IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MATTER OF TRUST B CREATED UNDER THE KARAM FAMILY TRUST,

ROSE A. KARAM,
Appellant,

v.

JANE W. KARAM,
Petitioner/Appellee.

No. 2 CA-CV 2021-0018
Filed December 20, 2021

Appeal from the Superior Court in Pima County
No. PB20150542
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Rose A. Karam, Tucson
In Propria Persona

Waterfall, Economidis, Caldwell, Hanshaw, & Villamana P.C., Tucson
By Corey B. Larson and Cindy K. Schmidt
Counsel for Petitioner/Appellee

MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Rose Karam appeals the trial court's dismissal of her objection to the termination of Trust B of the Karam Family Trust under Rule 12(b)(6), Ariz. R. Civ. P. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "When reviewing a dismissal for failure to state a claim pursuant to Rule 12(b)(6), Ariz. R. Civ. P., we assume the truth of all well-pleaded factual allegations." *Belen Loan Invs., LLC v. Bradley*, 231 Ariz. 448, ¶ 2 (App. 2012). When considering the facts, courts look to the pleading itself—here, Rose's objection (referred to below as her "petition")—and any attached exhibits or public records regarding matters referenced in the pleading. *Coleman v. City of Mesa*, 230 Ariz. 352, ¶ 9 (2012). In December 1992, George and Jane Karam executed the Karam Family Trust. George and Jane were the settlors and co-trustees of the trust. The trust stated that upon the death of the first settlor, the remaining trust estate would be divided between two trusts, Trust A and Trust B.

¶3 Trust A was "for the benefit of the surviving Settlor," and consisted of the survivor's portion of the settlors' community property within the trust estate, and, from the deceased settlor's portion, "the smallest pecuniary amount which will result in the least possible Federal estate tax payable by reason of the deceased Settlor's death." The surviving settlor was entitled to all the income and principal in Trust A without restriction during his or her lifetime, and was granted unlimited power of appointment over Trust A.

¶4 Trust B held the remainder of the trust estate after Trust A was funded. The surviving settlor was entitled to the income from Trust B during his or her lifetime and "such sums from principal as the Trustee deems necessary or advisable from time to time for the support of the surviving Settlor," as long as no "readily marketable assets remain in Trust A." The surviving settlor was granted limited power of appointment over

Trust B, and could "appoint any part or all of the principal of the trust to any one or more of the Settlors' descendants as he or she directs." Any part of Trust B not appointed at the time of the surviving settlor's death, including amounts added from Trust A, was to be divided into equal shares among the settlors' children, or, if deceased, among their children.

¶5 George died in December 1995 and was survived by Jane and their four children: Celina, Paula, Rose, and Michael. The trust estate was split into Trusts A and B, and Jane became the sole surviving settlor and sole trustee. In 2005, Michael died and was survived by his two children.

¶6 In April 2015, Rose received a letter from Jane's attorney, informing her that Jane would like to terminate Trust B and, for efficiency reasons, to move the venue of any trust proceedings from Santa Cruz County to Pima County. The letter explained that, to allow the termination, each beneficiary of Trust B needed to consent. Rose was asked to review the draft of the petition to terminate and sign the consent forms for the termination and venue change. Rose did not sign the consent forms. The remaining beneficiaries—Celina, Paula, and Michael's two children—did.

¶7 Jane filed the petition to terminate Trust B in May 2015, stating that she had "exercised her power of appointment to delete the distribution to Rose Ann Karam, and her descendants, for Trust B in its entirety, thus Rose Ann is no longer a remainder beneficiary of Trust B." Jane stated in the petition that "the *primary* purpose of directing the division of the Trust into Trust A and Trust B upon George's death was to minimize the risk of federal estate taxes upon [her] later death," but, due to changes in state and federal estate tax laws since the trust was created in 1992, Trust B was no longer necessary. The trial court granted the petition and ordered Trust B to be terminated and all assets from that trust be transferred to Jane, as trustee of Trust A.

¶8 Five years later, in May 2020, Rose filed an "objection" to the termination of Trust B and a "motion to reinstate Trust B" seeking a variety of relief (hereafter "petition"). Rose argued that she was still a beneficiary because Trust B had been an irrevocable trust, not subject to amendment, and therefore Jane did not have the authority to remove Rose as a beneficiary. She asserted that Trust B was "terminated illegally" and the trust assets were "subject to conversion," "[t]hrough fraud on the court." She claimed she was a beneficiary and did not consent to Trust B's termination or the change of venue, and that she was improperly not named as a beneficiary in the petition to terminate, and not provided the required

notice. In addition to requesting that Trust B be reinstated, Rose requested that Jane and her counsel be sanctioned for fraud, concealment, and misrepresentation. Rose later amended her petition.

¶9 In response, Jane filed a motion to dismiss Rose's amended petition, asserting that Rose had been properly removed as a beneficiary, was not entitled to notice of the termination, and that she had no interest in Trust B being reinstated. The trial court ultimately granted Jane's motion to dismiss under Rule 12(b)(6), Ariz. R. Civ. P. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(9).

Analysis

Timeliness of Motion to Dismiss

¶10 Rose first argues on appeal that the trial court erred by overruling her objection that Jane's motion to dismiss was untimely. She asserts that, under Rule 7.1(a)(3), Ariz. R. Civ. P., Jane's motion was filed too late. "We review the interpretation of statutes and court rules de novo." *Fragoso v. Fell*, 210 Ariz. 427, ¶ 7 (App. 2005) (quoting *Cranmer v. State*, 204 Ariz. 299, ¶ 8 (App. 2003)).

¶11 Following the filing of Rose's petition, the trial court set a hearing on September 1, 2020, for the purpose of scheduling a hearing on the merits. Jane filed her motion to dismiss on August 31, 2020. At the scheduling hearing, Rose appeared to object to the timeliness of the motion to dismiss, stating it had "been well over 30 days" since her objection to the termination had been filed (in May 2020). The court responded to Rose, stating that the timeliness was "not an issue" because no hearing had been set on her petition. Rose now argues that the court erred because it "failed to acknowledge [her] objection that the Motion to Dismiss was filed over 30 days" after Jane had been served with the petition.

¶12 In her amended opening brief, Rose argues Jane's motion to dismiss was untimely under Rule 7.1(a)(3), Ariz. R. Civ. P., which states that "an opposing party must file any responsive memorandum within 10 days" of being served. The rules of probate procedure govern "procedures in all probate proceedings in the superior court." Ariz. R. Prob. P. 1(a). And, although the rules of civil procedure apply to probate proceedings where the probate rules are silent, they do not apply if they are inconsistent with the probate rules. Ariz. R. Prob. P. 4(a)(1). Rule 15(e)(1), Ariz. R. Prob. P., allows a response or a motion under Rule 12, Ariz. R. Civ. P., to be filed "no later than 7 calendar days before the initial hearing on the petition." Civil

Rule 7.1 is therefore inconsistent with Probate Rule 15. Because no initial hearing date had yet been set on the petition when the motion to dismiss was filed, the trial court correctly determined that Jane's motion was timely under Rule 15(e)(1).

¶13 In her reply brief, Rose argues that the September 1 scheduling hearing was the initial hearing and therefore, the motion to dismiss needed to have been filed at least a week earlier. But, even if the September 1 hearing were the initial hearing, the probate rules would have, in any event, permitted an oral response to a petition by the opposing party. *See* Ariz. R. Prob. P. 15(e)(2) (party who attends hearing may orally respond and file written Rule 12(b)(6) motion within fourteen days of hearing). Jane appeared at the September 1 hearing and orally responded to the petition by stating she had filed a motion to dismiss the day before. Jane's motion to dismiss was also timely under Rule 15(e)(2), and the trial court did not err by hearing it.

Grant of Motion to Dismiss

¶14 Rose argues the trial court also erred in granting Jane's motion to dismiss because it failed to consider certain facts and arguments before ruling.[1] We review the dismissal of a complaint under Rule 12(b)(6), Ariz. R. Civ. P., de novo. *Coleman*, 230 Ariz. 352, ¶ 7. Dismissal is only appropriate under Rule 12(b)(6) if "as a matter of law . . . plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Id.* ¶ 8 (quoting *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, ¶ 4 (1998)).

