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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SHERYL REESE EDWARDS, Plaintiff/Appellee, v. ANTHONY A. FUENTES, Defendant/Appellant.	2 CA-CV 2007-0121 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20060188

Honorable Deborah Bernini, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 In this action involving a family trust, Anthony Fuentes, one of the trust's settlors, appeals from the trial court's judgment in favor of Sheryl Edwards, a successor trustee and remainder beneficiary. Anthony contends the court erred in finding that neither his execution of an undelivered notice of revocation in 2004 nor the delivery of that same notice in 2007 revoked his interest in the trust. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 In February 2001, Anthony and his wife, Bonnie Fuentes, executed a trust agreement establishing the Fuentes Family Trust (the Trust), naming themselves as trustees and beneficiaries during their lifetime. The Trust also listed as remainder beneficiaries Bonnie's only child, Sheryl Edwards, and three of Anthony's four children. In May 2004, Anthony Fuentes executed a notice of revocation of his interest in the Trust. However, the notice was never delivered to Bonnie as required by the trust agreement. Bonnie died in April 2005.

¶3 In January 2006, Sheryl brought the current action to enforce the Trust. After a bench trial, the trial court found that, because Anthony's revocation had not been completed pursuant to the terms of the trust agreement, his execution of the notice of revocation "had no legal [e]ffect upon the Trust." The court therefore granted judgment in favor of Sheryl.

¶4 After filing a timely notice of appeal, Anthony moved to remand the case to the trial court for a determination whether the mailing of a copy of the May 2004 notice of

revocation to Sheryl's attorney in November 2007 corrected any defect in delivery and rendered the trial court's prior ruling incorrect. We subsequently revested jurisdiction in the trial court for it to consider Anthony's motion pursuant to Rule 60(c), Ariz. R. Civ. P., to partially vacate the court's judgment. After an evidentiary hearing, the court denied the motion, finding Anthony had "failed to establish that he intended to revoke the Fuentes Family Trust on any date in 2007" and, thus, the mailing of the revocation document "did not remedy the legal defect" the court had found in its prior ruling. The appeal was therefore reinstated.

¶5 The competency of Anthony and Bonnie as these events unfolded was an underlying issue at trial and at the subsequent evidentiary hearing. And the trial court heard conflicting testimony about both Bonnie's and Anthony's mental capacity at the time the Trust was established.[1] Anthony had been "angry" with his daughter, Ingrid Fuentes, when the Trust was created, and the trust agreement explicitly excluded her as a beneficiary. In 2004, shortly before Anthony executed the notice of revocation, Bonnie was found to be mentally incapacitated, and a guardian was appointed for her. She was also apparently hospitalized. By that time, Ingrid and her husband, Vernon Peterson, had been taking care of Anthony, and Ingrid accompanied Anthony to his attorney's office when he signed the

[1]However, the court concluded Anthony had been competent when he executed the trust agreement, and Anthony does not challenge that finding on appeal. Nor does he challenge the court's determination of the validity of a transfer of property to the Trust, which the court also resolved in Sheryl's favor.

notice of revocation. Thereafter, but before trial, Ingrid and Vernon had been appointed co-guardians for Anthony. Although Anthony was present at trial and at the subsequent evidentiary hearing, he testified at neither, a fact the trial court noted in its order denying his motion to partially vacate the judgment.

Discussion

¶6 On appeal, Anthony argues the trial court erred in finding his attempted revocation of his interest in the Trust had not been effective. Whether Anthony's attempted revocation was effective pursuant to the trust agreement is a legal issue that we review de novo. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 50, 181 P.3d 219, 233-34 (App. 2008) (legal issues reviewed de novo). "The basic rule for the interpretation of . . . trusts is to ascertain the intent of the settlor[s] . . . ." *In re Estate of Gardiner*, 5 Ariz. App. 239, 240, 425 P.2d 427, 428 (1967). And, "when a trust is created by a written instrument, the intention of the settlor[s] is ascertained from the express language of the instrument." *State ex rel. Goddard v. Coerver*, 100 Ariz. 135, 141, 412 P.2d 259, 262 (1966).

¶7 "[W]hen [a] settlor reserves a power to revoke his trust in a particular manner or under particular circumstances, he can revoke it only in that manner or under those

circumstances."[2] *Matter of Estate and Trust of Pilafas*, 172 Ariz. 207, 210, 836 P.2d 420, 423 (App. 1992). Here, the trust agreement provided:

> During the joint lifetime of the Trustors, this trust may be revoked in whole or in part with respect to either Trustor's interest by an instrument in writing signed by the Trustor whose interest is being revoked and delivered to the Trustee and the other Trustor. On the death of one Trustor the Surviving Trustor shall retain the above rights of revocation and amendment . . . .

Although Anthony executed a notice of revocation in May 2004, he does not dispute that he failed to deliver it to Bonnie, the other trustor, during her lifetime. Indeed, the court found "no credible evidence that [Bonnie] knew of its existence."

