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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:
ARTHUR AND MARY JANE LAVERY LIVING TRUST DATED
OCTOBER 31, 1997, AS AMENDED AND RESTATED ON MAY 28, 1998.

MICHAEL A. LAVERY, as Trustee of the ARTHUR AND MARY JANE
LAVERY LIVING TRUST,
Petitioner/Appellant,

v.

MAUREEN GORMAN, individually and on behalf of Mary Jane Lavery,
Respondent/Appellee.

No. 1 CA-CV 12-0750
FILED 12-10-2013

Appeal from the Superior Court in Maricopa County
No. PB2012-001207
The Honorable Richard L. Nothwehr, *Judge Pro Tempore*

REVERSED AND REMANDED

COUNSEL

WARNER ANGLE HALLAM JACKSON & FORMANEK PLC, Phoenix
By Larry C. Schafer
Phillip B. Visnansky

Counsel for Petitioners/Appellants

Joe M. Romley, Esq., Phoenix

Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Patricia K. Norris joined.

T H U M M A, Judge:

¶1 This is an appeal from the superior court’s dismissal of a verified petition for approval of trust accounting filed by petitioner Michael Lavery as trustee of four trusts. Michael claims the court erred in granting a motion to dismiss filed by trust beneficiary Maureen Gorman, individually and on behalf of trust beneficiary Mary Jane Lavery, arguing a lack of subject matter and personal jurisdiction. Because Maureen presented no evidence to counter Michael’s verified factual showing, the order of dismissal is reversed and this matter is remanded for further proceedings.

FACTS¹ AND PROCEDURAL HISTORY

¶2 Created in 1977, the Arthur and Mary Jane Lavery Living Trust has been restated and amended several times. After Arthur died in 1998, the Trust was divided into four separate trusts. As relevant here, Michael and David Daze are co-trustees of three of the trusts while Michael and James Daze are co-trustees of the fourth trust.

¶3 No trust documents are included in the record. The parties, however, apparently do not dispute that the trusts are governed “by the laws of California” unless otherwise provided in the trust documents and “[t]he provisions of the California Probate Code relating to living trusts shall be applicable” to the trusts. It also appears undisputed that the trust

¹ In reviewing the grant of a motion to dismiss, this court accepts as true the facts alleged in the verified petition and views the facts in the light most favorable to the non-moving party. *See Rollin v. William V. Frankel & Co.*, 196 Ariz. 350, 352, ¶ 5, 996 P.2d 1254, 1256 (App. 2000) (citing *A. Uberti and C. v. Leonardo*, 181 Ariz. 565, 567, 569, 892 P.2d 1354, 1356, 1358 (1995)).

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documents do not specify the principal place of administration for the trusts.

¶4 For many years, California was the principal place of administration for the trusts. According to the verified petition, at some point prior to May 2012, Arizona became the principal place of administration for the trusts. The verified petition states Michael, David Daze and James Daze have accepted their appointment as trustees. The verified petition also states the beneficiaries have accepted distributions from the trusts, thereby submitting to the jurisdiction of Arizona courts.

¶5 Michael is a resident of Arizona. David Daze and James Daze are California residents as is beneficiary Mary Jane Lavery. Beneficiary and appellee Maureen Gorman is a Pennsylvania resident.

¶6 In May 2012, Michael filed a petition for approval of first accounting for the trusts in Arizona superior court, seeking an order “[a]pproving and settling” the first accounts for the four trusts for the period January 1, 2011 through December 31, 2011 and discharging the trustees from “any and all liability associated with transactions” during that period. In response, beneficiary Maureen Gorman (daughter of Arthur and Mary Jane Lavery and Michael’s sister) filed a motion to dismiss on her own behalf and on behalf of beneficiary Mary Jane Lavery, asserting a lack of subject matter and personal jurisdiction, and alternatively requesting the action be transferred to Ventura County California Superior Court.²

¶7 Maureen did not request an evidentiary hearing, did not seek discovery and did not submit any evidence (as opposed to legal argument) supporting her motion. From an evidentiary perspective, the only factual material properly before the superior court in addressing the motion was the verified petition and Michael’s verified response to Maureen’s motion. On this record, following full briefing and oral argument, the superior court granted Maureen’s motion to dismiss, noting:

The motion to dismiss argues that this
trust action should not be brought in Arizona.

