

2011 WL 9976811 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

In the Matter of the JOHN D. AND JEAN MACHARDY TRUST, u/t/a September 11, 1996;
And Related Claims;
Craig Machardy, Petitioner,
v.
Jane A. Mueller, Respondent.

No. PB2009-070493.
October 13, 2011.

Ms. Mueller's Closing Brief

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Hon. [Jose S. Padilla](#).

I. INTRODUCTION

This is an action, brought chiefly under the Adult Protective Services Act (the "ASPA"), [A.R.S. § 46-456\(A\)](#) (2003), by a disgruntled brother to invalidate undisputedly valid transfers from the decedents (the "MacHardys") to their trusted daughter, caretaker and confidant, Ms. Jane Ann Mueller.

Under the version of the APSA applicable here. Petitioner lacks standing to assert an APSA claim, as he is not a confirmed personal representative of his parents' estate. See *In re Estate of Wyttenbach*, 219 Ariz. 120, 193 P.3d 814 (App. 2008) ("A personal representative is permitted to bring a claim under the APSA on behalf of the incapacitated or vulnerable adult. The statute, however, does not provide for claims by others."); see also, [A.R.S. 14-3601 et seq.](#) (listing statutory requirements that must be satisfied prior to confirmation of personal representative); see also, Ms. Mueller's Request for Judicial Notice, filed September 9, 2011.

Although Judge Chavez decided Petitioner did have standing under the recently amended version of the APSA. that version of the statute was not in effect at the time of Ms. Mueller's challenged conduct. Moreover, as explained in further detail below. Petitioner's Closing Brief relies almost exclusively upon the 2003 version of the APSA.

For those two principal reasons, discussed further below, the Court should in its discretion reconsider Judge Chavez' ruling granting Petitioner standing under a version of the APSA that was not even in effect at the time of the alleged wrongdoings. See *Zimmerman v. Shakman*, 204 Ariz. 231, 236, ¶ 15, 62 P.3d 976, 981 (App.2003) (acknowledging that the law of the case doctrine "does not prevent a judge from reconsidering nonfinal rulings. '[n]or does it prevent a different judge, sitting on the same case, from reconsidering the first judge's prior, nonfinal rulings.'").

Putting aside the standing issue, this is not a true APSA case, but rather a complete subversion of the legislative purpose underpinning it. In reality, this case is more about intent. And more specifically, whether the MacHardys' intent that Ms, Mueller receive her parents' accounts and treasuries should be cast aside based solely on the fact of their declining physical condition without any proof of incapacity or undue influence.

Petitioner's case-in-chief was devoid of any evidence concerning the MacHardys' intent. Petitioner does not challenge now and did not otherwise proffer any evidence at trial seeking to invalidate the non-probate transfers to Ms. Mueller on the basis of his parents' intent.¹ Instead, Petitioner seeks to undo his parents' intent by leveraging their aging physical appearance as the sole basis to argue Ms. Mueller violated the APSA and should therefore be found to forfeit her intended inheritance and pay upwards of \$1,8 million to her effectively disinherited brother.

Proceedings under the APSA based *solely* on the **elderly** person's physical decline, as is the case here, are inherently dangerous because of the real possibility of retroactively depriving an **elderly** person of his or her right to manage their affairs without the due process protections of conservatorship proceedings (i.e., the right to an attorney, to a hearing, and to the appointment of an independent physical and mental examination). This danger is exacerbated in cases like this one where the action is initiated post-death, thereby precluding the **elderly** person(s) from testifying regarding his and/or her desires or intentions.

Because of the potential misuse of the APSA for personal gain, Petitioner's urging for the retroactive application of the APSA as an avenue to unwind his parents' otherwise valid non-probate transfers must be closely examined. The APSA, we submit was never intended to operate as a wealth-shifting mechanism.

Assuming *arguendo* this case is an APSA case, the Court must nonetheless find for Ms. Mueller. The RESTATEMENT OF TRUSTS, which is cited in Petitioner's Closing Brief, authorizes **financial** transactions between a beneficiary and trustee with the beneficiary's consent if (a) the beneficiary had capacity at the time of such consent (b) the beneficiary knew of his or her rights and the material facts and (c) the consent was not induced by the improper conduct of the trustee. [RESTATEMENT OF TRUSTS § 216](#). This rule also applies to allow gifts from a beneficiary to a trustee.

In this case, the evidence shows beyond any question that the MacHardys were competent as of November 28, 2006, and that Ms. Jean MacHardy was competent as of August 2, 2007, There was no evidence of any improper conduct by Ms. Mueller directed to inducing her parents' consent. Nor did Petitioner include any such allegations in his Petition or in the Joint Pre-Trial Statement, filed September 12, 2011.

In sum, this brief will highlight the evidence showing that the MacHardys' transfers to Ms. Mueller were valid and in accordance with their intentions and Arizona law. It will address what version of the APSA the Court should apply, and the factual and legal failings of Petitioner's APSA claim under either version. It will next discuss Petitioner's breach of fiduciary duty claim and, after that, the issue of damages.

II. THE MACHARDYS' DECISION TO GIFT MS. MUELLER JOINT OWNERSHIP OF THEIR WELLS FARGO ACCOUNTS WAS MADE KNOWINGLY AND WITHOUT DURESS AND IN ACCORD WITH ARIZONA LAW

In order to effectively transfer joint ownership of the Wells Fargo Accounts to Ms. Mueller, the MacHardys must have been competent, and they must have signed the appropriate bank documents with the intent to transfer joint tenancy interests to Ms. Mueller, acting voluntarily and not under fraud, duress, mistake or undue influence. *Saylor v. Southern Arizona Bank & Trust*, 8 Ariz.App. 368, 373. 446 P.2d 474. 479 (App. 1968).

