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Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH A. WILLINGHAM,
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JACOB C. ROSIER and ELIZABETH R.) 1 CA-CV 10-0369
ROSIER, individually and as)
Co-Successor Trustees of the) DEPARTMENT D
Patricia Rosier Trust,)
)
) **MEMORANDUM DECISION**
Plaintiffs/Appellees,) (Not for Publication -
) Rule 28, Arizona Rules
v.) of Civil Appellate
) Procedure)
GAIL ROSIER, an individual,)
)
)
Defendant/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-011402

The Honorable Eileen S. Willett, Judge

REVERSED AND REMANDED

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O R O Z C O, Judge

¶1 Gail Rosier (Gail) appeals the trial court's judgment, granting partial summary judgment in favor of plaintiffs Jacob C. and Elizabeth R. Rosier (collectively, the Rosier Children), and denying Gail's cross motion for partial summary judgment. For the reasons that follow, we reverse the trial court's judgment and remand for proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 Dr. R. Peter (Peter) and Patricia (Patricia) Rosier were married in 1963; together they had two children, the Rosier Children. Before her death in 1986, Patricia established a trust (the Patricia Trust) for the benefit of Peter and the Rosier Children, naming herself as trustee. Pursuant to the terms of the Patricia Trust, Peter assumed the role of trustee upon Patricia's death.¹

¶3 Upon her death, the Patricia Trust required creation of two sub-trusts referred to as Trust A and Trust B. Trust B was to be funded with assets equal in value to the applicable estate tax credit, and Trust A was to be funded with the remainder of the trust's assets. As beneficiary of the trust, Peter was entitled to income distributions from both trusts, and principal

¹ The Patricia Trust agreement was reformed in 2007 naming the Rosier Children as successor trustees.

distributions as necessary to provide for his health and well-being.

¶14 The Patricia Trust was initially funded with \$10 and seven life insurance policies; the Patricia Trust was the beneficiary and Peter was the insured on the policies. Upon her death, Patricia's Will poured over into the Patricia Trust all of her estate's remaining assets. Among her estate's assets was a twenty-five percent interest in real property known as the "Summerlin Property." Peter retained a seventy-five percent interest in the Summerlin Property.

¶15 In 1994, Peter quitclaimed to himself the Patricia Trust's twenty-five percent interest in the Summerlin Property. On the same day, Peter sold the entire property for a \$1,995,000 promissory note. Additionally, over the course of several transactions, Peter borrowed hundreds of thousands of dollars against the Patricia Trust's life insurance policies.

¶16 In 2000, Peter received payment on the Summerlin Property note. Peter subsequently purchased in the name of the Patricia Trust an annuity for \$500,000. Peter also made a cash transfer of \$783,000 to the Patricia Trust.

¶17 Peter married Gail in 2000.² Incident to their marriage, Peter and Gail entered into a prenuptial agreement.

² The parties dispute whether the marriage was lawful. Because the trial court did not address this issue, and it is not essential to our holding, we also decline to address it.

The agreement required Peter's estate, upon his death, to pay Gail \$50,000 for every complete year the two were married.

¶18 Prior to his death in 2007, Peter executed his Last Will and Testament, as well as a Trust Agreement (the Peter Trust) for the purpose of distributing his estate.

¶19 After Peter's death, the Rosier Children believed that Gail was attempting to sell or had sold property from Peter's estate that had been devised to the Rosier Children. The Rosier Children filed a complaint against Gail and contemporaneously applied for a temporary restraining order (TRO) and preliminary injunction.³ The Rosier Children sought to enjoin Gail from selling property belonging to the estate of Peter. Upon the parties' stipulation, the trial court issued the TRO, enjoining Gail from selling estate property.

¶10 The Rosier Children subsequently filed a first amended complaint seeking declarations that: (1) Gail has no interest in the Patricia Trust nor in any of its assets; (2) the Peter Trust has no interest in the Patricia Trust nor in any of its assets; (3) none of the assets in the Patricia Trust were derived from assets other than those already part of the trust before Peter

³ The Rosier Children initially filed their application for a TRO in the probate case regarding Peter's estate; however, for reasons not stated on the record in probate court, they withdrew the application and the parties stipulated to a TRO in this case.

married Gail; and (4) the Rosier Children are the sole beneficiaries of the Patricia Trust.

