IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of the Estate of:

RICHARD HOLBROOK ELLINGWOOD, JR., Deceased.

RICHARD HOLBROOK ELLINGWOOD, et al., *Petitioners/Appellants*,

v.

LINDA DIANE ELLINGWOOD, et al., *Respondents/Appellees*.

LINDA DIANE ELLINGWOOD, *Respondent/Appellee*.

No. 1 CA-CV 20-0644
FILED 9-30-2021

Appeal from the Superior Court in Maricopa County
No. CV2020-052535
No. PB2020-001635
No. PB2020-001671
The Honorable Thomas L. Marquoit, Judge *Pro Tempore*

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Cynthia J. Bailey and Judge Maria Elena Cruz joined.

P E R K I N S, Judge:

¶1 Richard, John, and Katherine Ellingwood ("Children") challenge the superior court's dismissal of (1) their petition to partially invalidate the terms of the Ellingwood Family Trust ("Trust") and to seek approval of a creditor claim against the Trust, and (2) their amended complaint, which asserts claims against Linda Ellingwood and Stacey Johnson (collectively "Trustees"). We affirm the dismissal of the Children's constructive fraud and conversion claims, vacate the remainder of the judgment, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 We take as true the facts set forth in the Children's petition and amended complaint. *See Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, 513, ¶ 3 n.1 (2021). The Children's parents, Richard Ellingwood Jr. ("Dick") and Frances Fairchild, divorced in 1983. The couple held a community interest in Soft Water Co., which they believed would provide future income through its business and several properties. Dick and Fairchild entered a property settlement agreement ("PSA") that included the following term:

> In the event that [Dick] should remarry subsequent to the entry of a Decree of

> Dissolution entered pursuant to this Property Settlement Agreement, then and in that event, [Dick] shall by Will, Trust, or other instrument direct that upon his death no less than fifty (50%) of his estate be willed or transferred equally to the children of the marriage between [Dick and Fairchild].

¶3 Dick married Linda in 1987. Ten years later, Dick sold Soft Water's business accounts and changed its name to D&L Futures, Inc. ("D&L"). D&L continued to hold the properties previously controlled by Soft Water. Dick owned D&L as his sole and separate property until 2003. He then began transferring his ownership rights to Linda and to a Trust, he and Linda created in 2008. The Trust expressly excludes the Children as beneficiaries.

¶4 Dick executed a will in January 2009, devising "a sum equal to one-half (1/2) the value of my total taxable estate, as that term is used for federal estate tax purposes, at the time of my death" to the Children and the residue to the Trust. The Trust wholly owned D&L by 2018 and Dick died in 2019.

¶5 The Children filed three lawsuits in April 2020, including: (1) a complaint alleging breach of contract, violation of the dissolution decree, and breach of the implied covenant of good faith and fair dealing; (2) a petition seeking partial invalidation of the Trust and approval of a creditor claim against the Trust ("Petition to Invalidate"); and (3) a petition for appointment of a special administrator for Dick's estate to accept service on the estate's behalf ("Petition to Appoint").

¶6 The Children alleged Dick "transferred almost the entirety of his . . . property to Linda and the . . . Trust" shortly before his death. They also claimed he "titled or created pay-on-death beneficiary designations" on other assets "such that the assets transferred to Linda or the . . . Trust immediately upon his death." Linda then allegedly sold the D&L-owned properties, netting $1.73 million for the Trust. The Children amended their complaint ("Amended Complaint") to add fraudulent transfer, constructive fraud, aiding and abetting, conversion, and "invalidation of post-nuptial agreement" claims against the Trustees.

¶7 The superior court consolidated the three cases and the Trustees moved to dismiss the Petition to Invalidate and the Amended Complaint. The Trustees contended: (1) the Will satisfied Dick's PSA

obligations; (2) the PSA "contain[ed] no terms limiting [him] from exercising all rights over his property;" and (3) the PSA allowed Dick to "deal in his property 'without claim or hindrance.'" The court granted the Trustee's dismissal motions. The court also stated it would award the Trustees attorneys' fees under A.R.S. §§ 12-341.01(A) and 14-11004(B), but it did not finalize an award.