A similar same standard applies to the making of wills. See *In re O'Connor's Estate*, 74 Ariz. 248, 259, 246 P.2d 1063, 1070 (1952) (en banc). The following instances have been found not necessarily indicating a lack of mental capacity to make a will:

- A person adjudicated incompetent under a guardianship statute [*In re Thomas' Estate*, 105 Ariz. 186, 189, 461 P.2d 484, 487 (Ariz. 1969) (en banc)];

- An illiterate [*In re Estate of Phondorf*, 11 Ariz.App. 29, 31, 461 P.2d 508, 510 (Ariz. App. 1969)];
- An adult person functioning at the level of a 10 or 12 year old [*In re Estate of Teel*, 14 Ariz. App. 317, 319, 483 P.2d 603, 605 (App. 1971)];
- **Elderly** people with (i) deteriorating mental conditions; or (ii) mental slowness, poor memory, childishness, eccentricities, or physical infirmities [*Evans v. Liston*, 116 Ariz. 218, 221-22, 568 P.2d 1116, 1119-1120 (Ariz. App. 1977)]; and,
- A habitual drug user who eventually died from an overdose [*In re Estate of Weil*, 21 Ariz.App. 278, 283, 581 P.2d 995, 1000 (Ark. App. 1974)].

Mr. and Mrs. MacHardy were careful and deliberate with their **finances**. On November 28, 2006, the MacHardys conferred with an independent third-party, Wells Fargo banker Tina Shepherd, about adding their daughter, Ms. Mueller, as a joint account owner to their three Wells Fargo Accounts (the “Wells Fargo Accounts”).² Ms. Shepherd testified at trial that she explained the Wells Fargo account forms to the MacHardys at length and also discussed with them the legalities associated with adding Ms. Mueller as a joint account owner versus adding her as power of attorney.³ [See Trial Exhibit 14] After consultation with Ms. Shepherd, the MacHardys signed the account transfer forms adding Ms. Mueller as a joint owner to the Wells Fargo Accounts.

Per Ms. Shepherd's unimpeached trial testimony, the MacHardys understood their actions and proceeded with the transaction, intending to gift ownership of those accounts to Ms. Mueller independent of the power of attorney designations. Per the unimpeached trial testimony of Mr. Pelligrino (“Ben”) Costanza, the MacHardys were competent as of November 28, 2006 and able to understand the nature and effect of their acts.⁴

Pamela Willson, PhD ABPP/CN,⁵ also testified consistent with her expert opinion, Trial Exhibit 71, which was based upon her review of all of the medical records at issue, among other things:

I do not find evidence that John MacHardy lacked capacity or was unable to make independent personal or estate-related decisions on or around November 28, 2006. He may have had some periods of **delirium** when ill, but seemed lucid and capable of autonomous acts and decisions at least until the second week of December, 2006.

Jean MacHardy appears to have likewise suffered some episodes of **delirium** when hospitalized in Autumn 2006, and may have been depressed, but she was not diagnosed with any **cognitive disorder** or severe psychiatric illness, and appears to have interacted independently with Hospice staff regarding management of her husband's care well into December 2006.

Elaine Perez, APRN, BC, testified had she personally observed any **cognitive disorder** or irregularities while caring for Ms. MacHardy in January 2007, she would have made a notation in the patient's chart for follow up with Ms. MacHardy's primary care physician, Dr. Kowaleski. Ms. Perez' dictation report contains no such notations. [See Trial Exhibit 16]

There is no record evidence to prove the MacHardys did not have the requisite capacity under Arizona law to sign the Wells Fargo Account transfer forms. In fact, the MacHardys were presumed to have been of a sound mind as of the date they signed the Wells Fargo Account forms. See *Golleher v. Norton*, 148 Ariz. 537, 541, 715 P.2d 1225, 1229 (App. 1985); *Estate of Thomas*, 105 Ariz. 186, 189, 461 P.2d 484, 487 (1969) (en banc). To the extent Petitioner suggests that Ms. Jean MacHardy lacked capacity to sign the account transfer forms in November 2006 due to her alleged severe **depression**, which is directly contrary to Dr. Willson's testimony, the same presumption applies.

Ignoring *arguendo* that Petitioner did rebut the presumption of Ms. Jean MacHardy's lucidity and knowing decision to sign the Wells Fargo account forms at trial, Arizona courts have found capacity to make a will in the following circumstances: (i)

A person adjudicated incompetent under a guardianship statute [*In re Thomas' Estate*, 105 Ariz. at 189, 461 P.2d at 487]; (ii) An illiterate [*In re Estate of Phondorf*, 11 Ariz.App. at 31, 461 P.2d at 510]; (iii) An adult person functioning at the level of a 10 or 12 year old [*In re Estate of Teel*, 14 Ariz. App. at 319, 483 P.2d at 605]; (iv) **Elderly** people with (a) deteriorating mental conditions; or (b) mental slowness, poor memory, childishness, eccentricities, or physical infirmities [*Evans v. Liston*, 116 Ariz. at 221-22, 568 P.2d at 1119-1120]; and, (v) A habitual drug user who eventually died from an overdose [*In re Estate of Weil*, 21 Ariz.App. at 283, 581 P.2d at 1000]. Petitioner's claim that Ms, Jean MacHardy was incompetent to sign the Wells Fargo account forms is quickly dispatched of under the following case authorities, which all present much closer issues of incompetency than Petitioner presented at trial.

