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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Estate of: PETER D. JONNAS, Deceased

HELEN P. KOUSOULAS, as Personal Representative of the ESTATE OF
PETER JONNAS, *Plaintiff/Appellee*,

v.

KALLIOPE J. MARINIS, an unmarried woman; and SOTIRIOS PAVLOS
MARINIS, an unmarried man, *Defendants/Appellants*.

No. 1 CA-CV 12-0801

FILED 1-7-2014

Appeal from the Superior Court in Mohave County
No. L8015PB20087072
No. L8015CV200907041
The Honorable Randolph A. Bartlett, Judge

AFFIRMED

COUNSEL

Dickinson Wright/Mariscal Weeks, PLLC, Phoenix
By Timothy J. Thomason, Michael J. Plati

Co-Counsel for Plaintiff/Appellee

DeCiancio Robbins, PLC, Tempe
By Christopher Robbins

Dana R. Stoker Attorney at Law, Lake Havasu City
By Dana R. Stoker
Co-Counsel for Defendants/Appellants

MEMORANDUM DECISION

Presiding Judge Andrew W. Gould delivered the decision of the Court, in which Judge Michael J. Brown and Judge Donn Kessler joined.

GOULD, Judge:

¶1 Kalliope J. Marinis and her son Sotirios Pavlos Marinis (collectively, "Appellants") appeal from the superior court's judgment after a bench trial finding they violated Arizona's Adult Protective Services Act¹ ("APSA"). Appellants contend the judgment is unsupported by the evidence and contrary to law. We disagree and therefore affirm.

BACKGROUND

¶2 "We view the facts in the light most favorable to supporting the trial court's judgment." *In re Estate of Pouer*, 193 Ariz. 574, 576, ¶ 2, 975 P.2d 704, 706 (1999). The trial evidence reveals the following. Mr. Jonnas was born in Greece in 1919 and moved to the United States in 1960. Helen Kousoulas, Mr. Jonnas' niece, lived in California, and she took care of him for approximately four months at her home while he recuperated from a stroke in 1994. During that time, Mr. Jonnas explained to Kousoulas that he had designated her the executor of his trust and that, should he survive his wife, his estate was to be divided among Kousoulas and two other nieces. After he returned to his home in Lake Havasu City, Kousoulas visited Mr. Jonnas a couple times annually and spoke with him weekly on the phone. She also took care of Mr. Jonnas' medical bills, and she handled his wife's funeral, before staying with him for a week thereafter.

¹ Arizona Revised Statute ("A.R.S.") sections 46-451 to -457.

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¶3 In late spring of 2000, Mr. Jonnas began looking for a full-time caregiver to live with him. In November 2001, Kalliope moved from Delaware to Lake Havasu City to live with Mr. Jonnas and serve as his caretaker.² Kalliope's caretaking responsibilities included giving Mr. Jonnas his medication, driving him on errands, feeding and bathing him, helping him with his catheter and changing his diaper. With the exception of a nurse who visited him after he suffered a heart attack in 2006, Kalliope was Mr. Jonnas' sole caretaker, and she took care of him until he died from pneumonia on September 10, 2008. Kalliope testified that Mr. Jonnas could not have lived by himself during the time she was his caretaker. Consistent with her expectations, Kalliope was not paid for her caretaking services because she "had [her] own money." Kalliope's adult son, Sotirios, would periodically travel from Delaware to Lake Havasu City to visit his mother and Mr. Jonnas.³

¶4 MW became Mr. Jonnas' accountant "somewhere around 2002" and assisted him with amending his revocable trust several times between 2006 to 2008.⁴ Sotirios and Kalliope would drive Mr. Jonnas to MW's workplace, but stayed in the lobby and did not accompany Mr. Jonnas into MW's office where the amendments were made.⁵ An

² The circumstances of how Kalliope and Mr. Jonnas initially became acquainted -- and the nature of their subsequent relationship -- are not clear from the record. Mr. Jonnas and Kalliope's husband had "talk[ed] together" before the latter's death in 1988. Kalliope testified that, before she moved to Arizona, she never personally met Mr. Jonnas; she had only communicated with him by letter and phone. She also testified, however, that she stayed with Mr. Jonnas at his house in 1999 for one week during a visit to Lake Havasu City.

³ Regarding Sotirios' relationship to Mr. Jonnas, the former testified, "[Mr. Jonnas] took me on [and] adopted me as a son [because] he loves my mother."