¶8 The Children filed a premature notice of appeal. The superior court then entered a final judgment, formally dismissing the Petition to Invalidate and Amended Complaint, but again deferring any attorneys' fee award to "a later date." We reinstated the Children's appeal and have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶9 We review Rule 12(b)(6) dismissals *de novo*, considering all well-pleaded allegations and any attached exhibits. *See Shepherd*, 250 Ariz. at 513, ¶ 11; *see also Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012). We will affirm dismissal only if the Children would not be entitled to relief under any interpretation of the facts susceptible of proof. *See Bottomlee v. State*, 248 Ariz. 231, 233, ¶ 7 (App. 2020) (cleaned up).

I. Extrinsic Evidence

¶10 It is undisputed that the PSA is a valid contract to make a will under A.R.S. § 14-2514(A). But the Children challenge the superior court's conclusions that it could not "interpret the decree of dissolution beyond the specific words written on it" and that the Children could not "rely upon any evidence beyond the actual contract." We review the court's interpretation of the PSA *de novo*. *See Dunn v. FastMed Urgent Care PC*, 245 Ariz. 35, 38, ¶ 10 (App. 2018).

¶11 Contracts to make a will and property settlement agreements are controlled by the same rules and principles as other contracts. *Minderman v. Perry*, 103 Ariz. 91, 93 (1968); *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21 (App. 2005). Our goal is to discern and enforce the parties' intent, which we do by considering the plain meaning of the words in the context of the entire agreement. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9 (App. 2009). If the terms are clear and unambiguous, we must give effect to them as written. *Town of Marana v. Pima County*, 230 Ariz. 142, 147, ¶ 21 (App. 2012). But the court may admit extrinsic evidence if the terms are reasonably susceptible to more than one meaning. *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 291, ¶ 15 (App. 2010).

¶12 The superior court relied on *In re Est. of Moore*, 137 Ariz. 176 (App. 1983), for the proposition that "[a] memorandum . . . must state the terms and conditions of all the promises constituting the contract and any deficiency in this regard cannot be supplied by parol evidence." The married couple in *Moore* signed a letter describing their testamentary desires and then tasked one of the husband's sons with preparing mutual wills. *Id.* at 177. The wills devised half of each spouse's estate to his or her own children and half to the other spouse's children. *Id.* After the wife died, the husband executed a new will revoking all prior wills and leaving his entire estate to his children. *Id.*

¶13 The trial court in *Moore* determined that the signed letter constituted a valid agreement not to revoke the earlier wills. *Id.* at 177–78. We held that the predecessor to § 14-2514(A) "supplements the common-law rule that a contract to make a will must be clearly proved and certain and unambiguous in all of its terms," but we also noted the letter's silence as to revocability. *Id.* at 179. We therefore concluded that the letter "show[ed] an agreement to execute mutual wills" but not "an agreement to execute *irrevocable* mutual wills." *Id.* (emphasis in original). This case is not about whether the PSA formed an enforceable agreement or whether there are missing terms; the parties instead dispute the proper interpretation of the written terms. *Moore* is therefore inapplicable.

¶14 The Trustees also cite *Gonzalez v. Satrustegui*, 178 Ariz. 92 (App. 1993), *superseded by statute on other grounds as stated in In re Estate of Jung*, 210 Ariz. 202, 205–06, ¶¶ 17–22 (App. 2005). In *Gonzalez*, we held that the predecessor to § 14-2514(A) barred the court from considering a surviving testator's testimony in determining whether the parties formed a contract to create a will. *Id.* at 100. Again, the parties do not dispute that Dick and Fairchild made an enforceable agreement obligating Dick to devise at least half of his "estate" to the Children should he remarry. The parties instead dispute what constitutes Dick's "estate," which the PSA leaves undefined.

