

2007 WL 5746666 (Ariz.App. Div. 1) (Appellate Brief)  
Court of Appeals of Arizona, Division 1.

In the Matter of the Estate of Emmet C. WYTENBACH, Deceased.  
Barry D. Wytttenbach, personal representative of the Estate of Emmet C. Wytttenbach, Appellant,

v.

Nona Wytttenbach, Surviving spouse of decedent, Appellee.

No. 1 CA-CV 07-0012.

May 7, 2007.

Maricopa County Superior Court No. PB 2002-003780

**Answering Brief**

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## \*1 INTRODUCTION

Defendant/Appellee Nona Wyttenbach (hereinafter “Nona”) submits her answering brief and urges the Court to deny Plaintiff/Appellant Barry D. Wyttenbach's (“Barry”) appeal from the probate court's summary judgment dismissing Barry's complaint and denying Barry's request for leave to amend.

In the case below, Barry alleged that Nona violated [A.R.S. § 46-456](#), the Adult Protective Services Act (“APSA”) by allegedly asserting undue influence to convince her late husband, Emmet Wyttenbach (“Emmet”), to bequeath and/or convey certain assets to Nona. The trial court held that this Court's opinion in [Estate of Winn v. Plaza Healthcare](#), 212 Ariz. 117, 128 P.3d 234 (App. 2006), barred Barry's complaint because he was not appointed personal representative of Emmet's estate within the two year statutory period set forth in Arizona's probate code.

On appeal, Barry argues that the Supreme Court's decision in [Estate of Winn v. Plaza Healthcare](#), 214 Ariz. 149, 150 P.3d 236 (2007), requires the reinstatement of his claims. Barry is simply wrong. In *Winn*, the Supreme Court ruled that the probate code's limitation on actions by late-appointed personal **\*2** representatives does not apply to an APSA claim for abuse of an incapacitated or vulnerable adult brought under [A.R.S. § 46-455\(B\)](#). The Supreme Court's opinion was premised on the legislature's provision under sub-section 0 of that section that “a civil action authorized by this section... does not limit and is not limited by any other civil remedy or criminal action or any other provision of law.” The Supreme Court held that sub-section 0 demonstrated the legislature's intent that claims brought under [A.R.S. § 46-455\(B\)](#) not be limited by the general provision of the Probate Code that bars a late appointed personal representative from asserting a civil claim. The Supreme Court, however, expressly declined to expand its holding beyond its application to [A.R.S. § 46-455](#).

The Supreme Court's holding in *Winn* does not apply to this case. Barry did not bring a civil action against Nona under [A.R.S. § 46-455](#), which permits a cause of action against one who provides care to an incapacitated or vulnerable adult and who causes or permits the life of that adult to be endangered or that person's health to be injured or endangered by neglect. Instead, Barry's complaint alleged violations of [A.R.S. § 46-456](#) which authorizes a civil cause of action for financial exploitation of an incapacitated or vulnerable adult, but does not include a provision similar to [A.R.S. § 46-455\(0\)](#). In fact, although the legislature incorporated several provisions of [A.R.S. § 46-455](#) into [A.R.S. § 46-456](#), it **\*3** declined to incorporate [A.R.S. § 46-455\(0\)](#) into [A.R.S. § 46-456](#). A civil action under [A.R.S. § 46-456](#), therefore, is subject to limitations imposed by “any other provision of law.” Accordingly, this Court's application of the probate code limitation against a civil action by a late-appointed personal representative, as expressed in *Winn* should still apply to preclude Barry's cause of action and the trial court's summary judgment should be affirmed.

Similarly, the trial court did not abuse its discretion in denying Barry's request to amend his complaint to add himself individually as a party plaintiff. After *Winn* was issued by this Court, Barry attempted to circumvent that ruling, and the trial court's subsequent summary judgment, by purporting to assign the estate's APSA claim to himself in his individual capacity. Barry then sought leave from the trial court to amend his complaint to add himself as an individual party plaintiff. An APSA claim, however, is a statutory tort that may only be brought by or on behalf of a vulnerable adult. An APSA claim may not be assigned and then asserted by a third-party. Moreover, any independent individual claims by Barry would be barred by the applicable statutes of limitation.

