which directed that Terry would be the successor trustee upon Loretta's death or incapacity. The Trust also provided that all "trust property" as described in Schedule A of the Trust shall be distributed as follows:

1. Adrin F. Bower [Loretta's second husband] shall be given a life estate interest in the

grantor's home known as Lot 162, Green Acres Drive, Happy Jack Arizona

2. All remaining trust property shall be distributed as follows: one-half ($\frac{1}{2}$) of the property shall be given to Gary C. Chenault and the remaining one-half ($\frac{1}{2}$) shall be given to Christina Chenault and Steven Chenault in equal shares, per capita. If Gary C. Chenault does not survive the grantor by 120 hours, then his share of the trust property shall be given to his children, Charles Chenault and David Chenault in equal shares, per capita.

The most significant asset subject to section two, the residuary clause, was real property the parties called Joy Ranch.

¶13 Loretta made several handwritten notations to Schedule A of the trust: One each on April 19, 2004, and September 6, 2006, and two on August 13, 2008 ("Schedule A Amendments"). Although Loretta did not sign these notations, she wrote, "I, Loretta Bower . . ." in the first two. While in hospice care, Loretta directed Terry's wife Betty to draft a separate document ("Separate Amendment") stating, "[i]n addition to schedule A," several other pieces of property were to be distributed to various beneficiaries, including "[a]ll-Gold K[r]uger[r]ands divided between Terry and Gary."¹ Loretta's signature appeared at the bottom of the Separate Amendment, dated October 2, 2008.

¹ A Krugerrand is a one-ounce gold coin of the Republic of South Africa. Random House Webster's Unabridged Dictionary 1067 (2d ed. 2001).

¶14 Loretta died on November 3, 2008, and Terry became trustee. Terry, who lived out of the state, gave Gary the keys to Loretta's home. After learning that Gary had removed property from Loretta's home, Terry asked Gary to list the items he removed. When Gary's list did not account for all the property that was missing, Terry retained counsel to assist with the administration of the Trust and force an itemization of the missing property. Gary resisted and petitioned the superior court in September 2009 to order Terry to account.

¶15 The court determined that the information Gary had about the missing property was significant to Terry's ability to account and ordered Gary to execute an affidavit listing the property in his possession. Gary admitted in his affidavit that he took more of Loretta's property than he previously identified, and he later admitted in a deposition that the itemization in his affidavit also was inaccurate. Nonetheless, in January 2010 Gary petitioned the court to remove Terry as trustee on several grounds, including that Terry allegedly had made "wrongful allegations of theft against [him]" and had acted partially toward his children in the administration of the Trust, specifically in the distribution of Joy Ranch.

¶16 In his petition to remove Terry as trustee, Gary also sought declaratory relief regarding the Schedule A Amendments and Separate Amendment. He alleged the amendments lacked the

requisite signatures or that the signatures were forged, they were written when Loretta lacked capacity and they resulted from undue influence. Gary later moved for partial summary judgment on these issues; the court denied his motion.

¶17 Gary also sought distribution of Joy Ranch. In response, Terry petitioned the court for instructions because he was receiving competing demands: Gary claimed the beneficiaries were entitled to in-kind distribution as tenants in common, while Stephen and Christina refused to co-own the property with Gary and wanted Joy Ranch sold. Gary, however, had not consistently sought in-kind distribution. When Loretta died, the value of Joy Ranch was substantial and Gary wanted to sell it. In fact, without permission from Terry, Gary placed a for-sale sign on the property listing his phone number. Gary then changed his mind and invited Stephen and Christina to purchase his interest, but expressed no interest in purchasing theirs.

¶18 In fall 2010, based on an appraisal Terry obtained, Stephen and Christina offered either to purchase Gary's interest in Joy Ranch for \$325,000 or sell him their interest for the same price. Gary declined both options and offered to purchase their interest for \$153,000. Thereafter, Gary filed a separate, civil complaint for in-kind partition of Joy Ranch and amended his complaint in the probate matter to allege that Terry must

distribute Joy Ranch, and by failing to do so, he violated his fiduciary duties by favoring his children's wishes.