¶15 The Children argue we should broadly construe the term "estate" because "the intention of the [PSA] and the parties thereto was to not limit the word 'estate' to only those assets subject to affect by Will." And the PSA therefore "required [Dick] to transfer no less than 50% of all assets owned at death (not just assets subject to his probate estate)." They also contend the PSA reaches beyond Dick's probate estate because it obligated him to devise the one-half interest "by Will, Trust, or other instrument." Trustees conceded that "the concept of the estate here means all of the assets in which [Dick] had an interest at the time of his death." But they also

contended that any assets Dick did not *possess* when he died, which allegedly included D&L and any D&L-owned properties, are not part of the "estate."

¶16 The PSA's plain language does not resolve whether Dick's "estate" includes those assets he held an interest in at his death or only those he possessed at his death. Because neither the Trustees, nor the parties can settle on the meaning of "estate," it is reasonably susceptible to both interpretations. The superior court thus erred in concluding it could not consider extrinsic evidence to discern Dick and Fairchild's intent. *See Long v. City of Glendale*, 208 Ariz. 319, 328, ¶ 31 (App. 2004); *see also Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154 (1993) (if the contract language is reasonably susceptible to the proponent's interpretation, then extrinsic evidence is admissible to determine the parties' intent).

II. The PSA's Post-Separation Property Provision

¶17 The Trustees also contend dismissal was appropriate based on the PSA's post-separation property provision:

> It is agreed . . . that from and after the date of separation, being September 1, 1979, all property acquired by either [Dick or Fairchild] shall be his or her separate property and estate, and the other party shall have no interest therein, as if they have never been married. Heretofore each party may deal in and acquire property of any kind, nature and description, and may work and earn wages, without claim or hindrance of the other, as though never married.

This provision bars Fairchild, not the Children, from asserting a claim to any property Dick acquired post-separation. It therefore does not bar the Children's current claims.

¶18 The Trustees nonetheless contend this case is like *In re Est. of Beauchamp*, 115 Ariz. 219 (App. 1977). But the property settlement agreement in that case gave each spouse an immediate right to transfer or dispose of "such party's interest in all property belonging to such party after the date hereof" for "all future acquisitions of property by such party" and "all property acquired by said party pursuant to this Agreement." *Id.* at 220. The PSA only granted Dick and Fairchild the right to "deal in and

acquire property" and "work and earn wages[] *without claim or hindrance of the other*" following separation. *Beauchamp* does not apply.

III. Constructive Fraud and Conversion Claims

¶19 The superior court dismissed the Children's conversion and constructive fraud claims on grounds unrelated to the PSA. We therefore address these claims separately.

A. Constructive Fraud

¶20 The superior court dismissed the Children's constructive fraud claim because they failed to allege a fiduciary or confidential relationship with Dick. *See Dawson v. Withycombe*, 216 Ariz. 84, 107–08, ¶ 72 (App. 2007). The Trustees cite *Gonzalez v. Gonzalez*, 181 Ariz. 32, 34 (App. 1994), for the proposition that a parent and child relationship does not alone create a confidential relationship. But in *Gonzalez* we affirmed a jury instruction stating that a confidential relationship could arise between a parent and a child if there are:

> some other circumstances, such as actual dominance over plaintiff by defendants, an established course of management of plaintiff's affairs by defendants, a disability, or similar facts coupled with the family relationship, which together make the transaction involved unfair.

Id.

¶21 The Children contend they alleged a confidential relationship because (1) they are third-party beneficiaries of the PSA and (2) "Dick owes a contractual duty and is bound to act for the benefit of the [Children] pursuant to the terms of the [PSA]." But the mere existence of a contractual duty does not alone establish a confidential relationship. *See Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 24 (App. 1996) ("Our case law distinguishes a fiduciary relationship from an arm's length relationship."). We thus agree with the superior court that the Children failed to allege a required element. The Children also failed to request an opportunity to cure the deficient allegation by amending the complaint. We therefore affirm the dismissal of the Children's constructive fraud claim.

