NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 08/06/09
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BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of: DORIS F. PETERS, Deceased. _____ GERTRUDE CUNNINGHAM, as Personal Representative of the Estate of DORIS F. PETERS, Deceased, Petitioner/Appellant, v. SAL KIELBUS, Respondent/Appellee.	No. 1 CA-CV 07-0896 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. PB2004-000341

The Honorable Karen L. O'Connor, Judge

AFFIRMED

Robert D. Barlow, Attorney at Law — Phoenix
By Robert D. Barlow, Jr.
Attorney for Petitioner/Appellant

Warner Angle Hallam Jackson & Formanek, PLC — Phoenix
By Jerome K. Elwell
J. Brent Welker

and

Curley & Allison, LLP Phoenix
By Sondri Allison
Attorneys for Respondent/Appellee

J O H N S E N, Judge

¶1 Gertrude Cunningham, as Personal Representative of the Estate of Doris F. Peters, appeals from the judgment of the superior court finding that Sal Kielbus did not violate the Adult Protective Services Act ("APSA") in obtaining money and property from Peters. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Peters was born in 1920 and widowed in 1975.[1] She always was known as an independent, assertive, demanding and controlling individual. In 1985, when he was 27, Kielbus came to the United States from Poland. Kielbus met Peters within a couple of weeks of his arrival through his aunt, who was Peters's friend. Kielbus and Peters became close friends as he assisted her with her needs and she helped him learn English. Throughout the next 18 years, Peters and Kielbus came to rely on each other for companionship and emotional support. Whenever

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[1] We view the record in the light most favorable to sustaining the judgment of the superior court. *In re Estate of Pouser*, 193 Ariz. 574, 576, ¶ 2, 975 P.2d 704, 706 (1999).

Peters needed anything, Kielbus made himself available to assist her.

¶3 In 1992, Peters, who was childless, executed a will naming her cousin, Elmer Cunningham, as primary beneficiary of her estate. Cunningham's wife, Gertrude, was named as the alternate beneficiary in the event her husband predeceased Peters. The Cunninghams lived in Ohio and visited Peters almost every year in the early 1990s. Mr. Cunningham passed away in 1998, leaving his wife as the sole beneficiary of Peters's residuary estate. After Mr. Cunningham's death, Peters maintained very limited contact with Gertrude Cunningham (hereafter "Cunningham") or any of her other family members.

¶4 In July 1998, 13 years after the beginning of her relationship with Kielbus, Peters executed a durable power of attorney and a healthcare power of attorney prepared at her request by her attorney Mack Tarwater that named Kielbus as her agent. Kielbus had no communication with Tarwater regarding these documents.

¶5 In May 1999, Kielbus was offered and accepted a job in Connecticut. When he informed Peters that he intended to move, she offered to give Kielbus her house and help him financially if he would stay in Phoenix and continue to help her when she called upon him. At the time, Peters was living at home by

herself and was able to get around without home care. Kielbus accepted Peters's offer and subsequently took a lower paying job in Phoenix. A few months later, Peters contacted Tarwater to prepare a deed conveying a remainder interest in her house to Kielbus. Tarwater prepared the deed and brought it to Peters's house, and she signed it on September 14, 1999. Peters informed Cunningham that she had signed her house over to Kielbus, and Cunningham did not voice any concerns or objections to the transaction.

¶6 Toward the end of 1999, Peters's physical condition deteriorated. She needed assistance getting out of bed, driving and walking. In September 1999, Kielbus arranged for his mother, Jadweiga Kielbus, to become Peters's main caregiver. Although Peters paid Kielbus's mother for several hours of work each day, Kielbus himself continued to be at Peters's beck and call, which disrupted both his personal and professional life.

¶7 In 1999 or 2000, after Kielbus's mother broke her leg, Kielbus contacted Cunningham to ask for assistance caring for Peters. Cunningham and her daughter, Mary Kay Taylor, came and stayed with Peters for less than a week and took care of her during that time. Although Peters spoke by phone with Cunningham, this visit was the last in-person visit Cunningham

(or any other family member) had with Peters before her death on January 19, 2004.

¶8 In May 2000, Peters gave Kielbus $64,000, which Kielbus deposited in the bank account of his company, Aerospace Contacts, L.L.C. Company financial statements in the years 2000-2002 reported a long-term liability to Peters in the amount of $64,000. Peters's income tax returns reported interest income from the company in 2000 through 2002.