Similarly, there is no record evidence to suggest that Ms, Mueller improperly influenced her parents to add her to those accounts.⁶ To the contrary, Ms. Mueller testified that her father asked her to take him and Ms. MacHardy to Wells Fargo for the purpose of adding her as a joint owner on their Wells Fargo Accounts, Moreover. Ms, Marian Marks gave an affidavit on November 28, 2006, averring that, at the time the Wells Fargo documents were signed, the MacHardys were "of sound mind and under no constraint or undue influence." [See Exhibits 3 & 4] Given the lack of any opposing evidence on this issue from Petitioner, the evidence presented is sufficient, even under a clear and convincing standard.⁷

The MacHardys intended to gift Ms, Mueller the monies in the Wells Fargo Accounts, which was consistent with their prior acts of (i) making Ms. Mueller a joint owner of their Bank of America money market savings account in 2003, (ii) designating Ms. Mueller as their medical power of attorney in June 2003 and (iii) again designating Ms. Mueller as their durable and medical power of attorney in November 2006. [See Trial Exhibits 3. 4. 79, 80, 84] Their intent was properly affected under Arizona law and should not be set aside based solely upon the MacHardys' subsequent physical decline. That is not the true intent of the APSA.

III. MS. JEAN MACHARDY POSSESSED LEGAL CAPACITY TO SIGN THE LEGACY TREASURY DIRECT REDEMPTION FORMS

It is entirely unclear from Petitioner's Closing Brief how Ms. Mueller allegedly violated the APSA with respect to the Legacy Treasury Direct accounts, except for the bold conclusion that Ms. Mueller somehow "caused her mother to cash out Treasury Notes," and then "instructed" her to deposit those funds in the Wells Fargo Accounts. *See* Petitioner's Closing Brief at 16:11-14.

In reality, as Ms. Mueller attempted to explain during her trial examination, Legacy Treasury Direct froze all accounts upon Mr. John MacHardy's passing. *See* 31 CFR § 370.10. To unfreeze the accounts, Legacy Treasury Direct then required Ms. Jean MacHardy to open a new account in her own name only. [See Trial Exhibit 20] At the time the new account was established in August 2007. all of the treasury bills. save and except for two of them, had matured.⁸ [See *id.*] As a matter of protocol, the matured accounts were paid directly into Wells Fargo account XXXXXXXXXX, which was the same depository account that had been on file with Legacy Treasury Direct for years. [See Trial Exhibit 20; *see also*, 31 CFR § 370.5] Ms. Mueller did not select the Wells Fargo Account as the depository bank -- her parents made that decision, years before any allegation of vulnerability or incapacity,

These record facts do not trigger application of the APSA. Ms. Mueller did not "redeem" those accounts as power of attorney nor did she otherwise "cause" them to be cashed out. The evidence presented at trial was that Ms. Mueller ordered the forms that Legacy Treasury Direct had requested in order to unfreeze the accounts. She explained the forms to her mother. And after an independent consultation with Mr. Thomas McAvoy, Ms. Jean MacHardy, being fully informed of the material facts, ultimately signed the forms to open a new account, which forms were thereafter verified and certified by Mr. McAvoy, Dime Bank's Senior Vice President.

As part of the certification, Mr. McAvoy averred under penalty of 31 C.F.R. § 357.31(c)(2) that Ms. Jean MacHardy "had the legal capacity to execute the transaction request[s]."⁹ [See Trial Exhibit 20] This certification is uncontested proof that Ms.

Jean MacHardy understood the nature of her act in opening the new account in August 2007. Even with times of forgetfulness, the presumption is that Ms. MacHardy was lucid as of August 2, 2007 and had the “legal capacity”¹⁰ to sign the Legacy Treasury Direct transaction forms. *See Golleher, 148 Ariz. at 541, 715 P.2d at 1229* (absent contrary evidence, presumption of competency continues despite period of incompetency because “such persons may have lucid intervals”).

It should also be noted that Wells Fargo Account XXXXXXXXXX was the depository account listed by Mr. John MacHardy at the time the treasury accounts were first established, dating back to at least 2005. [*See* Trial Exhibit 20¹¹] Indeed, payments from Legacy Treasury Direct were being directly deposited into the Wells Fargo account ending XXX-4981 in December 2006, well before any allegation of wrongdoing!¹² This was all part of the MacHardys' plan and intent, disproving Petitioner's statement that Ms. Mueller somehow directed the treasury monies be deposited into the Wells Fargo Accounts. That argument is simply false and contrary to what the record in fact reveals. [*See* Trial Exhibits 20, 99, & 100]

The allegations regarding the Legacy Treasury Direct Accounts are not properly part of an APSA claim. The APSA was never intended to punish beneficiaries for receiving gifts that were properly and understandably made in accordance with Arizona law and with the requisite amount of testamentary capacity.

IV. PETITIONER'S APSA CLAIMS FAILS

Even assuming *arguendo* the APSA does apply to both the Wells Fargo and Legacy Treasury Direct accounts, Petitioner's APSA claims nonetheless fail, for his lack of standing and for other reasons explained in more detail below.

A. THE 2003 VERSION OF THE APSA APPLIES

Petitioner alleges that Ms. Mueller engaged in certain conduct in November 2006 and August 2007 that violated the APSA. The version of the APSA in effect at the time of Ms. Mueller's challenged conduct, which must be the version of the statute that applies for obvious due process and *ex post facto* reasons.¹³ reads in part:

- A. 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 title 14, chapter 7, article 3.
- B. A person who is in a position of trust and confidence and who by intimidation or deception knowingly takes control, title, use or management of an incapacitated or vulnerable adult's asset or property with the intent to permanently deprive that person of the asset or property is guilty of theft as provided in § 13-1802.