This Court should deny Barry's appeal and affirm the trial court's judgment.

## \*4 STATEMENT OF THE CASE

This appeal arises out of Barry Wytttenbach's statutory claim against Nona Wytttenbach for alleged financial exploitation of Nona's late husband pursuant to the Adult Protective Services Act, [A.R.S. § 46-456](#).

On April 22, 2004, Barry submitted a petition for formal probate of the will of Emmet Wytttenbach, who died December 2, 2001, and for the appointment of Barry as personal representative of Emmet's estate. Court's Record Index item ("CR") 2. On May 24, 2004, the trial court ordered a formal probate of Emmet's will and appointed Barry as personal representative of Emmet's estate. CR 8 (submitted by Appellant as appendix exhibit 4).

On August 13, 2004, Barry, as personal representative of Emmet's estate, filed a petition and complaint against Emmet's widow, Nona Wytttenbach, alleging that Nona violated [A.R.S. § 46-456](#) by financially exploiting Emmet and diverting assets that would have otherwise belonged to Emmet's estate when he died. CR 13 (Appellant's App. 5).

On May 12, 2005, Nona filed a petition for removal of Barry as personal representative of Emmet's estate. CR 20. On June 3, 2005, Nona filed a motion \*5 for summary judgment requesting the dismissal of Barry's petition and complaint on the grounds that there was insufficient evidence to support a jury question on the essential elements of Barry's claims. CR 22.

On September 16, 2005, the trial court denied Nona's petition for removal of Barry as personal representative. CR 40. On March 3, 2006, the trial court denied Nona's motion for summary judgment, finding "genuine issues of material facts to allow the matter to proceed to trial." CR 55.

On March 10, 2006, Barry filed an instrument of distribution as personal representative, purporting to assign the estate's "claim against Nona Wytttenbach in State of Arizona, Maricopa County Superior Court, Cause No. PB2002-003780" to himself individually. CR 56 (Appellant's App. 8).

On May 4, 2006, Nona filed a second motion for summary judgment, this time asserting that this Court's opinion in *Winn*, issued February 14, 2006, precluded Barry as a late-appointed personal representative from asserting his claims against Nona. CR 58. <sup>1</sup> On June 2, 2006, Barry filed a petition to amend his complaint, requesting that he be added individually as a party-plaintiff based on his \*6 assignment as personal representative of the estate's claim against Nona to himself in his individual capacity. CR 61 (Appellant's App. 12).

On June 27, 2006, the trial court granted Nona's motion for summary judgment and denied Barry's petition to amend his complaint. CR 64 (Appellant's App. 13). On October 26, 2006, the trial court entered a formal signed order granting Nona's motion for summary judgment, dismissing Barry's complaint with prejudice and denying Barry's petition to amend the complaint. CR 74 (Appellant's App. 14).

Barry filed a timely notice of appeal on November 21, 2006. CR 75. This Court has jurisdiction on appeal pursuant to [A.R.S. § 12-2101\(J\)](#).

#### \*7 STATEMENT OF FACTS

Barry Wytttenbach is the only child of Emmet and Ester Wytttenbach. CR 59 (Appellant's App. 10), ¶1. On May 29, 1994, Emmet and Ester established a trust, which provided that the surviving settlor could "withdraw any part or all of the principal at any time or times." Exhibit A to November 10, 2005, Plaintiffs Statement Of Facts In Opposition To Defendant's Motion For Summary Judgment, CR 42, at page 5, § 3. The trust further provided the surviving settlor with a testamentary power of appointment. *Id.* at page 6, § 4. In the event that the surviving settlor failed to exercise his or her testamentary power of appointment, the remaining trust estate would be distributed to Barry. *Id.* at page 6, § 5.

Ester Wytttenbach died on July 30, 1993. CR 42, ¶2. Emmet married Nona Wytttenbach on September 26, 1996. *Id.* ¶6.