¶11 The Rosier Children moved for partial summary judgment on the four declarations and Gail cross-moved for partial summary judgment. In her cross-motion, Gail argued that she should be entitled to satisfy any debts held against Peter's estate from the assets of the Patricia Trust. Gail also filed an amended answer and counterclaim.⁴

¶12 The trial court ruled in favor of the Rosier Children and against Gail, entered judgment accordingly, and awarded \$123,695.44 in attorneys' fees and costs to the Rosier Children. Gail timely appealed and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) section 12-2101.B. (2003).

DISCUSSION

¶13 On appeal, Gail argues that she is entitled to judgment as a matter of law on the issue of her interest in the Patricia Trust as a creditor of either Peter's estate or the Peter Trust. Gail contends that (1) she holds claims as a creditor against Peter's estate and the Peter Trust, and (2) Peter made himself a settlor of the Patricia Trust by making deposits of his separate property, rendering the trust vulnerable to creditors' claims, which would include Gail's creditor's claim, through his estate

⁴ Gail's amended answer and counterclaim are not part of the record on appeal.

or the Peter Trust. Alternatively, Gail argues that the trial court erred in finding no genuine issue of material fact and granting a motion for partial summary judgment in favor of the Rosier Children.

¶14 "Summary judgment is appropriate 'if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.'" *Tarron v. Bowen Mach. & Fabricating, Inc.*, 225 Ariz. 147, 151, ¶ 15, 235 P.3d 1030, 1034 (2010) (quoting *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 14, 38 P.3d 12, 20 (2002)). "We review de novo a grant of summary judgment, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). We also determine "whether the trial court erred in application of the law." *Guo v. Maricopa Cnty. Med. Ctr.*, 196 Ariz. 11, 15, ¶ 16, 992 P.2d 11, 15 (App. 1999).

1. *Gail's Status as a Creditor of Peter's Estate*

¶15 Gail argues that she is a creditor of Peter's estate and the Peter Trust. Specifically, she argues that under the Peter Trust provisions, she is entitled to \$15,000, the residue of the Peter Trust assets, and reimbursement for other expenses relating to assets of the Peter Trust. Gail also argues that she

is entitled to \$300,000 pursuant to the prenuptial agreement, i.e., \$50,000 per complete year of marriage to Peter.

¶16 The Rosier Children contend that while Gail is a beneficiary of Peter's estate and the Peter Trust, she is not a creditor. Additionally, the Rosier Children argue that any debt owed to Gail arising under the prenuptial agreement was satisfied through an inter vivos money transfer of \$100,000 by Peter to Gail and Peter's designation of Gail as the beneficiary of two life insurance policies worth an aggregate of \$200,000.⁵

¶17 Because administration of Peter's estate and the Peter Trust is a matter still before the probate court in a separate case, cause number PB2009-050356, the issue as to Gail's status as a beneficiary is not properly before this Court.⁶ Therefore, because Gail's status as a beneficiary is an issue that has yet to be resolved by the probate court, addressing the matter on appeal would be premature. See *Craig v. Craig*, 225 Ariz. 508, 509, ¶ 2, 240 P.3d 1270, 1271 (App. 2010) ("[A]ppellate courts lack jurisdiction when 'a litigant attempts to appeal where a motion is *still pending* in the trial court or where there is no final judgment.'" (quoting *Barassi v. Matison*, 130 Ariz. 418,

⁵ These life insurance policies are not part of the record on appeal.

⁶ The probate court denied Gail's motion to consolidate this case with the probate matter; the probate court appeared to deny the motion to consolidate because a personal representative had not been appointed.

422, 636 P.2d 1200, 1204 (1981))). Thus, we decline to address this issue. As such, we turn to the question of her status as creditor stemming from the prenuptial agreement.

