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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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In the Matter of the Estate of:

ROBERT C. ODE, *Deceased*.

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CHRIS ODE, et al., *Petitioners/Appellants*,

*v.*

TRUSTEE ARIZONA BANK & TRUST, et al., *Respondents/Appellees*.

No. 1 CA-CV 18-0057  
FILED 10-25-2018

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Appeal from the Superior Court in Maricopa County  
No. PB2016-001714  
The Honorable Thomas Marquoit, Judge *Pro Tempore*

**AFFIRMED**

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COUNSEL

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*Counsel for Petitioners/Appellants*

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By Jeffrey Messing  
*Counsel for Respondent/Appellees St. Jude's Children's Research Hospital, et al.*

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## MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Michael J. Brown joined.

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**M O R S E**, Judge:

¶1 Petitioners/ Appellants Chris Ode, Stephen Ode, David Ode, and Norman Keon (collectively, "the Nephews") appeal from the superior court's order dismissing their petition for confirmation of gifts. For the following reasons, we affirm.

## FACTS AND PROCEDURAL HISTORY

¶2 Robert Ode was held as a hostage at the United States Embassy in Tehran, Iran for 444 days during the Iran hostage crisis in 1979-1981. He died in 1995, and his Last Will and Testament dated August 30, 1990 ("Robert's Will") stated that his personal possessions should go to his wife, Rita Ode, and the remainder of his assets to the trust created by the Robert C. Ode and Rita M. Ode Trust Agreement dated August 30, 1990 ("the Ode Trust"). Rita amended the Ode Trust in 2011 and directed that upon her death, the trustee should pay certain taxes, funeral expenses, and debts from the principal of the trust estate and then distribute the balance of the estate in equal portions to eight charitable organizations.

¶3 Before Rita died in 2012, she gave certain personal possessions related to the Iran hostage crisis to the Nephews (the "Hostage-Related Property"). After Rita's death, the United States Congress passed the "Justice for United States Victims of State Sponsored Terrorism Act," 34

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U.S.C. § 20144 (the "Act")<sup>1</sup>, which established a fund to provide compensation to victims of state-sponsored terrorism, their spouses, and their children. 34 U.S.C. § 20144(c) & (e). The Act provides that the fund shall pay compensation to eligible persons "or, if that person is deceased, to the personal representative of the estate of that person." 34 U.S.C. § 20144(d)(1).

¶4 In 2016, one of the Nephews, Norman Keon, asked the superior court to appoint him personal representative of Robert's estate. Keon, apparently unaware of Robert's Will, avowed that he did not know of any will left by Robert, and that his appointment as personal representative was necessary to comply with a federal statute. The court granted the application and appointed Keon personal representative of Robert's estate.

¶5 Keon filed a claim under the Act on behalf of Robert's estate. Thereafter, the Nephews filed the petition for confirmation of gifts, asking the superior court to confirm that Rita's gift to the Nephews of the Hostage-Related Property included all amounts payable under the Act. They plead that Robert "apparently gifted or devised his entire Estate to Rita," and alleged that because Rita had gifted the Nephews the Hostage-Related Property, she had also intended to give them any subsequent compensation awarded as a result of Robert's captivity.

¶6 The charitable organizations that were the beneficiaries of the Ode Trust objected to the petition and alleged that Robert had devised his estate not to Rita, but to the Ode Trust. The trustee of the Ode Trust, Arizona Bank and Trust, submitted Robert's Will to the court and filed a petition for formal probate of the will, removal of Keon as personal representative of Robert's estate, and appointment of Arizona Bank & Trust ("Arizona Bank") as successor personal representative. Arizona Bank's petition was unopposed, and the superior court removed Keon as personal representative, appointed Arizona Bank as successor personal representative, and admitted Robert's Will to probate.

¶7 Arizona Bank then filed a motion to dismiss the Nephews' petition for confirmation of gifts, arguing that Rita had not made a valid inter vivos gift to the Nephews and the court could not enforce her alleged testamentary disposition because it was unwritten and contradicted the Odes' written testamentary dispositions. It also challenged the Nephews'

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<sup>1</sup> Congress renumbered the Act in 2017. See 42 U.S.C. § 10609. We cite the current version.

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assertion that Rita had intended to give them everything she owned that related to Robert's captivity in Iran, and asserted that the Nephews' claims were untimely and prohibited by the Act.