Petitioner apparently agrees that the pre-2009 version of the APSA applies given his several citations to it in his closing brief. *See* Petitioner's Closing Brief at 12:20-24 (“Subsection A requires that a person “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 title 14, chapter 7 article 3 [Section 14-7301 et seq.] A.R.S. §46-456(A).”); 13:11-15 (citing to the definition of “incapacity” found only in the previous version of the APSA); 13:16-19 (citing to the definition of “Vulnerable adult” found in the previous version of the APSA); 14:24-26 (citing to § 46-456(A) and specifically the language “in a position of trust and confidence has duties equivalent to a trustee,” which is a reference to prior version of the APSA in effect at the time of Ms. Mueller's alleged conduct); 15:16-19 (citing to A.R.S. § 46-456(C) as providing for an award “of up to three times the amount of monetary damages.” which is the clearest example of Petitioner's position that the prior version of the APSA, in effect during Ms. Mueller's alleged conduct applies, since the amended version contemplates a discretionary award “for an amount up to two times the amount of the actual damages,” as set forth in the current version of the APSA at § 46-456(B). These four separate citations to the 2003 version of the APSA demonstrate Petitioner's agreement that this version of the statute should apply.

Because of the plain *ex post facto* implications, and considering Petitioner's repeated and multiple citations to the prior version of the APSA in his closing brief, the Court should apply the version of the APSA in effect during Ms. Mueller's allegedly improper conduct.

B. UNDER THE 2003 VERSION OF THE APSA. PETITIONER LACKS STANDING¹⁴

Under the 2003 version of the APSA, which is the version Petitioner references repeatedly throughout his closing brief, only a personal representative had standing to bring an APSA claim. *In re Estate of Wytttenbach*, 219 Ariz. 120, 193 P.3d 814 (App. 2008) (“A personal representative is permitted to bring a claim under the APSA on behalf of the incapacitated or vulnerable adult. *The statute, however, does not provide for claims by others.*”) (emphasis added).

The Court took judicial notice of the fact that Petitioner was never appointed personal representative of his late parents' estate. And given that uncontested fact, as applied to the holding in *Wytttenbach*, the Court must reconsider whether Petitioner has standing under the version of the APSA that he apparently concedes applies. *See Zimmerman, supra*,

C. EVEN ASSUMING ARGUENDO THAT PETITIONER HAS STANDING UNDER 2003 VERSION. THERE IS NO VIOLATION OF APSA

As noted by Petitioner in his closing brief, he shoulders the burden of proof by a preponderance of the evidence with respect to proving his APSA claim. *See A.R.S. § 46-455(L)*. Petitioner has failed to make such a showing.

1. The legislative intent of the APSA

The legislative purpose of the APSA in effect during times relevant hereto is twofold: (i) it seeks to expand protection for vulnerable adults by holding individuals who deal with vulnerable adults to the same fiduciary standards as a trustee, and (ii) it seeks to deter **elder abuse** by providing for civil remedies not otherwise available in the trustee/beneficiary context, *i.e.*, treble damages, disinheritance, and other potential criminal repercussions.

It is important to note that the APSA *itself* does not create a statutory code of conduct between persons in a position of trust and confidence and a vulnerable adult.¹⁵ Instead, it very simply provides that the laws and principles that govern the trustee/beneficiary relationship will apply to a layman (trustee) in his or her dealings with a vulnerable adult (beneficiary).

Although Title 14, A.R.S., contains a few statutory provisions governing a trustee, the general duties of a trustee, as set forth in the RESTATEMENT OF TRUSTS, are • not altered by Title 14. *See A.R.S. § 14-7301*. The RESTATEMENT provides protection to the beneficiary in any **financial** transactions with the trustee by holding the trustee to certain, enunciated fiduciary standards. The APSA merely extends the same protections afforded to a beneficiary under the RESTATEMENT to a vulnerable adult. Accordingly, if a **financial** transaction is allowed under the RESTATEMENT and meets the tests set forth in the RESTATEMENT, it should be a permitted transaction under the APSA.

In a proceeding brought under the APSA, the Court must accordingly balance the rights of **elderly** persons, *with the requisite mental capacity*, to be autonomous against the legislature's desire to protect the **elderly**. As we mentioned in the Introduction section, a lawsuit filed under the APSA based *solely* on the **elderly** person's physical decline, like the case at bar, is inherently perilous because of the very real possibility of retroactively depriving an **elderly** person of his or her right to manage their affairs without the due process protections of conservatorship proceedings (*i.e.*, the right to an attorney, to a hearing, and to the appointment of an independent physical and mental examination). This danger is intensified in cases like this one where the action is initiated post-death, thereby precluding the **elderly** person(s) from testifying regarding his and/or her desires or

intentions. Hence, proceedings initiated under the APSA, post death, should be closely examined to ensure that the true intent of the APSA is honored and not misapplied as an avenue to undo otherwise legitimate and valid testamentary transactions.

2. Transactions between a trustee and beneficiary are authorized under the RESTATEMENT OF TRUSTS

The RESTATEMENT OF TRUSTS¹⁶ authorizes transactions between a beneficiary (Ms. Jean MacHardy) and trustee (Ms. Jane Mueller) with the beneficiary's consent if (a) the beneficiary had capacity at the time of such consent (b) the beneficiary knew of his or her rights and the material facts and (c) the consent was not induced by the improper conduct of the trustee. [RESTATEMENT OF TRUSTS § 216](#). This rule also applies to allow gifts from a beneficiary to a trustee.

During trial, the following evidence was presented at trial and remains uncontroverted: (i) Mr. John MacHardy retained the requisite testamentary capacity under Arizona law up and until his death; (ii) Ms. Jean MacHardy retained the requisite testamentary capacity under Arizona law up and until the time of her death. Although sometimes forgetful, Ms. Jean MacHardy was never medically diagnosed with any [cognitive disorder](#) or severe psychiatric illness; (iii) the MacHardys wanted their daughter, Ms. Mueller, to have the Wells Fargo and Legacy Treasury Direct monies; (iv) Ms. MacHardy continued to receive and presumably review bank statements sent to her own P.O. Box and even clipped coupons up and until the date of her death; (v) Ms. Mueller did not request monies for her services, which she provided around the clock for approximately 26 months; and (vi) Ms. Mueller did not ask to be a joint owner of her parents' Wells Fargo Accounts.