⁴ Mr. Jonnas executed a total of four trust amendments affecting Appellants, including the last amendment in 2008.

⁵ On at least one occasion, however, Sotirios was with Mr. Jonnas in MW's office in 2008 a few months before Mr. Jonnas died. At that meeting, MW explained the procedures for transferring property to Mr. Jonnas' trust.

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amendment dated June 14, 2006 replaced the original three beneficiaries with Kalliope and designated Sotirios as the secondary beneficiary.⁶ This amendment also named Appellants as successor trustees. At some point, MW prepared a power of attorney for Mr. Jonnas authorizing Kalliope as his agent.

¶5 During the time Kalliope lived with Mr. Jonnas, he experienced severe health problems. For example, in 2004 he suffered from prostatitis, leg pain, arthritis, sinus infections, diabetes and diminished kidney function. He complained that he could not walk and had difficulty breathing. When Kalliope accompanied Mr. Jonnas on his doctor and hospital visits, she was represented to be his niece or wife.⁷ And despite requests from Kousoulas that Kalliope contact her when Mr. Jonnas “needed hospital, if he is sick, or if he needed anything[,]” Kalliope did not call Kousoulas when Mr. Jonnas suffered a heart attack and was hospitalized for six days in April 2006. Kalliope explained she did not call because she “was a busy woman [and] . . . didn’t want to be a gossip woman.”

¶6 From the time of the 2006 hospitalization forward, Kousoulas’ “access to [Mr. Jonnas] was restricted.” Mr. Jonnas feared Kousoulas and her husband were “trying to send Kalliope away[.]” Referring to herself and other relatives of Mr. Jonnas living in California, Kousoulas testified that Appellants “alienated [Mr. Jonnas] from all of us.”

¶7 On June 17, 2008, Kalliope and Sotirios accompanied Mr. Jonnas to his bank where he withdrew \$200,000 from his checking/savings account and established two time deposit accounts, one in Appellants’ names and the other belonging to Mr. Jonnas and Sotirios. That same day, Mr. Jonnas divided the withdrawn funds equally, depositing \$100,000 into each time deposit account. Kalliope did not suggest to Mr. Jonnas that he seek legal advice regarding these gifts, which were apparently made “for estate tax purposes.” On August 14, 2008, approximately one month before Mr. Jonnas died, Kalliope

⁶ Mr. Jonnas’ wife died in 1999, leaving the three nieces as the beneficiaries pursuant to the terms of the declaration of trust dated March 12, 1992.

⁷ Kalliope is listed as the “informant” and Mr. Jonnas’ niece on his death certificate.

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liquidated her time deposit account and used the funds to purchase real property in Delaware. The property was titled in Kalliope's name, and she sold it for \$141,000 in November 2008. Kalliope testified that Mr. Jonnas instructed her to purchase the property. Sotirios, who has an M.B.A. degree from Thunderbird School of International Management, "advised [Kalliope] on that purchase . . . to see if it was a good investment or not."⁸ Kalliope kept the money from the sale of the Delaware property, and never transferred it to Mr. Jonnas or his estate.

¶8 After Mr. Jonnas died and pursuant to the terms of his most recent (2008) trust amendment, Kalliope liquidated all of his accounts and put the funds "in [her] name." She also received approximately 2,560 shares of Exxon Mobil stock and Mr. Jonnas' furniture, home and two adjacent vacant lots.⁹

¶9 On April 1, 2009, Kousoulas filed suit in superior court alleging Appellants violated APSA because Mr. Jonnas "was a vulnerable adult who was manipulated into gifting the vast bulk of his estate solely to [Appellants]."¹⁰ In addition to statutory damages, Kousoulas sought declaratory relief that the trust amendments naming Appellants beneficiaries and successor trustees were invalid, and an order that Appellants forfeit the assets of Mr. Jonnas' estate. After a two-day bench trial, the court orally pronounced its findings and conclusions of law; specifically, the court found that pursuant to APSA, Kousoulas proved by a preponderance of evidence that Kalliope was in a position of trust and confidence relative to Mr. Jonnas who was a vulnerable adult. The court also found "that whatever transfers occurred from the decedent to either or both of the [Appellants] did not benefit Mr. Jonnas." Finally, although the court did not award Kousoulas damages, the court granted Kousoulas the remaining relief she requested pursuant to APSA. Appellants unsuccessfully moved for reconsideration, the court entered judgment on

⁸ Sotirios' sister was the real estate broker who earned a commission from the property's sale.