¶19 The court consolidated Gary's civil petition with the ongoing probate case and ordered that a panel of three commissioners partition the property with the following proviso:

If the Commissioners are of the opinion that a fair and equitable division of the Property or any part thereof cannot be made, the Commissioners shall report such opinion to the Court, stating their reasons therefore, and if the Court approves such report, the Court will order a sale of the Property.

See Ariz. Rev. Stat. ("A.R.S.") § 12-1218(A) (West 2013) ("If the commissioners are of the opinion that fair and equitable division of the property or any part thereof cannot be made, they shall report such opinion to the court, stating their reasons therefor, and if the court approves such report, it shall order a sale of the property which is incapable of partition.").² The commissioners' report, submitted to the court on September 23, 2011, concluded "there is no fair and equitable physical division of the subject property into the three shares requested. A sale of the property in its 'as is' shape and size would most likely result in the highest total price, which could then be divided into the three shares."

² Absent material revision after the relevant date, we cite a statute's current version.

¶10 The court conducted a three-day bench trial on whether the Trust required Terry to distribute Joy Ranch in-kind, whether the Schedule A Amendments and Separate Amendment were valid, whether Terry breached his fiduciary duties as trustee, whether the gold Krugerrands were Gary's and whether Terry or Gary were liable for the expenses each party incurred.³ At trial, Gary failed to present evidence on or abandoned arguments concerning many of the issues he had raised in pretrial filings. On the third day of trial, Gary, Stephen and Christina entered a settlement agreement in which Gary purchased Stephen and Christina's one-half interest in Joy Ranch for \$325,000.

¶11 The superior court made 172 findings of fact, 22 conclusions of law and eight rulings. The court ruled against Gary on all issues and imposed sanctions against him of \$176,466 in attorney's fees and \$4,979.19 in costs pursuant to A.R.S. §§ 12-341.01(C) (West 2013), 12-349 (West 2013), 14-11004 (West 2013) and Arizona Rule of Civil Procedure ("Rule") 11.

¶12 We have jurisdiction over Gary's appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (West 2013) and -2101(A) (West 2013).

³ Gary did not designate the trial transcripts for the record on appeal. See ARCAP 11(b)(1) (appellant has a duty to order and include the transcript in the record on appeal). When no transcript is designated, we assume the record supports the superior court's decision. *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998).

DISCUSSION

A. Standard of Review.

¶13 We apply a *de novo* standard of review to the superior court's legal conclusions, *In re Estate of Newman*, 219 Ariz. 260, 265, ¶ 13, 196 P.3d 863, 868 (App. 2008), and the interpretation of a trust, *In re Estate of Ziles*, 219 Ariz. 527, 530, ¶ 7, 200 P.3d 1024, 1027 (App. 2008). We accept the superior court's factual findings unless they are clearly erroneous. *In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5, 12 P.3d 1203, 1205 (App. 2000). A finding of fact is not clearly erroneous if substantial evidence was presented at trial supporting it, even if conflicting evidence also was presented. *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51-52, ¶ 11, 213 P.3d 197, 200-01 (App. 2009).

¶14 When a party appeals from the imposition of sanctions, we must review "the evidence in a manner most favorable to sustaining the award, affirming unless the [] court's findings are clearly erroneous." *Heuisler v. Phoenix Newspapers, Inc.*, 168 Ariz. 278, 284, 812 P.2d 1096, 1102 (App. 1991).

B. Joy Ranch.

¶15 Despite having settled the disposition of Joy Ranch on the last day of trial, Gary argues at length on appeal that the Trust required Terry to distribute Joy Ranch in-kind.