The RESTATEMENT elements are satisfied with respect to the MacHardys' decision to gift Ms. Mueller joint ownership of their Wells Fargo Accounts. The MacHardys consented (and in fact requested) that Ms. Mueller be added to the Wells Fargo Accounts. And they knew and understood the material facts and their rights with respect to their decision, as explained to them by an independent third-person, Ms. Tina Shepherd,

As to the last element under the RESTATEMENT -- whether the consent was induced by improper conduct of the trustee -- the record is absolutely bereft of any facts or evidence suggesting that Ms. Mueller acted in anyway inappropriately regarding her parents' knowing decision to gift her joint ownership of the Wells Fargo Accounts, She drove them to the bank, nothing more, nothing less. There is no APSA claim here with respect to the Wells Fargo Accounts.

The same analysis applies to Petitioner's claim that Ms. Mueller somehow acted improperly with respect to *Ms. Jean MacHardy's* decision open a new Legacy Treasury Direct account. As explained above, at the time the new account was opened, on or about August 2, 2007, all but two of the treasury accounts had matured. [See Trial Exhibit 20.] As a matter of course, the matured treasuries reverted automatically into Wells Fargo account XXXXXXXXXX, which was the depository account the MacHardys, not Ms. Mueller, had selected several years prior. *Ms. Jean MacHardy's* decision to open the new account, which she had to do to unfreeze the old one, was valid in all respects and never impeached. Ms. Jean MacHardy knew and understood the material facts and rights associated with her decision to open a new account, as certified under penalty of federal law by Senior Vice-President of Dime Bank. Mr. Thomas McAvoy.

Petitioner did not prove by a preponderance of the evidence that Ms. Mueller did anything to unduly influence her mother's decision to establish a new treasury account. In short. Ms. MacHardy had the capacity to make that decision. And even further, she had the opportunity to consult independently with Mr. Thomas McAvoy about the transaction and about any question she had about it. Ms. Mueller did nothing inappropriate. The APSA claim with respect to the Legacy Treasury Direct Accounts is entirely misguided. Additionally, nothing in the APSA comes close to supporting Petitioner's proposition that the transfers at issue here should be set aside because such transfers did not benefit the MacHardys. That is not consonant with the RESTATEMENT § [216](#), which Petitioner concedes applies.

3. Davis v. Zlatos is inapposite

Relying wrongly on *Davis v. Zlatos*, 211 Ariz. 519, 123 P.3d 1156 (App. 2005), Petitioner castigates Ms. Mueller as an **elder abuser**, while in reality, it was Ms. Mueller who traveled to and from Connecticut on several occasions in the Autumn of 2006 to care for her parents. When Mr. MacHardy died, Ms. MacHardy went to live with Ms. Mueller in Connecticut for approximately 26 months, where Ms. Mueller cared for her, fed her, played cards with her, took her to doctor appointments, and in sum provided her daily love and support, while simultaneously caring for her husband who had been diagnosed with terminal **cancer**. She did this around the clock and out of loyalty and devotion to her father and mother.

In *Davis*, the caregiver, Saenz had no relationship with Ms. Zlatos, the vulnerable adult, until he was hired to provide care-giving services to her. He was then, at that time, fully compensated for all his work on behalf of Ms. Zlatos. And he provided no evidence at trial that his compensation was unreasonable. In addition to his employment compensation, Saenz received from Ms. Zlatos (i) a parcel of real property and (ii) monies clearly given in the form of loans. During the six-month period in which Ms. Zlatos made the alleged loans and transferred the real property to Saenz, she was an eighty-six-year-old woman who was unable to walk. The Court of Appeals, Division One, ultimately held that Ms. Zlatos did not receive *even a general benefit* from the transfers. With respect to the real property, Ms. Zlatos provided it to Saenz to enable him to move closer to her home. However, the evidence showed that Saenz accepted the property without ever intending to move closer to her. As for the loans, Saenz provided no evidence showing how Ms. Zlatos benefited even generally by forgiving the loans.

This case is not the *Davis* case. Ms. Mueller was not her parents' paid employee, and they benefited directly from their transfer of accounts to her. Because of their gift, Ms. Mueller, who had to leave a high-paying job in Connecticut, was able to afford to take the time to care for her parents -- her father during the Autumn and Winter of 2006 and her mother from the Winter of 2006 through early-April 2009. Her mother did not want to stay in a nursing home and preferred to stay with Ms. Mueller. Per Ms. Ellis' testimony, Ms. MacHardy thoroughly enjoyed living with Ms. Mueller. Petitioner also testified that he never complained about the quality of care Ms. Mueller provided to their mother. From all accounts, Ms. Mueller provided great care and comfort to her mother.

Ms. Mueller and her parents reached an agreement whereby Ms. Mueller would care for her parents and tend to their every beck and call, forsaking a lucrative salary but allowing her to oversee their daily needs and care, and in return, they gave Ms. Mueller the **financial** assistance through gifting her joint ownership of their Wells Fargo Accounts. The evidence produced at trial confirmed that Ms. Mueller lived up to this agreement. She left her job. And she provided around the clock care to her parents: taking them to doctors, preparing their meals, giving them the companionship and devotion that Petitioner never showed, save and except for a trip or two to the hospital. This is not the *Davis* case.

4. A trustee's duty to account to beneficiaries

The Court asked Ms. Mueller to account for certain of the proceeds that came from the jointly-owned Wells Fargo Accounts. Two comments are required in response.