⁹ The remainder of Mr. Jonnas' securities was distributed to Sotirios and three individuals living in Greece.

¹⁰ The APSA lawsuit, filed as Mohave County Superior Court Case No. CV 2009-07041, was eventually consolidated with the pending probate action, Mohave County Superior Court Case No. PB 2008-7072.

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October 17, 2012, and Appellants appealed. We have jurisdiction pursuant to Arizona Revised Statutes section 12-2101(A)(1) (West 2013).¹¹

DISCUSSION

I. APSA

¶10 The Arizona legislature passed APSA in 1988 to protect incapacitated and vulnerable adults from neglect, abuse or exploitation. *In re Estate of Winn*, 214 Ariz. 149, 150, ¶ 5, 150 P.3d 236, 237 (2007); *Davis v. Zlatos*, 211 Ariz. 519, 524, ¶ 19, 123 P.3d 1156, 1161 (App. 2005); *see* A.R.S. §§ 46-455(A), -456(A) (2005).¹² A person who exploits a vulnerable adult in violation of APSA is subject to criminal and civil liability. A.R.S. § 46-456(B), (C). “We construe such remedial statutes broadly to effectuate the legislature’s purpose in enacting them.” *In re Estate of Winn*, 214 Ariz. at 150, ¶ 5, 150 P.3d at 237.

¶11 Pursuant to the version of APSA in effect in 2008, “[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 pursuant to [A.R.S. § 14-7301 et seq.]” A.R.S. § 46-456(A); *see Zlatos*, 211 Ariz. at 527, ¶ 32, 123 P.3d at 1158. 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.” *Id.* at 527, ¶ 33 (quoting A.R.S. § 14-7302 (Supp. 2004)). A trustee has a duty to act “with undivided loyalty to the trustor.” *Id.* (quoting *Shetter v. Rochelle*, 2 Ariz. 358, 366, 409 P.2d 74, 82 (App. 1965), *modified by Shetter v. Rochelle*, 2 Ariz. 607, 411 P.2d 45 (App. 1966)). Self-dealing may occur when “a trustee, acting for himself and also as trustee, seeks to consummate a deal where self interest is opposed to duty.” *Seven G. Ranching Co. v. Stewart Title & Trust of Tucson*, 128 Ariz. 590, 592, 627 P.2d 1088, 1090 (App. 1981). Additionally, “a trustee who accepts money from a vulnerable adult must

¹¹ Unless otherwise noted, we refer to a statute’s current version.

¹² The legislature substantially amended A.R.S. § 46-456 in 2009. *See* 2009 Ariz. Sess. Laws, ch. 19, § 9 (1st Reg. Sess.). Further, the trust provisions referenced in that statute, namely A.R.S. §§ 14-7201 et seq., were repealed effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 247, § 15 (2d Reg. Sess.). Although the current amendments do not affect or change our decision in this case, we cite to the version in effect at the time the alleged violations of the statute occurred.

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be prepared to explain how the vulnerable adult benefited from the transfer.” *Davis v. Zlatos*, 211 Ariz. 519, 528, 123 P.3d 1156, 1165 (App. 2005).

¶12 As relevant here, “[v]ulnerable adult” means an individual who is eighteen years of age or older and who is unable to protect himself from . . . exploitation by others because of a physical *or* mental impairment.” A.R.S. § 46-451(A)(9) (emphasis added). “Exploitation” means the illegal or improper use of a vulnerable adult or his resources for another’s profit or advantage.” A.R.S. § 46-451(A)(4).

¶13 A trial court has wide discretion under APSA in fashioning an appropriate remedy for violations of § 46-456(A). *See* A.R.S. § 46-455(O) (remedies for breach of caretaker’s duty owed to vulnerable adult “not limited by any other civil remedy . . . or any other provision of law. Civil remedies provided under this title are supplemental and not mutually exclusive.”); *see also Estate of McGill v. Albrecht*, 203 Ariz. 525, 528, ¶ 6, 57 P.3d 384, 387 (2002) (“We continue to believe it clear from the text of the [APSA], the conditions prevalent in this state, and the sparse legislative history¹¹ that the [APSA] was intended to increase the remedies available to and for elderly people who had been harmed by their caregivers.”). For example, the court has authority, after a hearing or trial, to “remedy” a caretaker’s breach of his or her fiduciary duties owed to a vulnerable adult “by issuing appropriate orders.” *See* A.R.S. § 46-455(F); *see also* A.R.S. § 46-455(H). Thus, a person found in violation of § 46-456(A) (exploitation of vulnerable adult) “forfeits all benefits with respect to the estate of the deceased, incapacitated or vulnerable adult[.]”¹² A.R.S. § 46-456(D).