¶9 Between 1993 and 1996 Peters had set up several annuity accounts naming Elmer Cunningham and her other cousins as pay-on-death beneficiaries. At some point several years later, Peters expressed an interest in naming Kielbus as beneficiary of the annuities and suggested that he use the power of attorney to sign any necessary documents. In February 2001, Kielbus visited Sylvester Martinez, an agent for American National Insurance Company, and inquired about procedures for changing the beneficiary on the annuities. Martinez telephoned Peters and confirmed that she wanted to make the beneficiary changes. On February 6, 2001, using the power of attorney, Kielbus executed forms naming himself as beneficiary, which Martinez then completed. The total death benefit from the policies was approximately $95,185.88.

¶10 Peters named Kielbus as a joint tenant on Peters's checking account in 2000. From May 31, 2000, through January 15, 2004, various checks were written from the checking account to Kielbus, members of his family and his acquaintances. The total of these distributions was $249,397.27.

¶11 In December 2003, Kielbus opened a brokerage account for Peters and deposited approximately $150,000 worth of her stocks. He withdrew $49,000 from the brokerage on December 31, 2003.

¶12 In late 2003, Peters required care 24 hours a day; workers from a professional care service helped care for her. After her death, Kielbus arranged and paid for the funeral.

¶13 Cunningham was appointed Personal Representative of Peters's estate. In July 2004, she filed a "Petition to Set Aside Transfers to Agent and Collect Amounts Due to Decedent from Agent," seeking (1) repayment of loans Peters made to Kielbus and his company; (2) to set aside transfers to Kielbus and his family that were not supported by consideration or justified as gifts; and (3) damages under Arizona Revised Statutes ("A.R.S.") section 46-456 (Supp. 2003) of the APSA.[2]

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[2] A.R.S. § 46-456 was substantially amended following the events at issue in this matter. *See* 2009 Ariz. Sess. Laws, ch. 119, § 9 (1st Reg. Sess.). We cite to the version in effect at the time relevant to this decision.

¶14 After considerable discovery and motion practice, a five-and-a-half-day trial was held in February 2007. The court issued its ruling on September 20, 2007, finding in part as follows:

> Those who knew [Peters] characterized her as an independent, assertive, demanding and controlling individual. At all times relevant . . . [Peters] maintained her assertiveness and controlling nature.
>
> * * *
>
> . . . Throughout [the 18 years of Peters's relationship with Kielbus], they came to rely on one another for companionship and emotional support. They became close friends and confidants.
>
> Whenever [Peters] needed anything, she would call [Kielbus] and he would make himself available to assist her. . . . This type of relationship continued up and until [Peters's] death in 2004.
>
> . . . At all times relevant to the issues in this case, [Peters] maintained limited contact with [Cunningham] and her distant family members.
>
> . . . [Kielbus] did not want to be named in the powers of attorney, but [Peters] insisted because he was her only friend and she trusted him with making these decisions on her behalf. The powers of attorney were prepared by [Peters's] attorney at her direction.
>
> In 1999, at age 79, [Peters] began to physically require in-home health care. . . .

With [Peters's] approval, Jadweiga became [Peters's] main caregiver. [Peters] paid Jadweiga an agreed upon wage for her services.

* * *

During this same timeframe in 1999, [Peters] and [Kielbus] worked out a system to pay [Peters's] bills and living expenses. They would discuss what needed to be paid. [Kielbus] would then write out the check and either he or [Peters] would sign it. . . . [Peters] continued to review bank statements, receipts and checks up and until the time of her death.

In 2000, [Cunningham] and [Taylor] visited [Peters] at her home. . . .

After their visit, [Peters] gifted $64,000.00 to [Kielbus] for his friendship and assistance. [Kielbus] did not ask for the money, nor did he tell [Peters] that he needed the money.

In 2001, [Peters] changed her POD beneficiaries on her annuity contracts. She chose [Kielbus] as her beneficiary because he had been and still was her main support and confidant. . . .

There was no sufficient evidence presented to conclude that [Peters] suffered from any mental impairment, from 1999 to the time of her death in 2004. . . . There is no reason to believe that [Peters] did not retain her full faculties up and until the time of her death.

Prior to 1999 and continuing thereafter, [Kielbus] put [Peters's] needs above his own family and work commitments. He acted with undivided loyalty to [Peters] throughout their relationship. He did not request money for his services. There was

> no other individual or family member who was close to [Peters] or who assisted her throughout the years. There was no other individual or family member who [Peters] trusted or who [Peters] could control like she controlled [Kielbus].
>
> Prior to 1999 and continuing thereafter, [Peters] made her intentions clear that she wanted [Kielbus] to have [] all her property and money. [Peters] maintained that her distant family members were going to get some of her money, but that [Kielbus] was the one deserving of her money and property.