On February 4, 1999, Emmet executed a First Amendment to the trust, providing that Nona would receive all property in which she was named sole beneficiary and/or was held by either joint-tenancy or community property with right of survivorship. Exhibit B to CR 42, at page 2. The First Amendment further \*8 provided that Nona would receive all Emmet's personal property and insurance policies upon his death. *Id.* at page 3, Article Third.

On May 3, 2001, Emmet executed a Second Amendment to the trust, again providing that Nona would receive all property in which she was named sole beneficiary and/or was held by either joint-tenancy or community property with right of survivorship, plus all of Emmet's personal property including insurance policies. Exhibit C to CR 42. The Second Amendment further provided that Nona would receive a promissory note made by John and Karen Roose, together with any right, title and interest, including a deed of trust securing that promissory note, to certain real property located in Lake City, Colorado. *Id.* The Second Amendment again provided for a general testamentary power of appointment and, to the extent that power was not exercised, that the residue of the trust would be distributed to Barry. *Id.* The second amendment to the trust named Bradley S. Hahn as trustee upon Emmet's resignation or death with William J. Howard as successor-trustee. *Id.*

Also on May 3, 2001, Emmet executed a last will and testament, which stated that Emmet had made provision for Nona outside the will and trust and again confirmed that Nona would receive Emmet's personal property plus any joint-tenancy or community property with right of survivorship. Exhibit D to \*9 CR 42. The residue of Emmet's estate was to be distributed to the trust, excluding any property subject to a testamentary power of appointment. *Id.* Emmet's will further provided that the trust would pay all expenses for Emmet's last illness and funeral, cost of administration and taxes assessed by reason of his death. *Id.*

Emmet's will appointed Bradley S. Hahn as personal representative of his estate, with William J. Howard to serve if Hahn should fail or cease to serve as personal representative. *Id.* at page 3. Emmet died on December 2, 2001. CR 1, ¶1.

On April 28, 2003, Barry's retained attorney Thomas J. Shumard wrote to William J. Howard demanding that Mr. Howard, as nominated personal representative of Emmet's estate, file a financial exploitation claim against Nona. CR 59 (Appellant's App. 10), ¶10 and letter attached thereto. Both nominated personal representatives (who are also successor-trustees of the trust) Bradley S. Hahn and William J. Howard declined to pursue an exploitation claim against Nona, but agreed to renounce any right to appointment as personal representative of Emmet's estate. *Id.* ¶11 and deposition excerpts attached thereto. Barry then submitted Emmet's will to the Maricopa County Superior Court for probate, his request to appointment as personal representative of Emmet's estate and \*10 subsequently filed the complaint against Nona alleging financial exploitation of a vulnerable adult, out of which this appeal arises.

#### **\*11 ISSUES PRESENTED**

1. Whether the applicable provisions of the Arizona probate code preclude a late-appointed personal representative from prosecuting a civil cause of action under [A.R.S. § 46-456](#), for the alleged financial exploitation of an incapacitated or vulnerable adult, on behalf of the victim's estate.
2. Did the trial court abuse its discretion in denying Appellant's request to amend his complaint to add himself individually as a party-plaintiff to the estate's claim for alleged financial exploitation of the decedent victim.

#### **\*12 ARGUMENT**

The trial court correctly granted Nona Wytttenbach summary judgment on the ground that Barry Wytttenbach as a late-appointed personal representative was precluded from pursuing a civil action against Nona under the probate code. The trial court also correctly refused to allow Barry to amend his complaint to add himself individually as a party-plaintiff, because he had no individual claim against Nona and any individual claim would have been barred by the statute of limitation in any event.

The fundamental flaw in Barry's argument on appeal is his failure to recognize the distinction between a civil action under [A.R.S. § 46-455](#) for injury arising out of abuse or neglect of an incapacitated or vulnerable adult as opposed to Barry's claim under [A.R.S. § 46-456](#) for the alleged financial exploitation of an incapacitated or vulnerable adult. In fact, Barry's opening brief did not even reference A.R.S. § 46456, even though that section provides the sole statutory basis for his claim.