¶8 The Nephews responded that the court was required to assume the truth of their allegations that Rita intended to give them any compensation related to the Iran hostage crisis. They asserted that the evidence showed that Rita gave them a constructive gift of all hostage-related assets and argued Rita could not have made a traditional inter vivos gift of the Act's compensation to the Nephews because the compensation did not exist before her death. They claimed Rita constructively delivered the gift of the compensation by giving them the Hostage-Related Property. They also argued that the gift did not violate Robert and Rita's testamentary instruments because those documents did not address the compensation received under the Act, their claim was not untimely, and it would be inequitable to allow the compensation to go to the Ode Trust beneficiaries because Congress established the Act to benefit terrorism victims, not charitable organizations.

¶9 The superior court granted the motion to dismiss, which it treated as a motion for summary judgment. *See* Ariz. R. Civ. P. 12(d). It ruled that Rita could not have validly gifted the Act's compensation to the Nephews because it did not exist at the time of her death. The court also found the right to compensation under the Act was not assignable and rejected the Nephews' equitable arguments.

¶10 The Nephews timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(9).

### DISCUSSION

¶11 The Nephews argue the superior court erred by dismissing their petition because Rita intended to give all hostage-related assets to them.

¶12 The superior court shall grant summary judgment "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We review the court's ruling *de novo*, viewing all facts and reasonable inferences in favor of the non-moving party. *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 311-12, ¶¶ 2, 10 (2017).

¶13 The Nephews argue the superior court was required to assume Rita intended to give all hostage-related assets to the Nephews and

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it therefore should have denied the motion to dismiss because that intent, along with her gift of the Hostage-Related Property, created a genuine issue of material fact about whether Rita constructively gave the Act's compensation to the Nephews.

¶14 As the superior court recognized, however, even assuming the Nephews' allegations regarding Rita's intent are true, their claims still fail as a matter of law because Rita was legally unable to give the Nephews something that did not yet exist—compensation under the Act. *See Bourne v. Lord*, 19 Ariz. App. 228, 232 (App. 1973) ("In order for there to be an executed gift, there must be property *In esse* which is the subject matter of the gift."); *see also* Restatement (Third) of Property (Wills & Don. Trans.) ("Restatement") § 6.1 (2003), cmt. f ("The donor cannot make a present transfer of property that the donor does not own or that does not exist."). Because Rita died in 2012 and the Act did not grant compensation for Robert's captivity until 2016, Rita could not have gifted the compensation to the Nephews.

¶15 Nevertheless, the Nephews argue Rita made a constructive gift of the Act's compensation because the delivery of the Hostage-Related Property was a "symbolic" delivery of all present and future hostage-related assets. They cite *Hebrew University Association v. Nye*, 223 A.2d 397, 399-400 (Conn. Super. Ct. 1966), in which the Connecticut Superior Court held that a decedent had made an effective gift of her library collection to the university, even though she was not able to deliver the items before her death, because she had declared her intent to make the gift and given the university a list of the gifted items. We find this authority unpersuasive, however, as the library collection at issue in *Hebrew University* was in existence at the time the decedent made the alleged constructive gift, unlike the compensation that is the subject of this dispute. The Nephews do not cite any authority holding that a person can effectively make a constructive gift of property that does not yet exist.

¶16 Moreover, because Rita never owned or controlled the compensation, she would not have been able to give it to the Nephews even if it had existed during her lifetime. *See Bourne*, 19 Ariz. App. at 232. The Act provides that because Robert is deceased his compensation must be paid to his estate. 34 U.S.C. § 20144(d)(1). Robert's Will bequeathed to Rita only his personal possessions and effects; he gave the balance of his estate to the Ode Trust. Accordingly, any compensation paid under the Act passed directly to the Ode Trust, and Rita never owned or controlled it. It was therefore never hers to give to the Nephews.

## CONCLUSION

¶17 For the foregoing reasons, we affirm.

¶18 Arizona Bank requests attorneys' fees and costs on appeal pursuant to A.R.S. §§ 14-1105(A) and -11004(B). Section 14-1105(A) authorizes an award of attorneys' fees and expenses to an estate when an opposing party has engaged in "unreasonable conduct." Section 14-11004(B) provides that a court "may order that a party's reasonable fees, expenses and disbursements . . . be paid by any other party . . . that is the subject of the judicial proceeding." In our discretion under A.R.S. § 14-11004(B), we grant Arizona Bank's request for attorneys' fees and costs, against the Nephews and not the Ode Trust, upon its compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court  
FILED: AA