The court concluded that due to her physical frailties, Peters was a vulnerable adult within the meaning of A.R.S. § 46-451(A)(10) (1997) during the years 1999 through 2004. It found that Kielbus was in a position of trust and confidence with respect to Peters, but based on the findings recited above, it concluded Kielbus had not violated A.R.S. § 46-456. Accordingly, the court denied the petition in full.

¶15 The court entered judgment on October 18, 2007. Cunningham timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101 (B), (J) (2003).

DISCUSSION

A. Legal Principles.

¶16 Pursuant to the version of A.R.S. § 46-456(A) in effect at the time, "[a] person who is in a position of trust and confidence to an incapacitated or vulnerable adult shall act

for the benefit of that person to the same extent as a trustee pursuant to [A.R.S. § 14-7201 et seq.]." *See Davis v. Zlatos*, 211 Ariz. 519, 527, ¶ 32, 123 P.3d 1156, 1164 (App. 2005).[3] Under Arizona law, a trustee shall "observe the standard in dealing with the trust assets that would be observed by a prudent man dealing with the property of another." *Id*. at ¶ 33 (quoting A.R.S. § 14-7302 (Supp. 2004)). A trustee has a duty to act "with undivided loyalty to the trustor." *Id*. (quoting *Shetter v. Rochelle*, 2 Ariz. App. 358, 366, 409 P.2d 74, 82 (1965), *modified by* 2 Ariz. App. 607, 411 P.2d 45 (1966)). Self-dealing may occur when "a trustee, acting for himself and also as trustee, seeks to consummate a deal where self interest is opposed to duty." *Id*. (quoting *Seven G. Ranching Co. v. Stewart Title & Trust of Tucson*, 128 Ariz. 590, 592, 627 P.2d 1088, 1090 (App. 1981)). Additionally, "a trustee who accepts money from a vulnerable adult must be prepared to explain how the vulnerable adult benefited from the transfer." *Id*. at 528, ¶ 36, 123 P.3d at 1165.

¶17 We will not set aside the superior court's findings of fact unless they are "clearly erroneous, giving due regard to the opportunity of the court to judge the credibility of

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[3] The trust provisions referenced by A.R.S. § 46-456, namely A.R.S. §§ 14-7201 *et seq*., were repealed effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 247, § 15 (2d Reg. Sess.).

witnesses." *In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5, 12 P.3d 1203, 1205 (App. 2000). A finding of fact "is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Kocher v. Dep't of Revenue*, 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003). We review the court's legal conclusions *de novo*. *In re Estate of Travers*, 192 Ariz. 333, 334, ¶ 11, 965 P.2d 67, 68 (App. 1998).

B. The House.

¶18 Cunningham does not dispute that Peters and Kielbus agreed in May 1999 that she would give her home to him, along with financial assistance, if he declined the Connecticut job offer to stay in Phoenix so that he could continue to care for her. The record contains no evidence that at the time she made this agreement, Peters was physically incapacitated. The life estate that Peters reserved for herself in the deed Tarwater later prepared granted her the right to remain in the home for as long as she lived.

¶19 The superior court properly concluded there was no APSA violation in Peters's deeding her home to Kielbus. Peters contacted her lawyer herself to prepare the deed. To fulfill Peters's express intent, Tarwater prepared the deed conveying a remainder interest in the house to Kielbus subject to Peters's

life estate. Tarwater testified Peters intended the house to be a gift to Kielbus and she understood the deed would divest her of rights associated with the house.

¶20 In making the transfer, Peters received independent advice from her attorney and notified her family members. Therefore, by accepting the transfer, Kielbus did not violate A.R.S. § 46-456. *See Davis*, 211 Ariz. at 527, ¶ 34, 123 P.3d at 1164 (prudent trustee would advise beneficiary to seek help of a family member or lawyer in making a transfer).[4]

C. The Annuities.

¶21 Cunningham contends the superior court erred by finding Kielbus did not violate A.R.S. § 46-456 in acceding to Peters's request that he exercise the power of attorney to have himself named as the beneficiary of certain annuity policies.

¶22 The record shows that at Peters's direction, Kielbus twice visited the insurance company office and consulted with the annuity agent, Martinez. During the second visit, Martinez telephoned Peters, verified her identity and asked if she wanted to name Kielbus as beneficiary of her annuities. Martinez testified Peters knew and understood exactly what she was doing

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[4] Cunningham argues that even though Peters retained a life estate in the home, she might have been forced to move from the home if her health deteriorated and home health care proved inadequate. This argument is irrelevant to the issue of the transfer of the home to Kielbus.

by naming Kielbus as beneficiary. Even after the beneficiary changes, Peters remained the owner of the annuities, retaining the power to change the beneficiary at any time.