¶14 Appellants argue that no evidence supports the trial court’s determination that they unduly influenced¹⁴ Mr. Jonnas to change his trust for their benefit, or that they were in a confidential or fiduciary

¹³ Appellants’ reliance on *In re Harber’s Estate*, 102 Ariz. 285, 290, 428 P.2d 662, 667 (1967) does not affect the statutory discretion afforded trial courts in remediating APSA violations because that case was decided before the legislature enacted the APSA.

¹⁴ Although there is some overlap between Kousoulas’ probate action and her APSA claim, because, in our view, the APSA claim is dispositive, we do not reach the issues raised on appeal regarding the probate action.

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relationship with Mr. Jonnas to permit the court to invalidate the trust amendments. They also challenge the court's finding that they could be liable under APSA.¹⁵

¶15 We will not set aside the superior court's findings of fact unless they are "clearly erroneous, giving due regard to the opportunity of the court to judge the credibility of witnesses." *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 supports it, even if substantial conflicting evidence exists." *Kocher v. Dep't of Revenue*, 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003). We review the court's legal conclusions *de novo*. *In re Estate of Travers*, 192 Ariz. 333, 334, ¶ 11, 965 P.2d 67, 68 (App. 1998).

II. Fiduciary or Confidential Relationship

¶16 We initially note Appellants have waived any argument challenging the court's finding that Kalliope was Mr. Jonnas' caregiver and in a position of trust as to him. Appellants affirmatively stated in their motion for reconsideration that they "have no argument with that determination." They further admitted that a "caretaker" is within the definition of "a person in a position of trust and confidence" as provided in A.R.S. § 46-456. Therefore, the issue of whether Kalliope is subject to

¹⁵ We reject Kousoulas' assertion that Appellants' failure to move for judgment as a matter of law precludes our review of the sufficiency of evidence. Nothing in Rule 50, Arizona Rules of Civil Procedure, requires a party in a bench trial to move for judgment as a matter of law in order to preserve sufficiency of evidence claims for appellate review. Indeed, that rule explicitly applies to jury trials. Further, Kousoulas misplaces her reliance on *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 96 P.3d 530, (App. 2004). That case dealt with a party's failure to move for judgment as a matter of law on an issue that the trial court had previously determined was not subject to the party's motion for summary judgment because material factual issues existed. *John C. Lincoln Hosp.*, 208 Ariz. at 538-39, ¶ 18, 96 P.3d at 536-37. This court held that, under those circumstances, the party waived its right to appeal the sufficiency argument on appeal. *Id.* at 538-40, ¶¶ 18-21. This case was a bench trial, and Kousoulas does not point to a summary judgment motion that unsuccessfully raised these sufficiency of evidence arguments before trial.

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APSA by virtue of her caretaker status vis-à-vis Mr. Jonnas is not before us on appeal. *See Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535, ¶ 18, 169 P.3d 120, 125 (App. 2007) (“Generally, arguments raised for the first time on appeal are untimely and deemed waived.”); *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 109-10, ¶ 17, 158 P.3d 232, 238-39 (App. 2007) (party waives argument raised for first time on appeal when the superior court had no opportunity to address the issue on its merits).¹⁶

III. Vulnerable Adult

¶17 Appellants contend Mr. Jonnas was not a vulnerable adult for the purposes of APSA “because every witness with personal knowledge testified that he was mentally competent to protect himself from financial exploitation.” We conclude otherwise; the trial evidence substantially supports the court’s determination that Mr. Jonnas was a vulnerable adult.