¶15 Rose argues on appeal that the trial court erred in not considering the following facts before granting the motion to dismiss: (1) Rose was still a beneficiary of Trust B upon termination and did not consent

[1]Rose also argues that the trial court erred by not providing a "reason/justification as to why [it] Dismissed the case." Rose provides no legal authority to support this argument and acknowledges in her amended reply brief that "there is no specific rule regarding judicial justification." Therefore, we consider this argument waived and will not address it. *See* Ariz. R. Civ. App. P. 13(a)(7); *see also Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, ¶ 11 (App. 2010). Nonetheless, the court did expressly grant the motion "[p]ursuant to Rule 12(b)(6)," which is only permitted when the pleading "fail[s] to state a claim upon which relief can be granted." Ariz. R. Civ. P. 12(b)(6).

to the termination; (2) Jane and her attorney committed "overt fraud in her/their representation of the facts presented to the Court in the Petition to Terminate Trust B"; and (3) Jane "derived direct financial benefit" from the termination of Trust B.[2]

Rose as Trust B Beneficiary at Termination

¶16 As to the first claim, Rose argues Jane did not comply with A.R.S. § 14-10411 because Rose was a beneficiary of Trust B and did not consent to its termination. Rose correctly states that, to terminate a trust under § 14-10411, all beneficiaries must consent to the termination, and the court must find that "continuance of the trust is not necessary to achieve any material purpose of the trust." But we do not agree Rose was still a beneficiary with the power to withhold consent at the time of Trust B's termination.

¶17 In Jane's petition to terminate Trust B, she referenced her exercise of the power of appointment to remove Rose as "a remainder beneficiary of Trust B," and therefore, only George and Jane's other "two (2) surviving children and the two (2) children of their deceased son" were interested parties entitled to notice of the termination of Trust B. The trial court commensurately found that "all of the qualified remainder beneficiaries of Trust B . . . [had] consented to the termination of Trust B," and that "[n]otice [had] been provided to all interested persons as required by law."

¶18 A trust is interpreted according to its terms. *KAZ Const., Inc. v. Newport Equity Partners*, 229 Ariz. 303, ¶ 7 (App. 2012); *see also* A.R.S. § 14-10105(B). Article 4, section 3 of the Karam Trust gives the surviving settlor—Jane—the power to "appoint" Trust B assets "to any one or more of the Settlors' descendants as . . . she directs." A power of appointment is created when the settlor (or settlors) grants another—such as a surviving

[2]Rose also asserts that the trial court erred by not considering that Trust B was "an irrevocable trust not subject to amendment or revocation by any person," before granting the motion to dismiss. Rose provided no legal authority to support this argument in her amended opening brief, and did not attempt to develop the argument until her amended reply brief. We typically do not consider arguments made for the first time in a reply brief and therefore deem this argument waived on appeal. *See Fisher v. Edgerton*, 236 Ariz. 71, n.2 (App. 2014).

settlor or trustee—the "authority to designate beneficiaries" of the trust estate. *Wetherill v. Basham*, 197 Ariz. 198, ¶ 12 (App. 2000). Under a special, or limited, power of appointment "the property subject to the power cannot be appointed to the donee himself, nor to his estate, his creditors, nor the creditors of his estate." *In re Meyer*, 195 Ariz. 336, ¶ 7 (App. 1999). Other limitations may also be placed on the power, such as that here, where the power may be exercised "only in favor of a particular person or class of persons." *Wetherill*, 197 Ariz. 198, ¶ 12. To exercise her power of appointment under Trust B, all Jane needed to do was designate such appointment in writing (or by reference in her will) and deliver it to the trustee. Jane was only limited in her exercise of that power in that she was bound to appoint "*one or more* of the Settlors' descendants" as beneficiary or beneficiaries. (Emphasis added.)

¶19 By exercising her power of appointment to appoint all of her descendants (or their surviving children) except Rose as beneficiaries of Trust B, Jane removed Rose as a Trust B beneficiary. Jane memorialized Rose's removal as a beneficiary in writing, at the latest by recounting it in her petition to terminate, thus satisfying the first requirement. Because Jane, as the sole trustee, issued that writing, the second "delivery" requirement was also met. And, finally, by appointing "one or more" of her and George's children as beneficiaries, she acted within the limitations of the power of appointment. Jane was not required to keep Rose as a beneficiary and, by removing her, Jane also removed Rose's power to withhold consent to the termination and her right to notice.

¶20 But Rose argues that her removal as beneficiary and the termination of Trust B altered the "intent" of the trust, which was "to ensure the surviving spouse was provided for until his/her death, and then to provide for all of their offspring." But we disagree. The intent of a trust is the intent of its settlors. *In re Estate of Zilles*, 219 Ariz. 527, ¶ 8 (App. 2008) ("The overriding goal in the interpretation of a trust document is to ascertain the intent of the trustor."). To interpret the intent of the settlors, "we consider the text of the trust 'as a whole and, when appropriate, the circumstances at the time it was executed.'" *Id.* (quoting *In re Estate of Pouser*, 193 Ariz. 574, ¶ 10 (1999)).