¶23 Although Martinez was neither an attorney nor a family member, he was an independent third party who discussed with Peters the transaction she was making. Peters thus received independent advice as contemplated by *Davis*. The record supports the court's conclusion that Kielbus did not violate A.R.S. § 46-456 by carrying out Peters's direction to effect the change of beneficiary forms.

D. The $64,000 Transfer.

¶24 At the time she made the $64,000 transfer to Kielbus, Peters had made it clear she did not want to go to a nursing home. In order to help her avoid that prospect, Kielbus had arranged for his mother to work in Peters's home and for Peters to receive other required care. Kielbus testified that when Peters first raised the prospect of the gift, he urged her to consider giving the money to her relatives instead, but that Peters replied that she wanted all of her money to go to Kielbus because in contrast to her relatives, he was "here" whenever she needed him.

¶25 The superior court found Kielbus did not violate A.R.S. § 46-456 by accepting the $64,000 from Peters because she

gifted that amount to Kielbus "for his friendship and assistance." The court noted that Kielbus had not asked for the money and that the gift was consistent with the May 1999 agreement Peters made with Kielbus to grant him financial assistance if he would remain in Phoenix and with the fact that Peters "wanted [Kielbus] to have . . . all her property and money." The court further found that Peters was competent and had the capacity to make the gift; it also found that from before 1999, Kielbus put her needs "above his own family and work commitments" and "acted with undivided loyalty to [Peters] throughout their relationship." The record contains considerable support for each of these findings.

¶26 Although Kielbus and his wife both testified Peters intended the money as a gift, Cunningham argues it was a loan, pointing to Kielbus's company's financial statements, which reported a long-term liability to Peters in the amount of $64,000, and Peters's tax returns, which showed interest received from the company during those years. Based on the record and in the absence of a promissory note, however, we cannot conclude the superior court's finding was clearly erroneous. *See Kocher*, 206 Ariz. at 482, ¶ 9, 80 P.3d at 289.

¶27 Citing *Davis*, Cunningham argues that even if the money was a gift, the transfer violated A.R.S. § 46-456 because it did

not benefit Peters. As noted, the court concluded the gift benefitted Peters in that it assisted her in fulfilling her commitment to Kielbus to support him financially if he would remain in Phoenix.

¶28 Section 46-456 provides that a person in "a position of trust and confidence" to a vulnerable adult "shall act for the benefit of that person to the same extent as a trustee pursuant to [A.R.S. §§ 14-7201 *et seq.*]." Cunningham argues *Davis* compels us to conclude the statute was breached because Peters did not benefit from the transfer. The transfers at issue in *Davis* were distinguishable, however. 211 Ariz. at 527-28, ¶¶ 35-36, 123 P.3d at 1164-65 (donor who transferred land to paid caretaker so he would live nearby was not benefited by land transfer because caretaker never intended to live there; no benefit from loans because caretaker did not allege his compensation was insufficient for services he provided).

¶29 In holding the superior court did not err in concluding that the gift benefitted Peters, we place great weight on its findings that (1) Peters remained mentally competent at all times; (2) Peters wanted Kielbus to receive all of her assets; (3) Kielbus never asked for any money from Peters; and (4) Kielbus always acted with undivided loyalty toward Peters. Implicit in the court's findings is that despite

the fact that Peters was a “vulnerable adult” and therefore subject to exploitation, she was not exploited by Kielbus. To the contrary, we conclude that the cash gift to Kielbus benefitted Peters because it helped her fulfill her promise to Kielbus to reward him financially, in large part so that he would assist her in remaining self-sufficient. *See id*. at 527, ¶ 34, 123 P.3d at 1164 (pursuant to section 46-456, person who cares for vulnerable adult is “expected to put her interests first”); *Shetter*, 2 Ariz. App. at 366, 409 P.2d at 82 (“The first duty of any trustee is to act with undivided loyalty to the trustor.”); *see generally In re Estate of Gordon*, 207 Ariz. 401, 407, ¶ 30, 87 P.3d 89, 95 (App. 2004) (in probate context, “decedent’s wishes can inform” analysis of benefit to estate; if action “can be said to *further a directive of the decedent expressed* either in his will *or in some other provable context*, the action can be said to benefit the estate . . . .”) (emphasis added).