Under A.R.S. § 46455(O), the legislature expressly provided that a claim for abuse could not be limited by any other provision of law. It is this language 3065013 1.DOC(56653.I) \*13 that informed the Supreme Court's decision in *Winn*, upon which Barry's argument so heavily relies. That language, however, was not included or incorporated into [A.R.S. § 46-456](#), which forms the basis of Barry's claim. The Supreme Court's opinion in *Winn*, therefore, has no application in this case and this Court's holding in *Winn* to the effect that the Arizona probate code precludes a late-appointed personal representative from pursuing a civil cause of action remains valid.

The trial court also correctly refused to allow Barry to amend his complaint to add himself individually as a party-plaintiff. The trial court recognized Barry's individual claim would be barred by the applicable statutes of limitation and that in any event, Barry could not simply assign a claim belonging to the estate to himself individually in order to circumvent the probate code. A tort claim cannot be assigned in Arizona and any claim under the Adult Protective Services Act can only be brought by or on behalf of the injured party, not an assignee.

As further demonstrated below, the trial court's rulings were correct and its judgment should be affirmed.

#### **I. THE PROBATE CODE CONTINUES TO BAR A LATE-APPOINTED PERSONAL REPRESENTATIVE'S CLAIM FOR FINANCIAL EXPLOITATION OF A VULNERABLE ADULT.**

Barry Wyttenbach's appeal rests on the faulty premise that the Supreme Court's decision in *Winn* rendered ineffective the probate code limitation on a late-3065013 \*14 appointed personal representative's authority to pursue claims. That is not the case.

Barry alleges that he has standing to assert an APSA claim against Nona, pursuant to [A.R.S. § 46-455\(P\)](#). That provision, however, does not confer standing, but merely provides that a vulnerable adult's civil action under APSA will not be limited by the victim's death. A personal representative's standing to pursue an APSA claim does not derive from [A.R.S. § 46-455](#), but from the applicable provision of the probate code, [A.R.S. § 14-3108](#).

The flaw in Barry's argument is his failure to recognize the distinction between a claim for abuse of a vulnerable adult under [A.R.S. § 46-455](#) and a claim for the financial exploitation of a vulnerable adult under [A.R.S. § 46-456](#). The Supreme Court's opinion in *Winn* dealt only with claims for abuse under [A.R.S. § 46-455](#). Because there is no dispute that Barry was late-appointed, his claim remains barred by [A.R.S. § 14-3108](#).

The claim at issue in *Winn* was brought under [A.R.S. § 46-455\(B\)](#), which creates a remedial cause of action against a caregiver who abuses or neglects the elderly. *Winn*, 214 Ariz. at 150, ¶5, 150 P.3d at 237. In *Winn*, the issue was whether [A.R.S. § 14-3108\(4\)](#), which provides that a personal representative who is appointed more than two years after the decedent's death has no right to possess \*15 estate assets beyond that necessary to confirm title in the rightful successors to the estate, bars an Adult Protective Services Act suit brought pursuant to [A.R.S. § 46-455\(B\)](#). *Id.* at 151, ¶11, 150 P.3d at 238. The issue was not whether [A.R.S. § 14-3108\(4\)](#) would bar the bringing of any lawsuit. The Supreme Court left that question to a later day. *Id.*

The Supreme Court's inquiry focused on [A.R.S. § 46-455\(0\)](#), which provides that a civil suit brought under that section is not limited by any other provision of law and [§46-455\(P\)](#), which provides that a civil action is not limited by the death of an elder abuse victim. The Supreme Court previously held in *In re Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 945 P.2d 1283 (1997), that an APSA claim for pain and suffering survived the death of an elder abuse victim in spite of [A.R.S. § 14-3110](#), which provides that damages for pain and suffering do not survive death. See *Winn*, 214 Ariz. at 151-52, ¶12, 150 P.3d at 238-39.

The Supreme Court similarly found in *Winn* that the plain language of § 46-455(0) and (P), taken together, evidenced the legislature's intent that the probate code not limit a personal representative's ability to seek a remedy on behalf of a deceased elder abuse victim's estate. *Id.* at 152, ¶14, 150 P.3d at 239. The Supreme Court thus concluded “that a late-appointed personal representative \*16 may bring an APSA claim pursuant to § 46-455(B) on behalf of a deceased victim's estate provided that the limitation period on the claim has not run.” *Id.* at 152, ¶15, 150 P.3d at 239.

