

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE GUARDIANSHIP AND CONSERVATORSHIP OF
SUZANNE L. GOODE, AN ADULT.

ERIK C. MORRIS AND THOMAS P. MORRIS,
Petitioners/Appellants/Counter-Respondents,

v.

GEORGE GOODE,
Objector/Appellee/Counter-Petitioner.

No. 2 CA-CV 2019-0094
Filed April 14, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. GC20180673
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

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By Joseph H. Watson
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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Erik and Thomas Morris appeal from the denial of their Petition for Appointment of Guardian and Conservator for their mother, Suzanne Goode. We affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the trial court's ruling, *In re Estate of Musgrove*, 144 Ariz. 168, 169 (App. 1985), and will affirm if any reasonable evidence in the record supports its decision, *Johnson v. Johnson*, 131 Ariz. 38, 44 (1981). In 2016, Suzanne executed healthcare and durable financial powers of attorney, appointing her husband of over thirty-five years, George Goode, as her agent and nominating him to be her guardian and conservator.

¶3 Suzanne suffers from dementia. Until March 2018, she lived in the marital home she shared with Goode, where he cared for her with the assistance of a hired caregiver. In March of that year, Suzanne was taken to the emergency room and urgent care on several occasions and, at the recommendation of hospital staff who treated her, Goode moved her to an assisted-living facility ("The Villas"), where she receives twenty-four-hour care.

¶4 Suzanne's adult children, Erik and Thomas Morris, filed a Petition for Appointment of Guardian and Conservator for Suzanne, alleging: (1) Goode was financially exploiting Suzanne by using her assets for the benefit of someone else; (2) Goode's appointment as Suzanne's agent "must be revoked to prevent further wrongful diminution of Suzanne's assets"; and (3) their appointment as co-guardians and co-conservators is necessary because Suzanne is "unable to manage her property and affairs effectively because she suffers from [d]ementia and because she is being exploited." They also alleged that Goode was not appropriately

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administering Suzanne's medications, which they suspected was for "nefarious reasons."

¶5 The trial court appointed counsel for Suzanne, a physician to examine her, and an investigator. Ultimately, after a one-day trial, the court found: "There is no dispute that [Suzanne] is receiving appropriate care at The Villas and her placement there is reasonable given her condition." The court also found the allegations that Goode had not been administering Suzanne's medications appropriately were "irrelevant at this point as Mr. Goode, following the recommendations from [hospital staff], has placed [Suzanne] at The Villas where she is receiving appropriate care." Finally, the court found Goode was providing appropriate care for Suzanne and appropriately managing the marital community's assets, and therefore concluded there was "no basis to revoke Mr. Goode's powers of attorney" and "no need for the appointment of a guardian or conservator for [Suzanne]." This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(9).

Discussion

¶6 On appeal, the Morrisses argue the trial court abused its discretion in finding Goode "acted appropriately as a fiduciary to Suzanne" and declining to appoint them as Suzanne's co-guardians and co-conservators. They assert the court "made several erroneous findings of fact, which are central to the conduct of George Goode in the care and treatment of Suzanne." Specifically, they contend Goode's testimony provides "[t]he only support in the record" for the court's finding that Suzanne was taken to the emergency room and urgent care three times in one month. The Morrisses further assert the urgent-care visits "never occurred" because they were not documented in the medical records from Suzanne's primary-care physician, and they point out that those records do not contain a recommendation from hospital staff that Suzanne move to an assisted-living facility.¹

¹Additionally, the Morrisses point to excerpts of Goode's testimony about a woman with whom he became romantically involved, who moved into the Goodes' home after Suzanne moved to The Villas. They also assert Goode's testimony shows Suzanne would prefer to live in the marital home and "a conflict of interest which is incurable" exists because of Goode's relationships with Suzanne and the woman who now lives with Goode. However, they do not cite authority explaining why these facts warrant

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¶7 We review a trial court's ruling on a petition to appoint a guardian or conservator for an abuse of discretion. *In re Guardianship of Kelly*, 184 Ariz. 514, 518 (App. 1996). A court abuses its discretion when it "commits an error of law in reaching a discretionary conclusion," "reaches a conclusion without considering the evidence," commits another substantial error of law, or makes a finding lacking substantial evidentiary support. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 27 (App. 2007); *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 14 (App. 2003) ("An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision.").