¶30 Based on the record and the court’s findings of fact, we cannot conclude the court abused its discretion by finding that the gift to Kielbus was consistent with Peters’s desire to assist Kielbus financially in the years after he acceded to her request to decline the higher paying job in Connecticut. As noted, the gift was made at a time when Peters was particularly

grateful for Kielbus's assistance in keeping her out of a nursing home. The record makes clear that although as she grew older Peters became physically incapacitated, to the end she remained mentally competent and obstinate, stubborn and domineering.[5] Cunningham herself testified that "when [Peters] made up her mind what she wanted . . . she could be very stubborn in having somebody else step in" and "I believe [Peters] controlled [Kielbus]." These facts, along with the other findings recited above, cause us to conclude that the court did not err by finding that Peters benefitted from the transfer and that no violation of A.R.S. § 46-456 occurred in Kielbus's acceptance of the $64,000 gift.[6]

E. The Checking Account.

¶31 Cunningham next argues that because Kielbus was subject to the same standards as a trustee, he had a duty to

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[5] In applying A.R.S. § 46-456 to this case, we note the statute does not purport to modify the legal standards by which one's capacity to contract is determined. While we acknowledge the concern we expressed in *Davis* that a mentally competent person who is rendered vulnerable by physical limitations may be subject to exploitation, such exploitation was not present here.

[6] It was undisputed that Peters informed Cunningham that she had transferred her home to Kielbus shortly after she made the transfer. Cunningham's failure to object to that transfer of property tends to support the proposition that Peters's later transfers to Kielbus were consistent with Peters's intentions rather than the product of Kielbus somehow overcoming Peters's will.

provide an accounting and explain how the checking account funds were used for Peters's benefit. *See* A.R.S. § 14-7303 (2005) (trustee must keep beneficiaries "reasonably informed of the trust" and upon request, must provide a statement of accounts).

¶32 The burden is on the trustee of funds to make a proper and satisfactory accounting. *In re Schuster's Estate*, 35 Ariz. 457, 469, 281 P. 38, 43 (1929). A trustee has a duty to maintain adequate books and records regarding the trust property and provide beneficiaries with accountings on request, Restatement (Third) of Trusts § 83 cmt. b (2007), although the necessity of a formal accounting can be dispensed with, Restatement (Second) of Trusts § 172 cmt. d (1959). The duty to provide an accounting may be discharged by simple, orderly forms of bookkeeping and record maintenance and disclosing information in a manner which will allow beneficiaries to determine whether the trust is being properly administered. Restatement (Third) of Trusts § 83 cmt. a.

¶33 The superior court found that Peters and Kielbus regularly employed a system to pay Peters's bills and living expenses by which they would discuss what needed to be paid, Kielbus would write out the checks, and one of them would sign them. The court further found that Peters continued to review

bank statements, receipts and checks up until the time of her death. Evidence in the record supports these findings.

¶34 We have found no case authority, and the parties have supplied none, resolving the precise extent of a duty to account that may be imposed on a person in a position of trust and confidence to a vulnerable adult pursuant to A.R.S. § 46-456. The parties dispute whether such a person need only "account" to the vulnerable adult (such as by the manner in which Kielbus conferred with Peters about the checks required to be written and her regular review of bank statements) or whether the person must "account" to the beneficiary or to the court, perhaps years later, after the eventual passing of the vulnerable adult.

¶35 Under the circumstances presented here we need not decide the issue because we conclude Kielbus's testimony and the other evidence at trial satisfied any obligation he may have had to account to the court after the fact with respect to the joint checking account. Kielbus testified at length about his practice of conferring with Peters, usually as she ate her lunch, about bills that needed to be paid and Peters's need for cash (she refused to use a credit card), and that he wrote out checks for her and signed some of them, both at her direction. Particularly in view of the court's findings that Kielbus always acted with undivided loyalty toward Peters and that at all times

Peters remained competent, we cannot conclude the court erred by finding that Kielbus adequately accounted for checks written from the joint checking account.

¶36 Finally, Cunningham argues that the superior court erred by failing to make findings with respect to interest and dividends paid to Peters over the relevant time. We agree with Kielbus, however, that Cunningham waived this issue by failing to identify it in the joint pretrial statement as a contested issue of fact or law.[7]

CONCLUSION

¶37 For the foregoing reasons, we affirm the judgment of the superior court.

__/s/_____
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

__/s/_____
PATRICIA A. OROZCO, Judge

__/s/_____
SHELDON H. WEISBERG, Judge

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[7] The pretrial statement identified as a contested issue "transfers made to [Kielbus] by [Peters]" but failed to identify any issue relating to Kielbus's control of checks or other payments to Peters from others.