In this case, however, Barry is not bringing a claim under A.R.S. § 46-455(B). Rather, Barry's claim is for the alleged financial exploitation of a vulnerable adult under A.R.S. § 46-456(C). In promulgating A.R.S. § 46-456, the legislature did not incorporate the provisions of A.R.S. § 46-455(0) or any similar provision. Rather, A.R.S. § 46-456(E) incorporates only § 46-455, subsections F, G, H, I, K, L, M and P. Significantly, subsection (O) is not included in that incorporation. Thus, there is no provision in A.R.S. § 46-456 to the effect that a civil action brought under that section may not be limited by any other provision of law. There is no reason, therefore, for holding that the probate code limitation on actions by a late-appointed personal representative should not apply. Accordingly, this Court's interpretation and the application of A.R.S. § 14-3108(4) to an APSA claim for financial exploitation pursuant to A.R.S. § 46-456 remains viable.

Under the Probate Code, a personal representative must be appointed within two years of the decedent's death, with certain exceptions. A.R.S. § 14-3108. If a personal representative is appointed after the two year period, he or she has no right to possess estate assets as provided in A.R.S. § 14-3709 beyond that \*17 necessary to confirm title thereto in the rightful successors to the estate. A.R.S. § 14-3108(4). Indeed, A.R.S. § 14-3108(4) is not simply a statute of limitation, but “is a statutory limitation on the probate court's power.” *Wood v. Hunt*, 147 Ariz. 366, 367, 710 P.2d 476, 477 (App. 1985). It is A.R.S. § 14-3709(B) that invests a personal representative with the authority to pursue a civil action in the probate proceeding to recover assets wrongfully diverted from the estate. In *Winn*, however, this Court concluded that the plain language of A.R.S. § 14-3108(4) did not extend such authority to a late-appointed personal representative. See *Winn*, 212 Ariz. 117, 128 P.3d 234. This Court, therefore, barred the personal representative in *Winn* from pursuing an APSA claim under A.R.S. § 46-455.

Although the Supreme Court overruled *Winn*, it did so based on the § 46-455(0) provision that a civil action brought under that section is not limited by any other provision of law. Section 46-456 does not contain such a provision and the legislature elected not to incorporate that provision into the section. It must be presumed, therefore, that the legislature deliberately determined that APSA claims for financial exploitation under A.R.S. § 46-456 should be subject to those limitations found in “any other provision of law,” including all limitations imposed by the Probate Code.

\*18 The Supreme Court's opinion overturning *Winn* applies only to APSA claims for abuse that harm or endanger the health of a vulnerable adult, not to claims for financial exploitation. The central basis for the Supreme Court's opinion in *Winn*, has no application to the claims brought by Barry Wytttenbach in this case. The Probate Code's limitations on the authority of a late-appointed personal representative, therefore, should still apply to Barry and bar his claims against Nona Wytttenbach.

This Court should affirm the trial court's summary judgment dismissing Barry Wytttenbach's Petition and Complaint.

## **II. BARRY COULD NOT ASSERT THE ESTATE'S APSA CLAIM AS AN ASSIGNEE OR IN HIS INDIVIDUAL CAPACITY AND THEREFORE WAS NOT ENTITLED TO AMEND HIS COMPLAINT TO ASSERT INDIVIDUAL CLAIMS.**

The trial court did not abuse its discretion in denying Barry's Petition to Amend to add himself as a party plaintiff in his individual capacity. Barry simply had no legal basis for pursuing a claim that belonged to the estate that he was legally barred from pursuing as personal representative. Emmet's will did not even name Barry as a beneficiary. The Wytttenbach trust is the residual beneficiary of Emmet's will. Exhibit D to CR 42. Moreover, to allow a late-appointed personal representative to avoid the limitations of the Probate Code by simply assigning \*19 estate claims would effectively abrogate the legislative distinction between timely and late-appointed personal representatives.