¶8 "In reviewing a trial court's findings of fact, we do not reweigh conflicting evidence . . . but examine the record only to determine whether substantial evidence exists to support the trial court's action." *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13 (1999). "It is not our function 'to reweigh the facts or to second-guess the credibility determinations of the judge who had the opportunity to evaluate the witnesses' demeanor and make informed credibility determinations.'" *In re Ghostley*, 248 Ariz. 112, ¶ 21 (App. 2020) (quoting *In re Estate of Newman*, 219 Ariz. 260, ¶ 40 (App. 2008)).

¶9 A court may appoint a guardian if it finds by clear and convincing evidence that: (1) "[t]he person for whom a guardian is sought is incapacitated";² (2) a guardian is "necessary to provide for the demonstrated needs of the incapacitated person"; and (3) the incapacitated person's needs "cannot be met by less restrictive means." A.R.S. § 14-5304(B). And, a court may "deny a petition to appoint a guardian for that person based on the

appointment of a guardian or conservator; therefore, we do not address them. See Ariz. R. Civ. App. P. 13(a)(7)(A) (requiring appellant's brief to contain supporting legal authority for each contention); see also *In re J.U.*, 241 Ariz. 156, ¶ 18 (App. 2016) ("We generally decline to address issues that are not argued adequately, with appropriate citation to supporting authority.").

²"'Incapacitated person' means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." A.R.S. § 14-5101(3).

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existence of a valid and unrevoked health care directive.” A.R.S. § 36-3206(K). Similarly, a court may appoint a conservator in relation to a person’s estate or affairs if it finds: (1) the person is unable to manage their estate and affairs effectively due to, among other things, “mental illness, mental deficiency, mental disorder, [or] physical illness or disability”; and (2) the person “has property that will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.” A.R.S. § 14-5401(A)(2).

¶10 If a court determines that a guardian should be appointed, it may first consider “[t]he person nominated to serve as guardian in the incapacitated person’s most recent durable power of attorney or health care power of attorney,” followed by the incapacitated person’s spouse, and then an adult child of the incapacitated person. A.R.S. § 14-5311(B)(3)–(5). Similarly, if a court finds it necessary to appoint a conservator, the person nominated to serve as such in the protected person’s durable power of attorney takes priority, followed by the protected person’s spouse, and then his or her adult children. A.R.S. § 14-5410(A)(3)–(5). A court may pass over a person who has priority for “good cause” if it finds: (1) the incapacitated or protected person’s healthcare or durable power of attorney is invalid; (2) honoring the incapacitated or protected person’s healthcare or durable power of attorney would not be in the physical, emotional, or financial best interests of the incapacitated person; or (3) the estimated cost of fiduciary fees would adversely affect the incapacitated or protected person’s estate’s ability to provide for the person’s living expenses.³ §§ 14-5311(F), 14-5410(B).

¶11 Before trial, both parties stipulated that Suzanne is incapacitated under A.R.S. § 14-5101(3) due to her dementia and that she validly appointed Goode as her agent and attorney-in-fact when she executed her powers of attorney. They also stipulated that Suzanne had

³While the criteria for passing over someone for appointment as guardian and conservator are substantively the same, § 14-5311(F) pertains to incapacitated persons and their durable and healthcare powers of attorney, whereas § 14-5410(B) pertains to protected persons and their durable powers of attorney. For the sake of simplicity in this case, we address these statutes together.

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not revoked her powers of attorney and, therefore, Goode's appointment was valid.