¶18 Although Appellants presented testimony of Mr. Jonnas’ sound mind generally during the time Kalliope took care of him, and specifically when MW amended the trust, the record also reflects that Mr. Jonnas’ doctor considered him “very passive . . . and easily would follow suggestions. . . . As to signing any legal papers, if [Mr. Jonnas] was told to sign, he probably would have whether it was a legal document or not.” Kousoulas also testified that, after Mr. Jonnas had a stroke in 1994, he became forgetful and “very susceptible to women . . . easy to be taken advantage from telemarketers.” In weighing this conflicting evidence, the court could properly discount the probative value of the ‘sound mind’ evidence that consisted of testimony from Kalliope, Sotirios, MW and Mr. Jonnas’ personal bankers, all of whom have an interest in Mr. Jonnas’ soundness of mind. Further, the bankers’ opinions were based on limited interactions with Mr. Jonnas. As the trial court noted, “[a]n individual can still act in a fashion that somebody observing an individual would not have any idea what the medical conditions and physical conditions of the individual [are].” It is the trial court’s function, not this court’s, to make credibility determinations and weigh the evidence. *Imperial Litho/Graphics*

¹⁶ Even if not waived, we would affirm this issue on the merits. *See* A.R.S. § 46-456(J)(5)(a) (being in a ‘position of trust and confidence’ means that a person has assumed a duty to provide care to the incapacitated or vulnerable adult). Kalliope clearly assumed a duty to provide care to Mr. Jonnas.

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v. M.J. Enterprises, 152 Ariz. 68, 72, 730 P.2d 245, 249 (App. 1986). Thus, substantial evidence of Mr. Jonnas' mental impairment exists to support a finding he was a vulnerable adult under the APSA.

¶19 In any event, Mr. Jonnas' mental facility was not the central factor underlying his vulnerable adult status. Rather, Mr. Jonnas' physical impairment, *supra* ¶¶ 3-5, and resulting dependence on Kalliope¹⁷ deemed him a vulnerable adult for purposes of APSA. *See A.R.S. § 46-451(A)(9)* (physical *or* mental impairment can result in an adult being deemed vulnerable under APSA). Therefore, Mr. Jonnas' physical impairment is supported by the evidence as an additional basis for finding him a vulnerable adult. We find no error in the court's determination that Mr. Jonnas was a vulnerable adult.

IV. Financial Exploitation

¶20 Appellants also contend no evidence supports the court's findings that they financially exploited Mr. Jonnas by using Mr. Jonnas' funds for their own use. They also assert no financial exploitation occurred because Mr. Jonnas used his independent accountant and bankers for disposition of his assets.

¶21 We disagree. Appellants do not explain how the \$200,000 that was transferred to them benefitted Mr. Jonnas. Indeed, the evidence shows Kalliope used half of that money to purchase Delaware real estate in her name, and she received the proceeds when that property was subsequently sold at a substantial profit. She therefore used the funds received from Mr. Jonnas for her own benefit in violation of § 46-456(A).¹⁸

¹⁷ Kalliope testified that Mr. Jonnas could not have lived by himself during the time she was his caretaker. For this reason, we are not persuaded by Appellants' attempt to distinguish *Zlatos*, 211 Ariz. at 525-26, ¶¶ 25-27, 123 P.3d at 1162-63.

¹⁸ Appellants inferentially contend that, regardless of Kalliope's culpability, no evidence supports a finding that Sotirios exploited Mr. Jonnas. We disagree. The evidence establishes that Sotirios was present at the bank when \$200,000 of Mr. Jonnas' money was given to Appellants, and Sotirios – who is knowledgeable about business matters and estate planning -- advised his mother, and possibly Mr. Jonnas, on using some of those funds to purchase the property in Delaware, and he discussed the investment opportunity with his sister, a real estate broker. This evidence

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Further, we are not persuaded that a transaction is rendered non-exploitative under APSA merely because a vulnerable adult relies on “independent” professionals to administratively effectuate the transaction. There is no evidence in the record that Mr. Jonnas’ accountant or bankers advised him that the \$200,000 “gift” to Appellants was potentially exploitive and Mr. Jonnas nonetheless proceeded with the transaction. Accordingly, on this record, we cannot conclude the court’s finding that Appellants exploited Mr. Jonnas is unsupported by the evidence.

CONCLUSION

¶22 The judgment is affirmed. Kousoulas requests her attorneys’ fees incurred on appeal pursuant to A.R.S. § 46-455(H) (4). *See* A.R.S. § 46-456(B). We grant this request subject to her compliance with ARCAP 21 and the filing of a fee application.



Ruth A. Willingham - Clerk of the Court
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establishes that Sotirios participated in Kalliope’s exploitation of Mr. Jonnas. Whether Sotirios personally benefitted from the transaction is not pertinent to a finding he exploited Mr. Jonnas, Kalliope’s benefit is sufficient. *See* A.R.S. § 46-451(A)(4).