¶16 "It is well settled that an appellate court will not consider a case which is moot." *Del Rio Land, Inc. v. Haumont*, 110 Ariz. 7, 9, 514 P.2d 1003, 1005 (1973). The parties' settlement, which was entered on the record pursuant to Arizona Rule of Civil Procedure 80(d), rendered the Joy Ranch issue moot, and the court of appeals does not decide moot issues. See *Bd. of Supervisors v. Robinson*, 105 Ariz. 280, 281, 463 P.2d 536, 537 (1970) (courts will not decide a moot case where the resolution will not affect the plaintiff).

¶17 Because Gary's settlement with Stephen and Christina rendered any claim about the distribution of Joy Ranch moot, we will not address his contention that the Trust required Terry to distribute to him one-half of Joy Ranch.⁴

C. Trustee's Alleged Breach of Fiduciary Duties.

¶18 Gary argues Terry committed several breaches of his fiduciary duty as trustee. In reviewing Gary's allegations, we defer to the superior court's factual findings that Terry committed no breach of fiduciary duty. See *Arpaio v. Davis*, 221 Ariz. 116, 119, ¶ 15, 210 P.3d 1287, 1290 (App. 2009).

⁴ Gary does not dispute the validity of the settlement agreement and because he did not provide a record containing the parties' recitation of the settlement terms, we assume the record supports the court's enforcement of the parties' agreement. See *Harris v. City of Bisbee*, 219 Ariz. 36, 44, ¶ 25, 192 P.3d 162, 170 (App. 2008).

1. Duty of loyalty to deed Joy Ranch or timely petition for instructions.

¶19 Gary argues Terry breached the duty of loyalty by favoring Stephen and Christina in failing to immediately distribute Joy Ranch in-kind or timely petitioning the court for instructions in the face of the beneficiaries' competing interests. See A.R.S. § 14-10802(A) (West 2013) ("A trustee shall administer the trust solely in the interests of the beneficiaries."); see also *Lane Title & Trust Co. v. Brannan*, 103 Ariz. 272, 278, 440 P.2d 105, 111 (1968) ("the trustee owes the beneficiary a duty of undivided loyalty").

¶20 As discussed above, however, Gary cannot claim any injury from Terry's failure to distribute Joy Ranch because by the settlement, Gary has taken possession of Joy Ranch. See *Patton v. First Fed. Sav. & Loan Ass'n of Phoenix*, 118 Ariz. 473, 476, 578 P.2d 152, 155 (1978). In any event, there is substantial evidence supporting the court's finding that Terry did not breach any fiduciary duty in addressing the beneficiaries' competing interests in Joy Ranch. The court found Terry did not favor his children's desire to sell Joy Ranch because Terry petitioned the court for instructions for how the ranch should be divided; it also cited Gary's frequently changing position about whether the property should be sold or distributed in kind. And Gary's argument that Terry "was

required to deed Joy Ranch to the beneficiaries pursuant to the Trust's terms, regardless of whether his children wished to co-own it with their uncle" flies in the face of A.R.S. § 14-3906(A)(4) (West 2013), which provides that residuary property may be converted into cash for distribution if the beneficiaries object to in-kind distribution. See A.R.S. § 14-10112 (West 2013) (rules of construction for wills also apply to the terms of a trust and distribution of trust property).

¶21 The superior court also addressed Gary's argument that Terry did not timely petition the court for instructions once Gary made his mind up to co-own Joy Ranch, noting "Gary raced [Terry] to the Courthouse to file his petition first, and then Gary complained that he (Gary) was forced to bring the issue to the Court's attention." In the absence of the trial transcript, we assume the record supported the superior court's conclusion that Terry did not favor his children over Gary in violation of a trustee's duty of loyalty. See *Kline v. Kline*, 221 Ariz. 564, 572, ¶ 33, 212 P.2d 902, 910 (App. 2009).

2. Duty to disclose the Separate Amendment to Gary.

¶22 Gary argues Terry breached the duty of full disclosure by failing to inform him of the existence of the Separate Amendment until several months after Loretta's death. See A.R.S. § 14-10813(A) (West 2013) ("a trustee shall keep the qualified beneficiaries of the trust reasonably informed about

the administration of the trust and of the material facts necessary for them to protect their interests"). Although Gary argues Terry conceded at trial that he did not immediately inform Gary of the Separate Amendment, on appeal Gary points to no evidence that he suffered harm as a result.