¶18 As a matter of law, insurance proceeds and inter vivos money transfers typically pass outside of the estate for purposes of probate. *In re Estate of Lamparella*, 210 Ariz. 246, 248 n.1, ¶ 10, 109 P.3d 959, 961 n.1 (App. 2005) (defining nonprobate transfers as assets transferred outside of probate such as insurance proceeds, payable on death accounts, and other revocable dispositions); see also A.R.S. § 20-1131.A. (2010); *May v. Ellis*, 208 Ariz. 229, 230, ¶ 7, 92 P.3d 859, 860 (2004) (“proceeds of life insurance policies payable to beneficiaries other than the decedent are exempt from claims against the decedent's estate”). However, Peter's estate is contractually bound to pay Gail according to the terms of the prenuptial agreement, which requires payment from the estate. Because life insurance proceeds and inter vivos money transfers pass outside of the estate, the children's argument that pre-death, Peter satisfied his estate's obligation to Gail does not defeat Gail's claims under the prenuptial agreement as a matter of law. As Gail points out, Peter specified in the prenuptial agreement that the obligation was to be paid from his “estate.” Further, the insurance policies in question are not part of the record on appeal, and it is not clear whether the insurance proceeds passed

through the estate or to Gail directly. Thus, there remains a genuine issue of material fact to be resolved by the trial court on the matter of Gail's status as creditor arising from the prenuptial agreement.

¶19 The Rosier Children allege that even if Gail is a creditor in the probate proceeding, the statute of limitations has expired and her creditor's claim is time-barred. Gail contends that the Rosier Children did not raise this issue below and it is therefore waived. Indeed, the Rosier Children did not raise this issue either in their complaint or in their motion for partial summary judgment. We generally do not consider for the first time on appeal arguments not raised below. *Stewart v. Mut. of Omaha Ins. Co.*, 169 Ariz. 99, 108, 817 P.2d 44, 53 (App. 1991). Thus, we decline to address the statute of limitations issue presented by the Rosier Children in their answering brief.⁷

2. *Peter's Status as a Settlor of the Patricia Trust*

¶20 A settlor of a trust is defined as "a person . . . who creates or contributes property to a trust." A.R.S. § 14-10103.16. (Supp. 2010). A person will be treated as a settlor to the extent he has a right of withdrawal. A.R.S. § 14-10505.B.1. (Supp. 2010). Indeed, a settlor of a trust may not shield assets from creditors by depositing them with the trust. A.R.S. § 14-10505.A.; *Ariz. Bank v. Morris*, 6 Ariz. App. 566, 569, 435 P.2d

⁷ We express no opinion whether the statute of limitations has run.

73, 76 (1967). Thus, if Gail is a creditor, she may prevail in her claims against the Patricia Trust upon a showing that Peter made himself a settlor of the Patricia Trust by depositing his separate property into the Patricia Trust, or by showing that he should be treated as a settlor due to his right of withdrawal. Only by making such a showing can she establish that the Patricia Trust is vulnerable to Peter's creditors' claims.

¶21 Gail argues that Peter contributed his separate property to the Patricia Trust in the form of cash deposits and an annuity purchased with the proceeds from the sale of the Summerlin Property.⁸ Specifically, Gail contends that Peter made three deposits into the Patricia Trust: (1) \$500,000 in the form of an annuity; (2) \$783,000 in cash, alleged by the Rosier Children to be payment in satisfaction of the loans drawn against the life insurance policies; and (3) \$650,000 in the form of a money transfer. Gail also argues that Peter must be treated as a settlor under A.R.S. § 14-10505.B.1. because he had a right to withdraw principal from the Patricia Trust. To this latter

⁸ Gail argues that the Rosier Children conceded in their motion for partial summary judgment that Peter contributed his separate property to the Patricia Trust. Indeed, in their motion for partial summary judgment the Rosier Children stated, "the assets used to fund the Patricia Trust were Dr. Rosier's sole and separate property because he took title to them prior to his marriage to Gail Rosier." In responding to Gail's allegation regarding this concession, the Rosier Children, in their Answering Brief, argue what they meant "was that no community property of Dr. Rosier and Gail was ever put in the Patricia Trust."

point, Gail posits that Peter's transfer of the Patricia Trust's twenty-five percent interest in the Summerlin Property, as well as his loans drawn against the Patricia Trust's life insurance policies, were withdrawals of trust principal.