¶21 Considering the text of the trust, we cannot say that removing Rose as a beneficiary altered or contradicted the intent of Trust B. Although each of the Karams' children were potential remaining beneficiaries of the Trust at the time of its execution, the power of appointment allowing the surviving settlor to divest any of them of the trust benefits was also in the

Trust at the time of its execution. Had the settlors' intent been to unequivocally and irrevocably provide for *all* of their offspring for all time, the surviving spouse—in this case, Jane—would not have been empowered to designate fewer than all of their children as beneficiaries. Therefore, the trial court did not err in rejecting Rose's claim to having been a beneficiary at the time of termination.[3]

Jane's Fraudulent Representation of Facts

¶22 Rose also asserts the trial court erred in failing to consider that Jane and her counsel committed "overt fraud in . . . their representation of the facts presented to the Court in the Petition to Terminate Trust B." The claimed misrepresentations were that George and Jane only had two surviving children, and that all beneficiaries had been notified of the petition to terminate Trust B. However, as stated above, Rose was not a beneficiary at the time of the petition to terminate and was not entitled to the notice of the petition that the remaining beneficiaries received. Furthermore, while the petition did (albeit correctly) state that the "two (2) surviving children and the two (2) children of their deceased son," were entitled to notice, the petition acknowledged that Jane and George did have four adult children, including Rose. The petition explained that Jane had exercised her power of appointment to remove Rose as a beneficiary from Trust B. These statements were not false.

¶23 Rose also asserts that Jane's representation in her petition "[t]hat the material intent of the trust would not be altered," was fraudulent. Although Rose does not explain how that statement was fraudulent or provide any legal authority to support this argument, we have already determined that the intent of the trust included Jane's power to alter beneficiaries and was not contradicted. Jane's representation was

[3]Rose asserts throughout her amended reply brief, as support for several of her arguments, that Jane's power of appointment was invalid under A.R.S. § 14-10010. Section 14-10010 does not apply because it addresses disclaimers of interest in property by an appointee of a power of appointment or by an object or taker in default of an exercise of a power of appointment, which are not at issue here. Regardless, Rose did not raise her arguments as to § 14-10010 until her amended reply brief. "We generally do not consider arguments made for the first time in a reply brief." *Fisher*, 236 Ariz. 71, n.2. Therefore, we deem each of her arguments as to § 14-10010 waived.

therefore accurate, and the trial court did not err in disregarding the claim of fraud.

Jane's Financial Benefit

¶24 Rose finally asserts that the trial court should have considered that Jane financially benefitted from Rose's removal and the termination of Trust B. Such a benefit is impermissible, she argues, because the Trust provides that, if there are no descendants who survive the settlors, Trust B may be appointed by the surviving settlor in his or her discretion, "except that such power of appointment shall not in any event be exercisable in favor of the surviving Settlor, the surviving Settlor's creditors, the surviving Settlor's estate, or the creditors of the surviving Settlor's estate." By its plain language, however, this provision only applies if George and Jane are not survived by any children, which is not the case here. Nothing in the Trust prohibits Jane from receiving some financial benefit.

Attorney Fees

¶25 Jane requests an award of attorney fees on appeal under Rule 21, Ariz. R. Civ. App. P., and A.R.S. § 12-341.01(A). Section 12-341.01(A) allows for the discretionary award of attorney fees to the successful party in an action arising out of a contract. However, "suits that arise out of a trust relationship are not suits arising out of a contract for purposes of A.R.S. § 12-341.01(A)." *Matter of Estate of Podgorski*, 249 Ariz. 482, ¶ 23 (App. 2020) (quoting *Owner-Operator Indep. Drivers Ass'n v. Pac. Fin. Ass'n, Inc.*, 241 Ariz. 406, ¶ 39 (App. 2017)). Therefore, § 12-341.01(A) does not permit the award of fees here.

¶26 Jane also requests her attorney fees and costs pursuant to A.R.S. § 14-11004. Section 14-11004(A) permits a trustee to be reimbursed 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.

The court may order the fees under subsection A to be paid by another party or by the trust that was the subject of the proceedings. § 14-11004(B). Jane's response to Rose's appeal is a "good faith defense" of the Karam Family Trust, and she prevailed in that defense in all respects. Therefore, we grant Jane's request for reasonable attorney fees and costs on appeal upon her compliance with Rule 21, Ariz. R. Civ. App. P. *See In re Estate of King*, 228 Ariz. 565, ¶ 29 (App. 2012).

Disposition

¶27 For the foregoing reasons, we affirm the trial court's grant of Jane's motion to dismiss.