² Maureen also objected to the petition, contesting Michael’s actions as trustee. Given the dismissal of the petition, the merits of Maureen’s objections were not addressed.

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In part, the claim is that supervision of the Trust should remain in California where the primary beneficiary resides, that the “transfer” of the Trust to Arizona was not properly made pursuant to California law, and that the Trust’s true nexus to Arizona is the Trustee’s residence.

This Court has considered the pleadings, Arizona and California law relating to trusts and the arguments of counsel. The Court finds that the proper forum, convenient to all parties, is in California and that the Trust could not be brought to Arizona unless and until compliance with California law. Under California law, a successor trustee must provide notice to all parties of the principal place of administration of the trust. In this instance, Michael Lavery was required to submit notices to beneficiaries upon his acceptance as successor trustee. He did not provide notice and therefore this Court finds that the principal place of administration is not currently in Arizona.

This court has jurisdiction over Michael’s timely appeal from this dismissal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 12-2101(A)(3)(2013).³

DISCUSSION

I. On This Record, Arizona Has Personal And Subject Matter Jurisdiction.

¶8 The resolution of this appeal implicates the factual record properly before the superior court. Maureen’s motion sought dismissal of Michael’s verified petition, claiming the court lacked personal and subject matter jurisdiction. *See* Ariz. Rs. Civ. P. 12(b)(1) and (2) (made applicable by Ariz. R. Prob. P. 3(A)). In seeking such a dismissal, Maureen could

³ Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

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have submitted affidavits and documents supported by a proper foundation, as well as deposition testimony, and could have requested an evidentiary hearing. *See, e.g., Arizona Title, L.L.C. v. Berger*, 223 Ariz. 491, 493, ¶ 8, 224 P.3d 988, 990 (App. 2010); *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 506, 744 P.2d 29, 33 (App 1987). Maureen, however, did not do any of these things. Indeed, Maureen submitted no evidence the superior court properly could consider. Instead, Maureen’s submissions were limited to pressing legal arguments and attaching a copy of a power of attorney indicating she could sue on Mary Jane Lavery’s behalf.

¶9 Maureen correctly argues that whether Arizona is the principal place of administration for the trusts is a jurisdictional issue. The verified petition, however, shows Arizona has jurisdiction over the trusts by declaring that the principal place of administration of the trusts is in Arizona, the trustees consented to Arizona jurisdiction by acceptance of their appointment as trustees of the trusts and all beneficiaries of the trusts submitted to jurisdiction in Arizona by accepting distributions from the trusts. These facts establish a prima facie showing that Arizona is the principal place of administration for the trusts and also for jurisdiction over the trusts and the beneficiaries. *See* A.R.S. §§ 14-10202(A) (jurisdiction over trustees); 14-10202(B) (jurisdiction over beneficiaries).

¶10 This factual showing shifted to Maureen the burden “to rebut the showing.” *Berger*, 223 Ariz. at 493, ¶ 8, 224 P.3d at 990. Maureen, however, submitted no evidence disputing Michael’s factual showing. Given this failure to provide any controverting evidence or request an evidentiary hearing, “[u]pon this state of the pleadings, [Michael’s] action could not properly have been dismissed for lack of personal jurisdiction.” *Gatecliff*, 154 Ariz. at 507, 744 P.2d at 34.⁴

⁴ The verified petition also alleges subject matter jurisdiction pursuant to A.R.S. § 14-10203(A), which provides that the superior court “has exclusive jurisdiction of proceedings in this state brought by a trustee or beneficiary concerning the administration of a trust.” On appeal, Maureen does not suggest that subject matter jurisdiction was lacking if the superior court had personal jurisdiction. *See Gatecliff*, 154 Ariz. at 507, 744 P.2d at 34 (citing cases).