¶12 At trial, Goode testified he had cared for his wife at home for several years. A nurse practitioner who provided care for Suzanne during that time testified that Goode took "excellent" care of Suzanne, with the help of hired caregivers. Goode testified that he moved Suzanne to The Villas at the recommendation of hospital staff who, during an emergency-room visit, told him she required twenty-four-hour care. Goode and Erik also testified that Suzanne was receiving appropriate care at The Villas. Erik also testified he would prefer to move Suzanne back to the marital home, but acknowledged that doing so "would probably not be workable." Thomas did not take issue with the quality of care Suzanne is receiving at The Villas but testified that if he were appointed her co-guardian, he would seek to move her back into the marital home because he believed she "probably would cognitively be a lot better off" being "around things that are familiar."⁴

¶13 As to whether the trial court should appoint his brother and him as co-conservators, Erik testified he believed Goode was "exploiting" Suzanne by "utilizing her assets for his girlfriend and their living conditions" at the marital home, although he did acknowledge the assets Suzanne and Goode share are not exclusively hers. In contrast, Goode testified that he continues to pay the premiums for Suzanne's long-term care insurance, Medicare insurance, and Medicare prescription drug policy, as well as all of her needs that are not covered by these policies. He also acknowledged that all of his and Suzanne's assets are shared as community property and testified that he manages the assets "to be used for her support, care, and welfare." Further, Goode testified that he continues to pay the mortgage and/or taxes for their marital home and another jointly owned property.

⁴On appeal, the Morrisises allege Goode over-medicated Suzanne, resulting in overdoses in 2014 and 2018, just before Suzanne moved to The Villas. As the trial court noted, these allegations about Goode's care for Suzanne at their home are not relevant to whether their appointment as co-guardians is necessary to provide for her needs, which are undisputedly being met at The Villas, *see* § 14-5304(B), or whether their appointment as co-conservators is necessary to prevent the dissipation of her property or to provide funds for her care, *see* § 14-5401(A)(2).

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¶14 “[G]iving due regard to the opportunity of the court to judge the credibility of witnesses,” *In re Estate of Zaritsky*, 198 Ariz. 599, ¶ 5 (App. 2000), we will not reweigh the evidence, but will look only to determine if there is substantial evidence to support the trial court’s ruling, *Estate of Pouser*, 193 Ariz. 574, ¶ 13. Thus, based on the record before us, we conclude the evidence supports the court’s findings that Goode was providing appropriate care for Suzanne and appropriately managing their community assets and, therefore, there was no basis to revoke Suzanne’s powers of attorney and no need to appoint a guardian or conservator.

Attorney Fees at Trial

¶15 Goode appears to assert the trial court abused its discretion in denying his request for attorney fees pursuant to A.R.S. §§ 12-349(A)(1) and (2) and 14-1105(B). We review the court’s award of attorney fees at trial for an abuse of discretion, *see In re Conservatorship for Mallet*, 233 Ariz. 29, ¶ 7 (App. 2013), but we review its application of statutes de novo, *see Rogone v. Correia*, 236 Ariz. 43, ¶ 23 (App. 2014).

¶16 Goode requests attorney fees and costs in the trial court under § 12-349(A)(1) and (2) on the basis that the Morrisises “proceeded with their action in bad faith.” He argues they brought this action based on their objections to his personal life, which had no bearing on the care Suzanne received, and that doing so constitutes harassment. Under § 12-349(A)(1) and (2), a court may award attorney fees, costs, and at its discretion, double damages,⁵ if it finds a party has brought a claim “without substantial justification” or “solely or primarily for delay or harassment.” “[W]ithout substantial justification” means that the claim or defense is groundless and is not made in good faith.” § 12-349(F). These elements “must be proven by a preponderance of the evidence and ‘the absence of even one element render[s] the statute inapplicable.’” *Reynolds v. Reynolds*, 231 Ariz. 313, ¶ 16

⁵Although Goode seeks double damages on appeal, the trial court did not award any damages and, notably, Goode did not allege damages at trial. Therefore, his argument for double damages is forfeited. *See Cont’l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, ¶ 12 (App. 2011) (“If the argument is not raised below so as to allow the trial court . . . an opportunity [to address the issue on its merits], it is waived on appeal.”); *cf. Balestrieri v. Balestrieri*, 232 Ariz. 25, ¶ 11 (App. 2013) (claim for attorney fees forfeited where party did not request fees until after court granted motion to dismiss).