First, Ms. Mueller was a joint owner of the Wells Fargo Accounts and had the same rights and powers under those accounts as her parents did. Ms. Tina Shepherd explained this to the MacHardys and to the Court during her direct examination.

Second, Ms. Mueller's duty to account is governed under [A.R.S. § 14-7303](#), which requires a trustee to "keep the beneficiaries of the trust *reasonably informed* of the trust and its administration." (Emphasis added.)

With the exception of conservatorship matters, Arizona law *does not* mandate any particular form of "accounting." This view is consistent with the [RESTATEMENT \(SECOND\) OF TRUSTS, § 172](#), Cmt. D, which states in plain terms: "The necessity of a *formal* accounting by the trustee may be dispensed with..." (Emphasis added.)

The manner in which a trustee "accounts" to a beneficiary is a direct function of the type and amount of property that the trustee is handling. "[G]iven the diversity of trusts and trustees, the law recognizes that the duty ...may be satisfactorily discharged

by simple, orderly forms of bookkeeping and records maintenance, disclosing information in an understandable manner that will enable the beneficiaries to determine whether the trust is being properly administered,” [RESTATEMENT \(THIRD\) OF TRUSTS, § 83](#), Cmt. A.

In this case, there was only one *joint* asset that was arguably being administered by Ms. Mueller -- the Wells Fargo Accounts. In the context of trust administration, providing the beneficiary with copies of the bank statements is the most practical and efficient way to keep a beneficiary informed as to the status of the Wells Fargo Accounts. The bank statements themselves are an orderly form of bookkeeping and record maintenance, since the statements contain starting balance information, a list of deposits and withdrawals, and ending balance information.

The evidence at trial was that Ms. Mueller established a P.O. Box for her mother -- P.O. Box 61, Uncasville, CT, 06382 -- which is where the Wells Fargo Account statements were sent and presumably reviewed. [See Exhibits 35 through 68] ¹⁷ Moreover, Ms. Mueller testified during trial regarding several conversations she had with her mother about her **finances**, the Wells Fargo Accounts, and her *mother's* decision to open a new treasury account.

In total sum, [A.R.S. § 46-456](#) was intended to prevent a person in a position of trust and confidence from taking control of and depriving a vulnerable adult of his or her property during the person's life (even if the suit is not brought until after the person's death). It was not designed as a basis to set aside at death, *inter vivos* or non-probate transfers. The common law principles of undue influence and lack of testamentary capacity continue to provide a basis to set aside improper at death, *inter vivos* or non-probate transfers. [Section 46-456](#) was not intended to be used to circumvent the elements of a cause of action for undue influence or lack of testamentary capacity.

V. PETITIONER'S CLAIM FOR BREACH OF FIDUCIARY DUTY FAILS

In order to prevail on a claim for breach of fiduciary duty, a plaintiff must demonstrate the existence of a duty, breach of that duty, and resulting harm. See [RESTATEMENT \(SECOND\) OF TORTS § 874 \(1979\)](#). Petitioner did not prove at trial the existence of a fiduciary* duty independent of his APSA claim. Even *assuming arguendo* that he did (which he did not), there is no record evidence suggesting a breach of that duty or any resulting damages. For these reasons, the Court must enter judgment against Petitioner on his breach of fiduciary duty claim.

A. PETITIONER DID NOT ESTABLISH THE EXISTENCE OF A FIDUCIARY DUTY

Petitioner argues Ms. Mueller had “fiduciary duty to her Mother following her Father's death because she and Craig were Co-Trustees of the John D. and Jean MacHardy Trust since her mother was incapacitated by her physical and mental conditions.” Petitioner's Closing Brief at 8:21-23. This is utterly false and without any record support. Under the John D. and Jean MacHardy Trust, u/t/a September 11, 1996 (the “Trust”), Petitioner and Ms. Mueller could not have become co-trustees until both John and Jean deceased, *absent* a written declaration from a medical doctor or court adjudication diagnosing or finding Mr. John MacHardy or Ms. Jean MacHardy “incompetent or incapacitated.” [See Trial Exhibit 1 at Article I. Section 2 (“For purposes of this Agreement, a settlor may be considered to be unable to manage his or her affairs and therefore treated as being under a legal disability, incompetent or incapacitated, if so declared or adjudicated by an appropriate court... A settlor may also be considered to be unable to manage his or her own affairs and therefore treated as being under a legal disability, incompetent or incapacitated, if so certified in writing by his or her personal physician...”)] Petitioner presented evidence of neither. Petitioner's reliance on the Trust to establish the existence of a fiduciary duty independent of his equally misguided APSA claim is sorely misplaced and without any record support.

Just as unpersuasive is Petitioner's position that Ms. Mueller owed *him* a fiduciary duty under the durable power of attorney forms that Mr. and Mrs. MacHardy executed on November 28, 2006 nominating Ms. Mueller as their durable agent. [See Trial Exhibits 3 & 4] This argument is fundamentally flawed for at least two principal reasons. First, any duty Ms. Mueller had

under the durable power of attorney forms ran directly to Mr. and Mrs. MacHardy -- not to Petitioner. [*Id.*] Second, Petitioner presented no trial evidence that Ms. Mueller ever acted inappropriately as the MacHardys' durable agent. There was absolutely no evidence presented during trial that Ms. Mueller ever signed her name as power of attorney on her parents' behalf or otherwise acted inappropriately as an agent for her parents.

These points conclusively foreclose Petitioner's ability to prove the existence of a fiduciary duty and accordingly his breach of fiduciary claims.