¶22 Respecting the Summerlin Property, the Rosier Children counter that Peter did not withdrawal principal from the Patricia Trust. Specifically, the Rosier Children argue that the Patricia Trust never lost its twenty-five percent interest in the Summerlin Property; rather, Peter merely substituted the Summerlin Property interest for an annuity of equal value. That is, when Peter subsequently purchased in the name of the Patricia Trust an annuity for \$500,000, which is approximately twenty-five percent of the Summerlin Property transaction proceeds, he completed the sale of the trust's twenty-five percent interest in the property by depositing the proceeds of the transaction. Thus, according to the Rosier Children, there was no withdrawal of trust principal; nor was there a deposit of separate property associated with this transaction.

¶23 Gail's argument portrays the Summerlin Property transaction as a three-step process: (1) Peter withdrew a trust principal asset, i.e., the Summerlin Property twenty-five percent interest; (2) Peter sold the Summerlin Property as his separate property; and (3) Peter deposited a portion of the proceeds from the transaction into the Patricia Trust. Gail points to the two

Summerlin Property deeds as evidence of her characterization of the transaction; one conveying the Patricia Trust's twenty-five percent interest to Peter, individually, and the other conveying the entire property to a third-party purchaser. Gail also points to Peter's tax records, which indicate that Peter claimed the Summerlin Property for tax purposes until the promissory note was paid in full. This evidence is sufficient to substantiate a genuine issue of material fact regarding the nature of the Summerlin Property transaction and whether the proceeds from the sale of that property were assets of Peter or the Patricia Trust. Thus, summary judgment was inappropriate in resolving this issue.

¶24 Respecting the Patricia Trust life insurance policies, the Rosier Children posit that Peter merely borrowed against the policies and that any cash deposits were in repayment of loans drawn against those assets of the Patricia Trust. That is, Peter did not actually withdraw trust assets, but merely borrowed against them. The Rosier Children contend that \$783,000 was deposited with the trust to satisfy the obligations arising out of the loans drawn against the life insurance policies. However, Gail argues that Peter was not obligated to pay off his indebtedness to the trust. Rather, the insurance policy proceeds, as security, would have satisfied the debts, or else Peter could have paid the creditor directly in order to preserve the trust. Again, because the characterization of this money

transfer is a disputed question of fact, summary judgment was inappropriate in resolving the issue.⁹

¶25 Regarding Gail's argument that Peter should be treated as a settlor under A.R.S. § 14-10505.B.1., resolution of this issue hinges on disputed questions of fact to be resolved by the trier of fact. Thus, we decline to address it. We note, however, the language of A.R.S. § 14-10505.A. limits a settlor's exposure to creditors' claims against the trust principal to the extent of the amount contributed to the trust principal by the settlor.

¶26 It is for the fact finder to weigh the evidence, assess questions of credibility regarding witnesses, and chose among competing or conflicting inferences. *Orme Sch. v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990). If such questions of fact exist, summary judgment is indeed inappropriate. *See id.* Thus, the trial court's ruling in favor of the Rosier Children's motion for partial summary judgment is reversed and remanded for proceedings consistent with this decision.¹⁰

⁹ The Rosier Children also argue that Gail cannot reach any portion of the insurance proceeds in the Patricia Trust pursuant to A.R.S. § 20-1131.A. Because the character of the money used to repay the life insurance loans is disputed, we need not decide this issue.

¹⁰ Because we have reversed the judgment below and remanded, we also vacate the trial court's award of attorney's fees.

¶27 As the prevailing party, Gail is entitled to her costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21. We decline to award attorneys' fees on appeal.

CONCLUSION

¶28 For the foregoing reasons, the judgment of the trial court is reversed and the matter is remanded for proceedings consistent with this decision.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

JOHN C. GEMMILL, Judge