II. Maureen Did Not Show That Forum *Non Conveniens* Applies.

¶11 Although the briefs on appeal discuss forum *non conveniens*, neither party cites any authority applying the doctrine to a case filed under the Arizona Trust Code. See A.R.S. §§ 14-10101 to -11102. Maureen correctly states that, where applicable, Arizona law imposes on a trustee a “continuing duty to administer the trust at a place appropriate to its purposes, its administration and the interests of the beneficiaries,” A.R.S. § 14-10108(B), and allows a trustee to transfer the principal place of administration, A.R.S. § 14-10108(C). Maureen’s motion, however, did not allege a breach of, or seek relief under, these Arizona statutory provisions. Moreover, Maureen has cited no California law -- which apparently governs the trusts -- setting forth comparable duties and rights.

¶12 Even if the issue of forum *non conveniens* applied to proceedings under the Arizona Trust Code,⁵ Maureen provided no evidence (as opposed to argument) that would sufficiently support application of the doctrine here. Maureen has not factually supported her claim that “California remains the principal place of administration of the” trusts, a position squarely contrary to the showing in the verified petition. Nor has Maureen cited to California law showing how that state would have jurisdiction to address a petition for approval of accounting for trusts having their principal place of administration in Arizona. *Parra v. Cont’l Tire N. Am., Inc.*, 222 Ariz. 212, 215, ¶ 9, 213 P.3d 361, 364 (App. 2009) (for forum *non conveniens* to apply, court must find, inter alia, “there is an available and adequate alternative forum to hear the case”). On this record, any factual determination that Arizona is not the principal place of administration is contrary to the prima facie factual showing in the verified petition that, as noted above, Maureen failed to rebut.

¶13 Similarly, Maureen did not factually support her arguments that “all of the witnesses, information and documents relating to Mary Jane Lavery's health care and personal financial needs are located in California. It would also be burdensome and expensive to require California residents with respect to these issues to appear in Arizona.” It is

⁵ See A.R.S. 14-10106(A) (“The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.”).

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true that a forum *non conveniens* analysis would not focus solely on Michael, but because Maureen did not factually support her arguments, there is no evidentiary record to find that, “on balance, the alternative forum is a more convenient place to litigate the case.” *Id.* at 215, ¶ 10, 213 P.3d at 364 (citations omitted).

¶14 On the limited factual record presented, it appears that the trusts are governed by California law, that any change of the principal place of administration from California to Arizona would have to comply with California law and that California law would apply to any requested approval of an accounting for the trusts. Should she chose to do so, Maureen can fully present those arguments to the superior court in addressing the merits of the petition and her objections. The fact that another state’s law may apply, however, does not require dismissal under forum *non conveniens*. See *Coonley & Coonley v. Turck*, 173 Ariz. 527, 534, 844 P.2d 1177, 1184 (App. 1993) (“It is true that Arizona courts can and often do interpret and apply the law of other states.”). In short, the factual void Maureen created when arguing her motion to dismiss or transfer also infects any reliance on forum *non conveniens*.

¶15 On the current state of the record, the order granting Maureen’s motion to dismiss cannot stand. In reversing, this court notes the limited nature of the factual record presented on appeal and that Maureen sought relief pursuant to Ariz. R. Civ. P. 12. If Maureen makes proper evidentiary submissions on remand, it may be that she will be able to make the required factual showing that Arizona is not the proper forum to resolve what may be substantial claims involving the administration of these trusts. On the current record, however, she has failed to do so.

CONCLUSION

¶16 The dismissal of the petition for approval of first accounting is reversed and this matter is remanded for further proceedings.



Ruth A. Willingham · Clerk of the Court
FILED: mjt