B. IGNORING ARGUENDO THE LACK OF A FIDUCIARY DUTY, PETITIONER PRESENTED NO EVIDENCE OF BREACH

Ignoring *arguendo* the complete lack of a fiduciary duty, there was no evidence adduced at trial regarding Ms. Mueller's alleged breach of fiduciary obligation, which would have run to Trust assets only. As established during these proceedings, at the time of Ms. Jean MacHardy's death, the Trust assets comprised only the Sun City-residence and the MacHardys' vehicle.

Petitioner presented no evidence of Ms. Mueller's alleged breach with respect to either of those two assets,

The Wells Fargo Accounts were undeniably not Trust assets -- they passed to Ms. Mueller via a non-probate transfer outside of the Trust pursuant to [A.R.S. §14-6212](#) -- nor did Petitioner prove that the MacHardys intended the Wells Fargo Accounts to be Trust assets. Indeed, the MacHardys received written instructions from their attorney, William Don Carlos, Esq, explaining how to transfer the Wells Fargo Accounts to the Trust. [*See* Trial Exhibit 75] Had they intended to fund the Trust with the Wells Fargo Accounts, the MacHardys would have done so, But they did not. instead deciding to transfer joint ownership of those accounts to Ms. Mueller in consideration and reward for her devotion to their continued care.

With respect to the Legacy Direct Accounts, these were not Trust property, either. When the MacHardys set up their Legacy Treasury Direct accounts well before the times at issue here, they had to provide Legacy Treasury Direct routing and account information for another depository bank, which was to be used when the treasuries incurred interest or otherwise matured. [*See* Trial Exhibit 20] Pursuant to this direction, the MacHardys listed their Wells Fargo account ending in XXXX-4981. ¹⁸ And front that time until the date of Mr. John MacHardy's passing, Legacy Treasury Direct paid ACH interest dividends to the MacHardys through direct deposit into the MacHardys' Wells Fargo XXXX-4981 account. [*See* Trial Exhibits 99 & 100]

Ms. Jean MacHardy made a knowing decision to open a new Legacy Treasury Direct account, pursuant to Legacy Treasury Direct's request, on or about August 2, 2007. After the new account was established, the treasuries in those accounts, which had all previously been frozen, matured and were then, accordingly, per protocol, deposited directly into the Wells Fargo Account XXXXXXXXXX, which the MacHardys -- not Ms. Mueller -- selected well before any allegations of their incapacity or vulnerability, [*See* Trial Exhibits 20, 99 & 100] These facts are not APSA facts.

The Legacy Treasury Direct accounts were not Trust assets and were never intended to be Trust assets. Had the MacHardys intended otherwise, they would have followed the written instructions provided to them by their counsel, William Don Carlos, Esq. [*See* Trial Exhibit 75]

In sum. the Court must enter judgment for Ms. Mueller on Petitioner's breach of fiduciary claim. Petitioner failed to establish the existence of a fiduciary obligation and any breach or corresponding damages,

VI. DAMAGES

If any violation of the APSA is found, the Court must also consider, in its absolute discretion, whether to double or treble these amounts under [A.R.S. § 46-456\(C\)](#) (2003) (as is requested by Petitioner) or [§ 46-456\(B\)](#) (2009), depending upon what

version of the APSA the Court determines applies. In making this decision, the Court can consider any appropriate mitigating circumstances, including a lack of intent, the perpetual around the clock quality care Ms. Mueller provided to her parents for approximately 26 months, the advice of lawyers and bankers that she relied upon, and the time she would have otherwise had to spend with her dying husband, including others,

VII. CONCLUSION

The Court must respectfully enter judgment in favor of Ms. Mueller and against Petitioner on all claims.

RESPECTFULLY SUBMITTED this 13th day of October, 2011.

BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.

<<signature>>

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Attorneys for Ms. Mueller

Filed this 13th day of October. 2011.

COPY of the foregoing hand-delivered this 13th day of October, 2011, to:

The Honorable Jose S. Padilla

Northwest Regional Superior Court Facility

14264 West Tierra Buena Lane, Courtroom 124

Surprise, AZ 85374

COPIES of the foregoing e-mailed and mailed this 13th day of October. 2011, to:

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Attorneys for Petitioner

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Footnotes

- 1 Nor could he have done so, as no such record evidence exists.
- 2 The Wells Fargo Accounts as of November 28, 2006 totaled approximately \$93,968.19. These accounts are identified by their last four numbers and together comprise the above total amount: (i) XXXX-4981 (\$36,289.50), (ii) XXXX-3395 (\$21,006.04), and (iii) XXXX-6645 (\$36,672.65). [See Stipulated Trial Exhibit 99, appended hereto as *Exhibit A*]
- 3 It is important to note that the MacHardys decided to add Ms. Mueller as a joint owner of the Wells Fargo Accounts as opposed to adding her as power of attorney. Because she was added as a joint owner, Ms. Mueller owned the accounts with her parents as of the date of transfer and solely as of the date of Ms. Jean MacHardy's passing. See [A.R.S. §14-6212\(A\)](#) (“[O]n the death of a party, sums on deposit in a multiple party account belong to the surviving party or parties.”); compare [A.R.S. § 14-6211\(C\)](#) (“An agent in an account with an agency designation has no beneficial right to sums on deposit.”).
- 4 Mr. John Strasheim, Ms. Cookie Ellis and Mr. Richard French all gave credible testimony that the MacHardys appeared of sound mind and in good mental condition during or about November 2006.
- 5 Petitioner agrees that Dr. Willson is a “well-recognized psychologist who is particularly skilled in assessing **elderly** individuals.” Petitioner's Closing Brief at 6:4-5. Respondent presented to controverting expert testimony on the issue of the MacHardys' alleged incapacity. See e.g., *In re Thorpe*, 152 Ariz. 341, 732 P.2d 571 (App. 1986) (discussing expert testimony on issues of testamentary capacity).
- 6 Petitioner's Closing Brief, which is supposedly an overview of the evidence Petitioner presented at trial, does not address any evidence probative to this issue at all.
- 7 Petitioner errs in arguing that Ms. Mueller has the burden to prove the absence of undue influence by clear and convincing evidence. Petitioner's Closing Brief at 10:18-22. “A presumption of undue influence arises when one occupies a confidential relationship with the testator and is active in preparing or procuring the execution of a will in which he or she is a principal beneficiary.” See *In re O'Connor's Estate.*, 74 Ariz. 248, 246 P.2d 1063 (1952) (emphasis added).
Here, there was no evidence that Ms. Mueller “actively procured” joint ownership of the Wells Fargo Accounts. The trial testimony was, in fact, to the contrary. Ms. Mueller testified that Mr. MacHardy requested her to drive him and Ms. MacHardy to Wells Fargo for the sole purpose of adding her as a joint owner of their Wells Fargo Accounts. And Ms. Tina Shepherd testified that she prepared the necessary banking forms and explained those forms to the MacHardys in good detail. In short, Ms. Mueller was not active in procuring anything. All she did was oblige her parents' request for a ride to the bank. Accordingly, no presumption of undue influence arises. Indeed, “[t]he bare existence of a confidential relationship between grantor and grantee, standing alone, does not raise a presumption of fraud or coercion.” *Stewart v. Woodruff*, 19 Ariz. App. 190, 194, 505 P.2d 1081, 1086 (1973) (emphasis added); see also, *In re Estate of Pitt*, 88 Ariz. 312, 317, 356 P.2d 408, 411(1960) (legal presumption of undue influence “ ‘dissolved’ ” on denial by one presumed to have exerted undue influence “ ‘even if neither the judge nor the jury believed the denial to be true’ ”) (*quoting O'Connor's Estate*, 74 Ariz. at 260, 246 P.2d at 1071, *supra*). It is Petitioner's burden, therefore, to prove the alleged invalidity of his parents' decision to add Ms. Mueller as a joint owner of their Wells Fargo Accounts.
- 8 These two accounts matured on August 16 and August 23, 2007. The monies in those accounts were transferred and later redeemed. There was no trial evidence that Ms. Mueller did anything inappropriately with respect to these two accounts.
- 9 The last sentence of [31 C.F.R. § 357.31\(c\)\(2\)](#) reads: “*In guaranteeing a signature, the certifying individual and the organization for which he or she is acting warrant to the Department that the signature is genuine and that the signer had the legal capacity to execute the transaction request.*” Ms. Mueller requested the Court take judicial notice of this federal statute. Petitioner did not object to that request.
- 10 We have not located any authority defining “legal capacity” for purposes of [31 C.F.R. §357.31\(c\)\(2\)](#),
- 11 Appended hereto as *Exhibit B* is the second page from Trial Exhibit 20. The top of that page, which is highlighted for the Court's convenience, sets forth the history of the Legacy Treasury Direct account's “ACH [automated clearing house] Payment Information,” See [31 CFR § 370.1](#). This history shows that the Wells Fargo Account ending in XXXX-4981 was the original intended depository set up at the same time the MacHardys opened certain Treasury accounts in July 2005 in both their names, prior to any allegation

of vulnerability. When the account was placed solely in Ms. Jean MacHardy's name in August 2007, the same Wells Fargo account, XXXXXXXXXX, remained on file.

Also relevant the top of Exhibit A states; "All interest and redemption payments were made by direct deposit."

12 Appended hereto as *Exhibit C*, which is now per the parties' stipulation Trial Exhibit 100, are Wells Fargo Statements from December 8, 2006 through January 8, 2007. This statement shows that Legacy Treasury Direct was making deposits directly and automatically into the MacHardys' Wells Fargo account ending in XXXX-4981 in December 2006, while both John and Jean were still alive. The same is shown on Trial Exhibit 99, which is attached hereto as Exhibit A.

13 *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (1992) (en banc) is the seminal Arizona case on *ex post facto* prohibitions. *Because the APSA has a criminal component, and because the current version of the APSA, which was enacted in 2009, made criminal acts that were not criminal in November 2006 and August 2007, the version of APSA in effect during Ms. Mueller's alleged improper conduct must apply*,

Also, the current version of the APSA does not indicate that it applies retroactively. Under A.R.S. § 1-244. "[n]o statute is retroactive unless expressly declared therein." This is another argument for application of the 2003 version of the APSA in effect during the time of Ms. Mueller's challenged conduct.

14 We must point out to the Court its Minute Entry Ruling of March 23, 2010, wherein it applied the amended version of the APSA to the issue of whether Petitioner had standing to bring the APSA claim as an unappointed personal representative of his late parents' estates. Although we are mindful of this ruling, we urge the Court to reconsider its decision, which it is permitted to do any time prior to final judgment. *See Zimmerman v. Shakman*, 204 Ariz. 231, 236, ¶ 15, 62 P.3d 976, 981 (App.2003) (*acknowledging that the law of the ease doctrine "does not prevent a judge from reconsidering nonfinal rulings, '[n]or does it prevent a different judge, sitting on the same ease, from reconsidering the first judge's prior, nonfinal rulings.' "*).

15 *See A.R.S. §46-456(A)* (2003): "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 title 14, chapter 7, article 3.*" (Emphasis added.)

16 Even Petitioner acknowledges that Ms. Mueller's duties to her mother are governed by the Restatement of Trusts. *See* Petitioner's Closing Brief, citing to the [RESTATEMENT OF TRUSTS](#), at 9:8.

17 These Wells Fargo Account Statements were all sent to Ms. Jean MacHardy's personal P.O. Box address in Connecticut

18 *See* footnotes 11 & 12, *supra*,