B. Conversion

¶22 The superior court dismissed the Children's conversion claim because they did not allege "an immediate right [to possess]" any of the assets at issue when Dick transferred them to either Linda or the Trust. *See Case Corp. v. Gehrke*, 208 Ariz. 140, 143, ¶ 11 (App. 2004) ("To maintain an action for conversion, a plaintiff must have had the right to immediate possession of the personal property at the time of the alleged conversion.").

¶23 The Children's rights to possess any of the assets at issue, assuming such rights exist, did not vest until Dick's death. And they acknowledged in the Amended Complaint that Dick transferred ownership of the assets before he died in 2019. They contend on appeal that conversion did not occur until Linda "took control" of the assets upon Dick's death but cite no authority supporting this proposition. Their main allegation–that Dick "continued to be involved in D&L Futures' operations at the same level as prior to the transfer"–also demonstrates that Dick transferred those assets during his lifetime. We therefore affirm the dismissal of the Children's conversion claim. *See Universal Mktg. & Entm't, Inc. v. Bank One of Ariz., N.A.*, 203 Ariz. 266, 268, ¶ 6 (App. 2002).

IV. Petition to Invalidate

¶24 The Trustees also contend we may affirm the dismissal of the Petition to Invalidate because the Children do not challenge that dismissal on appeal. The Children challenged both dismissals in their opening brief. In any event, the superior court dismissed the Petition to Invalidate on the same grounds as the Amended Complaint.

¶25 The Trustees also contend we may affirm dismissal of the Petition to Invalidate because the only remedy unique to it–invalidation of "the dispositive provisions of the . . . Trust"–is not available for breach of a contract to make a will. Invalidation is not the only unique remedy–the Children also requested approval of a creditor claim against the Trust in the Petition to Invalidate. *See* A.R.S. § 14-6102. Nonetheless, the superior court did not address either remedy in its dismissal order and we will not address them for the first time on appeal.

V. Attorneys' Fees

¶26 Both sides request attorneys' fees under A.R.S. §§ 14-11004(B) and 12-341.01(A).

¶27 Section 14-11004(A) authorizes a trustee or a person nominated as a trustee to receive reimbursement from the trust for:

> reasonable fees, expenses and disbursement, including attorney fees and costs, that arise out of and that relate to the good faith defense or prosecution of a judicial or alternative dispute resolution proceeding involving the administration of the trust, regardless of whether the defense or prosecution is successful.

Section 14-11004(B) authorizes the court to order "fees, expenses and disbursements pursuant to subsection A" be paid by "any other party or the trust that is the subject of the judicial proceeding." The Children are not trustees or persons nominated to be trustees of the Trust, so they cannot recover fees under § 14-11004(B). In our discretion, we also decline to award the Trustees fees under § 14-11004(B). *In re Est. of Podgorski*, 249 Ariz. 482, 488, ¶ 24 (App. 2020).

¶28 Section 12-341.01(A) permits a discretionary award to the successful party in an action arising out of a contract. An action arises out of contract when the duty allegedly breached was created by the contractual relationship and would not have existed but for the contract. *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, 220, ¶ 12 (App. 2012). On balance, the Children are the successful parties on appeal, and their claims arise out of the PSA. They may recover reasonable attorneys' fees and taxable costs upon compliance with ARCAP 21.

CONCLUSION

¶29 We affirm the dismissal of the Children's constructive fraud and conversion claims, vacate the remainder of the judgment dismissing the Amended Complaint and Petition to Invalidate, and remand for further proceedings. We also vacate the portion of the judgment granting the Trustees "reasonable attorney's fees to be determined at a later date." The superior court may consider awarding attorneys' fees and costs at the conclusion of the case.