¶23 Based on the evidence, the superior court found "no breach of fiduciary duty" by Terry. On the record before us, we cannot conclude the court erred.

3. Duty to disclose that Terry asked Stephen to find an Arizona broker to list Joy Ranch.

¶24 Gary argues Terry breached the duty of full disclosure by "secretly empower[ing] his son, Stephen, to take measures to sell Joy Ranch." See *id.* In September 2009, Terry asked Stephen, a Michigan-licensed real estate agent, to find an Arizona broker to list Joy Ranch for sale. Terry argues that because he never listed Joy Ranch for sale, his communication with Stephen was immaterial to Gary's rights. From the superior court's broad ruling that Terry breached no fiduciary duty, we infer the court agreed. In its findings of fact, the court noted that the for-sale sign Gary had placed on the property remained there at the relevant time. Under these circumstances, the court properly concluded that Terry's communication with Stephen did not constitute a breach of fiduciary duty.

4. Undisclosed email communications about Gary.

¶125 Gary further contends that Terry did not inform him about an email in which Christina called Gary insulting names. We cannot conclude the court erred in determining that Terry did not breach by refraining from forwarding the offending email.

5. Spending trust resources to litigate personal property issues.

¶126 Lastly, Gary argues Terry did not act prudently by incurring more than \$8,000 in attorney's fees to litigate the whereabouts of the "unwanted [] housewares" that went missing from Loretta's home. See A.R.S. § 14-10804 (West 2013) ("A trustee shall administer the trust as a prudent person would"); *Davis v. Zlatos*, 211 Ariz. 519, 527, ¶ 33, 123 P.3d 1156, 1164 (App. 2005) (a trustee shall "observe the standard in dealing with the trust assets that would be observed by a prudent man dealing with the property of another").

¶127 The superior court found that Gary was to blame for much of the litigation concerning the missing items. Substantial evidence supported the court's finding. As recited above, although Gary needed to report what Trust property he possessed so Terry could accurately account, it was Gary who initiated the litigation when he refused to fully itemize the Trust property he had taken and instead petitioned the court to order Terry to account. See A.R.S. § 14-10809 (West 2013) ("A

trustee shall take reasonable steps to take control of and protect the trust property."). Moreover, even once the litigation began, Gary continued to provide false information about what items he possessed. Terry then was forced to defend against Gary's petition to remove Terry as trustee. On the record presented, the court did not err by concluding that Terry did not breach his duty to prudently care for the trust assets.

D. Disposition of the Krugerrands.

¶28 The Separate Amendment to the Trust stated, "All-Gold K[r]uger[r]lands divided between Terry and Gary." Gary does not appeal the superior court's ruling that the Separate Amendment was valid. He argues only that the court erred in rejecting his testimony that Loretta gifted him the Krugerrands.

¶29 The court's finding that the Krugerrands were part of the Trust property is supported by substantial evidence. The court found that, "based on the totality of the evidence," Loretta "would not have provided for the distribution of the Krugerrands in the Separate Amendment" if she had already gifted them to Gary. Evidence was presented that Loretta kept the Krugerrands in Gary's safe only because they were "safer" there.

¶30 Although Gary presented conflicting evidence, we do not reweigh the evidence. *In re Estate of Newman*, 219 Ariz. at 271, ¶ 40, 196 P.3d at 874. We therefore affirm the court's

determination that the Krugerrands were to be distributed to Gary and Terry pursuant to the Separate Amendment.

E. Attorney's Fees and Costs.

¶31 Gary argues the superior court erred by awarding attorney's fees in favor of Terry, Stephen and Christina pursuant to A.R.S. § 12-341.01 because his conduct in the case was not harassing, groundless and advanced in bad faith. But the court's ruling explicitly stated that Terry, Stephen and Christina were entitled to fees not only pursuant to § 12-341.01, but also pursuant to A.R.S. §§ 14-11004, 12-349 and Rule 11. We may affirm the court's ruling if it is legally correct for any basis supported by the record. *Forszt v. Rodriguez*, 212 Ariz. 263, 265, ¶ 9, 130 P.3d 538, 540 (App. 2006).