On February 14, 2006, this Court issued its opinion in *Winn*, holding that a late-appointed personal representative could not pursue an APSA claim on behalf of the estate. On March 10, 2006, Barry submitted an Instrument of Distribution to the trial court, purporting to assign the estate's APSA claim against Nona to Barry in his individual capacity. On June 2, 2006, after Nona filed her Motion for Summary Judgment based on this Court's holding in *Winn*, Barry filed the petition to amend his complaint to add himself as a party plaintiff in his individual capacity, based on the March 10, 2006 assignment. The trial court correctly rejected Barry's ploy to avoid the limitations on late appointed personal representatives and denied leave to amend.

Barry's attempted assignment of the estate's APSA claim had no legal significance and did not confer Barry with authority to pursue a claim that was legally barred. An APSA claim for financial exploitation may only be "brought by or on behalf of an incapacitated or vulnerable adult." [A.R.S. § 46-456\(C\)](#). Although, pursuant to [A.R.S. § 46-455\(P\)](#), incorporated into [§46-456](#) by subsection (E), a cause of action or right to bring a cause of action under sub-section B does not abate with the death of the incapacitated or vulnerable, the Probate Code [\\*20](#) governs who has authority to assert claims on behalf of the decedent's estate. Only a timely appointed personal representative of the estate can assert a financial exploitation claim. A late appointed personal representative cannot assign a claim he has no authority to possess or pursue under the Probate Code.

Moreover, an APSA claim is a statutory tort claim that is personal to the injured party and cannot be assigned. *See e.g., K.W. Dart Truck Co. v. Nobel*, 116 Ariz. 9, 11, [567 P.2d 325, 327 \(1977\)](#) (absent legislative authority to the contrary, unliquidated claims for damages arising out of tort are unassignable); *Lingel v. Olbin*, 198 Ariz. 249, [8P.3d 1163 \(App.2000\)](#) (personal representative's agreement to share proceeds of wrongful death action and insurance benefits violated public policy against assignment of tort claims). It would be incongruous to hold that a late appointed personal representative can assign a claim he has no authority to pursue on behalf of the estate of a decedent who could not have assigned the claim in his lifetime.

Finally, any individual claims asserted by Barry are facially time barred. His petition to amend was not filed until June 2, 2006. All the acts that form the basis of Barry's claims must have occurred prior to Emmet's death on December 2, 2001. Any individual claims asserted by Barry, therefore, accrued more than four years prior his purported amendment and would be time barred under any legal [\\*21](#) theory. Indeed, Barry concedes that the statute of limitations on the APSA claim lapsed no later than September 4, 2004, one year after the effective date of the legislature's amendment reducing the APSA statute of limitations from seven to two years.

Barry's requested amendment would be futile. He had no legally viable claim to assert individually and the trial court did not abuse its discretion by denying leave to amend.

### **III. NONA IS ENTITLED TO RECOVER HER REASONABLE ATTORNEY'S FEES AND EXPENSES ON APPEAL.**

Under [A.R.S. § 14-3709\(B\)](#), a court must award necessary expenses out of the estate to a person who appears to answer a personal representative's complaint, if the court determines that the claim is unfounded. Accordingly, Nona Wytttenbach requests an award of her expenses, including reasonable attorney's fee incurred on appeal.

### **\*22 CONCLUSION**

The trial court properly entered summary judgment dismissing Appellant's Petition and Complaint for financial exploitation. The Supreme Court's opinion in *Winn* does not apply in this case and the summary judgment should stand. The trial court also properly exercised its discretion in denying Appellant's Petition to Amend his Complaint to add himself as a party plaintiff in his individual capacity. Appellant has no legally recognized claim to assert and the proposed amendment would have been futile.

Accordingly, Appellee Nona Wytttenbach requests this Court to affirm the trial court's judgment and award Appellee her expenses, including reasonable attorneys' fees, incurred on appeal.

Footnotes

- 1 Although Appellant's Opening Brief references Appendix exhibit 9 as Nona's May 4, 2006, motion for summary judgment, appendix exhibit 9 in the copy of the Opening Brief served on Appellee is actually Nona's June 3, 2005, motion for summary judgment (CR 22) rather than her May 4, 2006, motion (CR 8.)

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