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(App. 2013) (quoting *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶ 49 (App. 2011)). Based on the record before us, Goode did not show by a preponderance of the evidence that the Morrisises' claim was groundless and not made in good faith, or that they initiated the litigation for the purpose of harassing him. Therefore, the court did not abuse its discretion in denying Goode's request for attorney fees under § 12-349(A)(1) and (2). See *Mallet*, 233 Ariz. 29, ¶ 7.

¶17 Next, Goode contends the trial court erred in denying his request for attorney fees pursuant to § 14-1105(B), which provides:

In a guardianship or conservatorship case, if the court finds that a ward or protected person has incurred professional fees or expenses as a result of unreasonable conduct, the court may order the person who engaged in the conduct or the person's attorney, or both, to pay the ward or protected person for some or all of the fees and expenses as the court deems just under the circumstances.

This provision plainly applies to wards and protected persons. "Ward" is defined as "a person for whom a guardian has been appointed," and "protected person" means a "person for whom a conservator has been appointed or any other protective order has been made." § 14-5101(10), (16). Because neither a guardian nor conservator had been appointed for Suzanne, nor had a protective order been issued for her, § 14-1105(B) does not apply here. Therefore, the trial court did not abuse its discretion in denying Goode's fee request under § 14-1105(B).

Attorney Fees

¶18 Goode seeks attorney fees on appeal pursuant to §§ 12-349(A)(1) and (2), 14-1105(B), and 36-3206(J)(5). Specifically, Goode requests his costs, attorney fees, and double damages⁶ on appeal under § 12-349(A)(1) and (2). As noted, under § 12-349(A)(1) and (2), a court may award attorney fees, costs, and at its discretion, double damages, if it finds the appeal was groundless and brought in bad faith, or brought solely or primarily for

⁶As noted, because Goode did not allege damages at trial, his claim is forfeited. See *Cont'l Lighting & Contracting*, 227 Ariz. 382, ¶ 12; cf. *Balestrieri*, 232 Ariz. 25, ¶ 11.

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harassment. Goode has not shown by a preponderance of the evidence that the Morrisses' appeal was groundless and made in bad faith, or that it was brought to harass him. Therefore, we deny his request for costs and attorney fees under § 12-349(A)(1) and (2).

¶19 Goode also requests his attorney fees on appeal pursuant to § 14-1105(B). As noted, because Suzanne is neither a ward nor a protected person under § 14-5101(10) or (16), this statute does not apply. Thus, we deny Goode's request.

¶20 Finally, Goode requests attorney fees and costs on appeal pursuant to § 36-3206(J)(5),⁷ which allows the trial court to "assess[] court costs and attorney fees against a party found to have proceeded in bad faith" when entering orders to safeguard the wishes of a patient in a challenge to the patient's healthcare directive. Because the Morrisses sought to revoke Suzanne's healthcare power of attorney that nominated Goode to serve as her agent, § 36-3206 applies. See A.R.S. § 36-3201(5), (6) ("Health care directive" includes healthcare power of attorney). But, again, Goode has not shown the requisite bad faith. Therefore, we deny Goode's request for attorney fees on appeal. As the prevailing party, however, Goode is entitled to taxable costs pursuant to A.R.S. § 12-341, upon compliance with Rule 21(b), Ariz. R. Civ. App. P.

Disposition

¶21 For the foregoing reasons, we affirm the trial court's order denying the Morrisses' petition to be appointed co-guardians and co-conservators.

⁷It appears Goode may also be requesting his attorney fees and costs from trial pursuant to § 36-3206(J)(5). Because he did not request fees and costs on that basis at trial, he has forfeited his request for trial fees and costs under § 36-3206(J)(5). Cf. *Balestrieri*, 232 Ariz. 25, ¶ 11.