¶32 Viewing the evidence in a manner most favorable to sustaining the court's decision, we affirm the award of attorney's fees on the basis of A.R.S. § 12-349. That statute mandates an award of fees when the lawyer or party (1) brings or defends a claim without substantial justification (defined by A.R.S. § 12-349(F) as a "claim or defense [that] is groundless and is not made in good faith"), (2) brings or defends a claim solely or primarily for delay or harassment, (3) unreasonably expands or delays the proceedings, or (4) engages in abusive discovery. A.R.S. § 12-349(A). Section 12-350 (West 2013)

requires the court to set forth "specific reasons for the award" of fees under § 12-349.

¶133 The superior court made extensive findings detailing how Gary's bad-faith conduct primarily was motivated to delay the proceedings "in order to give the real estate market time to rebound so that when [Joy Ranch] was sold, it would bring a higher price." The court also identified 15 different court filings by Gary that unnecessarily expanded the proceedings. For example, Gary petitioned for an order to show cause why Terry had not distributed Joy Ranch even though the court had frozen all of the Trust assets at Gary's request. Gary also filed a civil complaint that caused the matter to be assigned to a separate division. Additionally, Gary presented little evidence at trial supporting his claims concerning the Schedule A Amendments and Separate Amendment.

¶134 The superior court's exhaustively documented and detailed ruling is expressly supported by the factors listed in A.R.S. § 12-350, which apply to a fee award pursuant to § 12-349. The court may consider the effort a litigant makes "to determine the validity of a claim before the claim was asserted" and "to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid." A.R.S. § 12-350(1), (2). See also *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997)

("Section 12-349 was enacted with the express purpose of reducing groundless lawsuits.").

¶135 Neither can we say the court erred by finding that Gary was motivated to delay. See A.R.S. § 12-349(A)(2), (3). First, although the court did not allow him the option, Gary objected to Stephen and Christina's designated commissioner in the partition action. He then delayed contacting his own commissioner. Presumably realizing that Joy Ranch might be sold into a depressed real estate market, Gary belatedly objected to the court's order that the property be sold if the commissioners could not equitably divide it. The court noted that Gary objected to Joy Ranch being sold even though he cited in his filings the very statute requiring the court to do so if physical partition was impossible. See A.R.S. § 12-1218(A).

¶136 Moreover, Stephen and Christina consistently were amenable to resolving the Joy Ranch issue, but Gary refused to settle, only to finally agree to a settlement at the end of trial for the exact amount Stephen and Christina had offered a year prior. Gary asserts there is "no legal authority for the court to consider 'failure to settle' as a basis for" imposing attorney's fees. But one of the factors listed in A.R.S. § 12-350 is "[t]he amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court." A.R.S. § 12-350(8).

¶137 The record contains abundant support for the court's finding that "Gary used the judicial system as a gameboard to hold onto [Joy Ranch] as long as possible." See *Moreno v. Jones*, 213 Ariz. 94, 98, ¶ 20, 139 P.3d 612, 616 (2006) (court will uphold factual findings unless clearly erroneous). We therefore affirm the court's award of sanctions in the form of attorney's fees and costs in favor of Terry, Stephen and Christina.

CONCLUSION

¶138 For the reasons stated above, we affirm the superior court's rulings. Moreover, because Gary has pressed on appeal the same claims the superior court found he brought without substantial justification, and for the same reasons the superior court cited, we grant the requests by Terry, Stephen and Christina for attorney's fees on appeal pursuant to A.R.S. § 12-349(A), and their costs on appeal, subject to their compliance with Arizona Rule of Civil Appellate Procedure 21.

_____/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Presiding Judge

_____/s/_____
RANDALL M. HOWE, Judge