¶8 Instead, Anthony contends, "Given her incapacity, delivery of the [Notice of] Revocation to Bonnie would have been futile." However, we are not persuaded by Anthony's assertion that the general principle that "the law does not require a futile act" excused him from delivering the notice of revocation to Bonnie.[3] *See Wetherill v. Basham*, 197 Ariz. 198, ¶ 20, 3 P.3d 1118, 1125 (App. 2000) (settlor not required to deliver notice of amendment to herself as trustee). Despite Bonnie's incapacity, the court heard no evidence Bonnie was persistently incompetent to understand the notice between the time it was signed

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[2]We do not address whether Anthony's actions constituted substantial compliance with the trust agreement's revocation provisions pursuant to A.R.S. § 14-10602(C) because the statute was not in effect at the time.

[3]Neither are we persuaded that a telephone call informing the public fiduciary of the attempted revocation was an effective substitute for delivery of the notice of revocation to Bonnie, particularly given the absence of evidence the public fiduciary had been appointed Bonnie's guardian at the time of the call.

and her death. We must therefore presume she was competent for at least part of that time. *See Golleher v. Horton*, 148 Ariz. 537, 541, 715 P.2d 1225, 1229 (App. 1985) (absent contrary evidence, presumption of competency continues despite period of incompetency because "such persons may have lucid intervals").

¶9 Anthony also argues delivery of the notice was "impeded" by Bonnie's hospitalization. However, to the extent this contention differs from his previous argument, he has failed to develop it or support it with citation of authority or to the record. We therefore do not consider it. *See* Ariz. R. Civ. App. P. 13(a)(6) (opening brief shall include argument containing "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities . . . [and] statutes . . . relied on"); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (declining to consider issue raised on appeal "wholly without supporting argument or citation of authority"). Thus, because Anthony "presented no evidence showing that [he] complied with the required method of revocation," *Estate of Pilafas*, 172 Ariz. at 212, 836 P.2d at 425, and "provides no legal basis for this court to disregard the express provisions in the Trust document," *In re Walter P. Herbst and Shirley A. Herbst Trust*, 206 Ariz. 214, ¶ 20, 76 P.3d 888, 891 (App. 2003), we agree with the trial court that his execution of the notice of revocation "had no legal [e]ffect upon the Trust."

¶10 In the alternative, Anthony argues his revocation became effective once the notice was delivered to Sheryl as trustee in 2007, three years after its execution and two years

after Bonnie's death. Relying on "an analogy to testamentary capacity," he contends that, because in 2004 he both intended to revoke the Trust and had the capacity to do so, the delay in delivery until 2007 did not affect the efficacy of the revocation, but only "the time at which [it] is deemed to take effect."[4] *See In re Estate of Walters*, 77 Ariz. 122, 126, 267 P.2d 896, 899 (1954) (change in testator's mental condition after making will does not affect will's validity). However, the analogy to a testator's competency when executing a will is inapposite. "Unlike the execution of a will, the creation of a trust involves the present transfer of property interests in the trust corpus to the beneficiaries." *Estate of Pilafas*, 172 Ariz. at 210, 836 P.2d at 423. Because a revocation involves a similar "present transfer" of property interests, the trial court did not err in considering as dispositive Anthony's intent in 2007, when any such transfer would have been effected. And Anthony does not contest the court's finding that he failed to establish either his intent or his capacity at that time. We therefore agree with the trial court that delivery of the notice "did not remedy the legal defect" in Anthony's attempted revocation of his interest in the Trust.

[4]Arguably, Anthony's execution of the notice of revocation, standing alone, was insufficient to establish his intent even in 2004. At least with respect to trust instruments that do not prescribe the manner of revocation, "the failure of the settlor to communicate his decision . . . to the trustee indicates that his decision to revoke the trust is not definitive, and . . . there is no effective revocation . . . until the settlor takes such further steps as indicate a definitive decision by him that the trust be revoked." Restatement (Second) of Trusts § 330 cmt. i (1959).

Disposition

¶11 For the reasons stated above, we affirm. Although both parties request an award of attorney fees pursuant to A.R.S. § 12-341.01, "suits that arise out of a trust relationship are not suits arising out of a contract for purposes of . . . [§] 12-341.01(A)," *In re Naarden Trust*, 195 Ariz. 526, ¶ 18, 990 P.2d 1085, 1089 (App. 1999), nor do we find the appeal constituted "harassment; [wa]s groundless; [or] . . . [wa]s not made in good faith," as required for an award of fees under § 12-341.01(C), *Fisher ex rel. Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, ¶ 13, 965 P.2d 100 (App. 1998). We therefore deny their requests; however, as the prevailing party, Sheryl is entitled to her costs on appeal upon compliance with Rule 21, Ariz. R. Civ. App. P.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge