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

In the Matter of the Estate of:	1 CA-CV 12-0081
WARREN E. RENFROW,	DEPARTMENT C
Deceased.	**MEMORANDUM DECISION**
VALLERIE PEREZ, as Special Administrator of the Estate of Warren Renfrow,	(Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)
Petitioner/Appellee,	
v.	
LANCE RENFROW,	
Respondent/Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. PB2008-000210

The Honorable Andrew G. Klein

AFFIRMED

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T H U M M A, Judge

¶1 Lance Renfrow appeals from a judgment entered against him awarding the Estate of Warren Renfrow (Lance's father) $940,000 in restitution as well as attorneys' fees, costs and interest, and ordering that Lance forfeit all interest in the Estate. Finding no reversible error, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Warren and Ruby Renfrow had two children: Lance, who is a party to this case, and Carol, who died in 2003. Warren and Ruby were married for 67 years until Ruby's death in April 2005, following a short illness that began on March 12, 2005. Warren and Ruby took pride in living debt free. At the time of Ruby's death, they had no debt of consequence. They had lived for years in their home on Edgemont Street in Scottsdale, owned by Warren and Ruby free of debt and valued at $440,000 just before Ruby's death.

¶3 Warren was 90 years old when Ruby died. Two months later, in July 2005, Lance placed Warren in an assisted living facility called Dream Catcher, where Warren lived until his

[1] This court reviews the evidence in a light most favorable to sustaining the judgment. *In re Estate of Newman*, 219 Ariz. 260, 263, ¶ 3, 196 P.3d 863, 866 (App. 2008).

death in December 2007. In July 2005, Warren had assets generating sufficient income to pay for his living expenses, including Dream Catcher expenses, for the foreseeable future. When Warren died less than two years later at age 92, Lance held title to the Edgemont house. According to Lance, at the time of Warren's death, Warren's estate was worth just $3,500, consisting of a 1987 Porsche, furniture, clothing and personal effects. The reason and responsibility for this nearly complete transfer of Warren's assets are the keystone of this litigation.

¶4 In 2002, Warren signed a durable power of attorney naming Lance as his attorney in fact, and Lance filed Warren's income taxes thereafter. Although Warren had executed a Will years earlier, Warren signed a Codicil purporting to amend his Will in May 2005. At about that same time, Lance was involved with various documents transferring title to the Edgemont home, in the end making Lance owner of the property. Warren then signed various notes, deeds of trust and loan agreements to obtain loans on the Edgemont property.

¶5 In April 2005, Warren signed documents making Lance a signer and joint owner of a Bank of America checking account owned by Ruby and Warren. Almost immediately, Lance began writing checks on that joint account. From 2005 through 2007, Lance took funds from a line of credit on the Edgemont home and the Bank of America account for Lance's personal use and the use

of his wife and his business. Although Lance's records noted these transactions were "loans," no promissory notes or similar documents were ever signed for the "loans."

¶6 In the years leading up to his death, Warren developed various medical issues, the precise nature and impact of which were hotly contested. The superior court found Warren suffered from senile dementia, Alzheimer's type, a condition that provided the basis for the court's conclusion that Warren had a mental impairment rendering him a statutory vulnerable adult.

¶7 In March 2008, Vallerie M. Perez[2] filed this action seeking to invalidate Lance's transfers and other relief. Vallerie was appointed Special Administrator of Warren's Estate and the parties participated in substantial discovery and motion practice. Among other things, Lance demanded a jury trial, which the superior court denied.

¶8 A six-day bench trial addressed the Estate's claims that (1) Lance exploited Warren, who was a vulnerable adult, in violation of Arizona Revised Statutes (A.R.S.) § 46-456(A) (2007);[3] (2) Lance misused the power of attorney in violation of A.R.S. § 14-5506 and (3) Lance exercised undue influence over

[2] Vallerie is the granddaughter of Warren and Ruby and the daughter of Lance's sister Carol.

[3] The parties agree that the 2007 versions of the relevant statutes apply in this case. Thus, unless otherwise indicated, this decision cites to statutes as they existed in 2007.

Warren.[4] After considering conflicting evidence (including hundreds of exhibits and witness testimony), the superior court found in favor of the Estate on all three claims in a detailed 30-page minute entry issued August 25, 2011. On November 14, 2011, the court entered judgment against Lance awarding the Estate $940,000 in restitution as well as attorneys' and expert fees, costs and interest, and ordering that Lance forfeit all interest in the Estate. After post-judgment motions were resolved, Lance filed a timely appeal and this court has jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (2013).

ANALYSIS

I. Right To A Jury Trial.

¶9 Lance argues the superior court erred by denying his demands for a jury trial. Whether a party is entitled to a jury trial is a question of law, meaning the review on appeal is de novo. *Stoudamire v. Simon*, 213 Ariz. 296, 297, ¶ 3, 141 P.3d 776, 777 (App. 2006).

¶10 Lance cites several cases, each relying directly or indirectly on *Brown v. Greer*, 16 Ariz. 215, 141 P. 841 (1914), for the boundless proposition that the Arizona Constitution

[4] Although the Estate also claimed Lance violated A.R.S. § 14-3709 by concealing and/or destroying evidence, the superior court "decline[d] to make a determination that Lance violated A.R.S. § 14-3709." No cross-appeal was taken from that finding, meaning that issue is not part of this appeal. *See also Newman*, 219 Ariz. at 273, ¶ 50, 196 P.3d at 876 (holding there is no jury trial for claim made under A.R.S. § 14-3709).

ensures "either party to any litigation in the superior court is entitled to a jury trial as a matter of right." *See Shaffer v. Ins. Co. of N. Am.*, 113 Ariz. 21, 22, 545 P.2d 945, 946 (1976) (citing *Stukey v. Stephens*, 37 Ariz. 514, 516, 295 P. 973, 973 (1931)); *see also Mounce v. Wightman*, 30 Ariz. 45, 48, 243 P. 916, 917 (1926). *Brown*, however, construed a provision of the 1901 Arizona Territorial Code providing that "[i]n all cases, both at law and in equity, either party shall have the right to submit all issues of fact to a jury." 16 Ariz. at 218, 141 P. at 842 (quoting Ariz. Rev. Stat. ¶ 1389 (1901)). That code provision "was deleted from the 1928 Revised Code and was replaced by a provision that did not grant a substantive right to a jury trial in civil actions." *Hoyle v. Superior Court*, 161 Ariz. 224, 229, 778 P.2d 259, 264 (App. 1989).

¶11 Nearly 90 years ago, the Arizona Supreme Court rejected the argument that *Brown* did anything other than address a statutory jury trial right, which was then repealed in 1928. *Donahue v. Babbitt*, 26 Ariz. 542, 550, 227 P. 995, 997 (1924) (*Brown*'s language "concerning the extent of trial by jury was gratuitous and entirely aside from the issue. *Brown v. Greer* does not announce the law in this respect in the face of at least four prior decisions to the contrary.").

¶12 *Brown*'s dicta, moreover, is contrary to broad directives that simply could not exist if Lance's argument was

correct. *See, e.g.*, A.R.S. Title 8 (providing for non-jury trials in juvenile matters in superior court); Title 25 (providing for non-jury trials in family court cases in superior court). Stated simply, *Brown* and its progeny cited by Lance "do not provide an independent statutory or constitutional basis for requiring a jury for equitable claims." *In re Estate of Newman*, 219 Ariz. 260, 274, ¶ 56, 196 P.3d 863, 877 (App. 2008).

¶13 To determine whether there is a right to a jury trial, the proper analysis focuses on the nature of the claim raised, not the division of the court in which it was filed. "'[T]here is no probate court apart from the superior court.' Thus, 'if a party to a probate proceeding is otherwise . . . entitled to trial by jury, it gets one.'" *Id*. at 272, ¶ 44, 196 P.3d at 875 (quoting *Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 100, 102, 907 P.2d 67, 69, 71 (1995)). A jury trial right may be based on a statutory or constitutional provision or case law. *Id.* at 272, ¶ 45, 196 P.3d at 875. There are three claims for which Lance argues he had a jury trial right: (1) exploitation of Warren as a vulnerable adult in violation of A.R.S. § 46-456(A); (2) misuse of a power of attorney in violation of A.R.S. § 14-5506 and (3) undue influence by Lance over Warren. None of these claims provides Lance a jury trial right.

¶14 For all three claims, Lance cites to A.R.S. § 14-1306(A) and (B) for a jury trial right. Subsection A does not

create a jury trial right but, rather, preserves the right if a constitutional jury trial right exists and a proper demand is made. A.R.S. § 14-1306(A) ("If duly demanded, a party is entitled to trial by jury in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury."); *see also Newman*, 219 Ariz. at 272, ¶ 44, 196 P.3d at 875 (noting, by statute, "there is no mandatory right to a jury trial in probate proceedings unless one is constitutionally required. Thus, [the appellate court's] inquiry becomes whether any of the individual causes of action at issue here created a constitutional right to a jury trial."); Ariz. R. Civ. P. 38(a) ("The right of trial by jury shall be preserved inviolate to the parties."). A.R.S. § 14-1306(B) does not create a jury trial right but, rather, affords the superior court the discretion to use an advisory jury "[i]f there is no right to trial by jury . . . or the right is waived." Accordingly, neither subsection of A.R.S. § 14-1306 supports Lance's argument.

¶15 Lance next argues A.R.S. § 46-455(H)(4), expressly incorporated into § 46-456(F), establishes a jury trial right for the vulnerable adult claim. A.R.S. § 46-455(H)(4) provides that, following a liability determination, "[t]he court or jury may order the payment of punitive damages under common law principles that are generally applicable to the award of

punitive damages in other civil actions." As applied, the superior court did not award punitive damages and no cross-appeal was taken, meaning punitive damages have no application here. Moreover, as previously recognized, A.R.S. § 46-455(H)(4) does not contain a jury trial right but merely recognizes "that some claims for which there is no independent entitlement to a jury may be heard by a jury because they are consolidated with a claim arising out of the same set of facts for which there is a jury trial right." *Newman*, 219 Ariz. at 272, ¶ 47, 196 P.3d at 875. If the Legislature "had intended to create an independent statutory right to a jury trial for vulnerable adult claims, it would have said so." *Id.* at 272-73, ¶ 47, 196 P.3d at 875-76.

¶16 Nor can Lance show a common law right to a jury trial for the claims against him. Lance argues *McRae v. Lois Grunow Memorial Clinic*, 40 Ariz. 496, 14 P.2d 478 (1932), "holds that trial by jury is required in both civil and equitable cases" and, because *McRae* "has never been overturned or modified," it "supersedes" *Newman*. *McRae*, however, did not hold that trial by jury was required and, in fact, expressly noted that issue was not raised or argued on appeal. 40 Ariz. at 511, 14 P.2d at 483 ("The question of damages and the amount thereof being one at law, under the Constitution either party might have demanded a jury trial. That was not done and no question of that kind was

raised below nor presented on appeal."). Simply put, *McRae* does not supersede *Newman*.

¶17 Lance next argues the discussion in *Newman* about the lack of a jury trial right under "A.R.S. § 46-456 is pure *dicta*." Like this case, *Newman* was an appeal from a bench trial resulting in a forfeiture order under A.R.S. § 46-456. *See* 219 Ariz. at 264, ¶ 9, 196 P.3d at 867. Like this case, in *Newman*, a jury trial demand had been denied and that denial was challenged on appeal. *Id.* at 264, 272-74, ¶¶ 7, 44-59, 196 P.3d at 867, 875-77. After a detailed discussion, *Newman* concluded:

> We thus find no error in the trial court's determination that there is no right to a jury trial for breach of fiduciary duty cases relating to a trustee's duties in probate proceedings. Because we find no jury trial right in such cases, Max's arguments that the statutory claims (A.R.S. §§ 46-456 and 14-3709(D)) are entitled to trial by jury likewise fail, given that they are based on breach of fiduciary duty.

Id. at 274, ¶ 57, 196 P.3d at 877. This holding was not dicta.

¶18 Lance further argues that he had a jury trial right under the Arizona Constitution. *See* Ariz. Const. art. II, § 23 ("The right of trial by jury shall remain inviolate."); Ariz. Const. art VI, § 17 ("The right of jury trial as provided by this constitution shall remain inviolate."). The Arizona Constitution "preserves a right to a jury trial only in those actions that existed at common law when the Arizona Constitution

was adopted in 1910." *Life Investors Ins. Co. of Am. v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529, 532, 898 P.2d 476, 481 (App. 1995). For statutory causes of action that did not exist at common law at that time, there is no jury trial right under the Arizona Constitution. *Id.* at 531-32, 898 P.2d at 480-81.[5]

¶19 Statutes protecting vulnerable adults (including A.R.S. §§ 46—455 and -456), were enacted in the 1980s and 1990s. 1988 Ariz. Sess. Laws, ch. 85 (2d reg. sess.); 1996 Ariz. Sess. Laws, ch. 274 (2d reg. sess.). Lance does not suggest any such cause of action existed at common law when the Arizona Constitution was adopted.

¶20 Powers of attorney were recognized prior to the adoption of the Arizona Constitution. *See Taylor v. Burns*, 8 Ariz. 463, 468-69, 76 P. 623, 625 (1904) (recognizing revocable power of attorney to sell mining claims), *aff'd*, 203 U.S. 120 (1906). The statutory remedy specified for a breach of the power of attorney in A.R.S. § 14-5506(A), however, is set forth in A.R.S. § 46-456, which Lance does not suggest provides a constitutional jury trial right. Moreover, a power of attorney entrusts the principal's money, property or other assets to the agent. A.R.S. § 14-5506(A). At common law prior to the adoption

[5] Although there could be a *statutory* right to a jury trial for a statutory cause of action that did not exist at common law prior to statehood, there is no such statutory jury trial right applicable here. *See supra* ¶¶ 13-15.

of the Arizona Constitution, a power of attorney created a fiduciary duty. *Autoville, Inc. v. Friedman*, 20 Ariz. App. 89, 93, 510 P.2d 400, 404 (1973) ("'Where one intrusts his property to another for a particular purpose, it is received in a fiduciary capacity.'") (quoting *Britton v. Ferrin*, 63 N.E. 954, 956 (1902)). A fiduciary duty claim is an equitable claim to which no right to a jury trial attaches. *Newman*, 219 Ariz. at 873, ¶ 54, 196 P.3d at 876.

¶21 Similarly, the Estate's undue influence claim –- a common law claim derived from will contests in probate -- is an equitable claim. *See Evans v. Liston*, 116 Ariz. 218, 220, 568 P.2d 1116, 1118 (App. 1977); *Schornick v. Schornick*, 25 Ariz. 563, 564-65, 220 P. 397, 397 (1923) (suit to set aside deed on grounds of incapacity and undue influence is a suit in equity). As such, the Arizona Constitution grants Lance no right to a jury trial of the Estate's claims for misuse of a power of attorney or undue influence. *Newman*, 219 Ariz. at 273-74, ¶ 55, 196 P.3d at 876-77 ("[T]here is no constitutional right in Arizona for a jury trial of claims that would have been considered equitable at the time Arizona's constitution was adopted.").

¶22 Lance next argues that he has a jury trial right because "[s]uits for money damages were in existence at common law long before Arizona's Constitution." Because Lance cites no

authority to support this claimed constitutional right, his argument is waived. ARCAP 13(a)(6); *see also Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62, 211 P.3d 1272, 1289 (App. 2009). Similarly, Lance has not shown that the relevant claims against him were "for money damages" rather than for restitution and other equitable relief; in fact, the superior court awarded restitution and other equitable relief.

¶23 For all these reasons, the claims in this case involved no right to a jury trial under the Arizona Constitution. *See also Newman*, 219 Ariz. at 264, 271-74, ¶¶ 8-9, 44-59, 196 P.3d at 867, 874-77 (holding no jury trial right under the Arizona Constitution for similar claims resulting in similar relief).[6] Because Lance did not have a right to a jury trial, the superior court properly denied his jury trial demands.

II. The Superior Court's Findings of Fact and Conclusions of Law.

¶24 Lance challenges various findings of fact and conclusions of law made by the superior court. On appeal,

[6] Lance also claims a jury trial right because a violation of A.R.S. § 14-5506 may constitute a misdemeanor, subjecting Lance up to six months in jail. Lance cites no authority for the proposition that a civil suit under a statute that also includes possible criminal penalties gives the defendant a jury trial right. Moreover, it is not clear that Lance would have a jury trial right even if this was a criminal prosecution for a misdemeanor violation. *See generally Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005).

factual findings will be reversed only if they are "clearly erroneous." *Davis v. Zlatos*, 211 Ariz. 519, 523, ¶ 18, 123 P.3d 1156, 1160 (App. 2005). Factual findings "are not clearly erroneous if substantial evidence supports them," and "[s]ubstantial evidence is evidence which would permit a reasonable person to reach the trial court's result." *Id.* at 524, ¶ 18, 123 P.3d at 1161 (citation omitted). This court reviews the facts "in the light most favorable to sustaining the trial court's judgment." *Newman*, 219 Ariz. at 263, ¶ 3, 196 P.3d at 866. Conclusions of law are reviewed de novo. *Stoudamire*, 213 Ariz. at 297, ¶ 3, 141 P.3d at 777.

A. Warren Was A Vulnerable Adult.

¶25 Lance argues the superior court erred in finding Warren a "vulnerable adult." A "vulnerable adult" is "an individual who is eighteen years of age or older who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment." A.R.S. § 46-451(A)(10). Lance contends the evidence did not show that Warren had such an impairment.

¶26 Although the term is not defined by statute, the superior court defined "impairment" as "any injury, deterioration or lessening of physical or mental abilities, if the injury, deterioration or lessening of ability affects an adult's ability to care for himself or herself." *See Davis*, 211

Ariz. at 525, ¶ 24, 123 P.3d at 1162 (impairment is "something that causes a decrease in strength, value, amount, or quality" or an "injury, deterioration, or lessening") (citations omitted). After considering the credibility of the witnesses and assessing and weighing the competing evidence, the court found Warren "suffered from mild to moderate dementia from at least early 2004 until his death in 2007 . . . and that Warren's physical and mental impairments were sufficient to make him dependent on assistance from others, at least from the time of Ruby's death in 2005." The record amply supports these factual findings.

¶27 Lance himself repeatedly used the term "dementia" when describing Warren's condition, but explained that as a lay person he used this term as shorthand to describe Warren's short-term memory loss. The superior court found it troubling that Lance would maintain that Warren was not mentally impaired in the face of all of the evidence to the contrary. In a mid-2005 email explaining to the family why he placed Warren at Dream Catcher, Lance states:

> As you know we have been catering my dad since early March. His *dementia* needs to be addressed on a constant basis. We have taken turns assisting around the clock and as you know we found "Dream Catchers" . . . [I]f someone gets worse *(and I understand there are three stages)* they can stay with no further increase in price, etc.

(Emphasis added.)[7] Despite his position at trial, Lance's email clearly indicated that Warren was mentally impaired when he was placed at Dream Catcher.

¶28 Lance's witness, Gaile Dixon, the owner and manager of Dream Catcher, testified that Dream Catcher's residents are impaired either mentally or physically. Albeit reluctantly, Ms. Dixon admitted that Warren had some cognitive impairment. She further testified that Lance routinely made decisions for Warren and signed documents on his behalf.

¶29 Lance asserts that Warren's primary treating physician, Dr. Daniel Featherston, "refuted" that Warren suffered from dementia sufficient to render him mentally impaired and, instead, established that Warren was placed at Dream Catcher for companionship and to have someone cook and clean for him. In fact, however, Dr. Featherston testified that he had no recollection of Warren and could offer no opinion as to whether Warren suffered from any mental impairment.

¶30 Warren's mental impairment and decline are also illustrated by his scores on the Mini Mental Status Evaluation (MMSE). Dr. Featherston's progress notes demonstrate that Warren took the MMSE numerous times; several times, Warren scored 18/24

[7] Neuro-psychological expert evidence offered by the Estate indicated that dementia typically is described in three stages: mild, moderate and severe (or, alternatively, early, middle and late).

with notations of "SDAT," the standard acronym for "Senile Dementia of the Alzheimer's Type." According to the Estate's neuro-psychological expert, Pam Willson, Ph.D., these results show a person suffering from dementia in the moderate impairment range. Dr. Willson testified that, from mid-2003 to February 2004, Warren experienced a "surprising drop" of six points in his MMSE score to 12/30.[8] Dr. Willson testified that this score shows a worsening to a "moderately severe impairment." In February 2004, Dr. Featherston prescribed medication typically used to treat Alzheimer's dementia. Although his notes from the next office visit, just two months later, show improvement in Warren's MMSE to 20/30, that score is still within the moderate impairment range.

¶31 Dr. Willson testified that a person who is moderately impaired would experience "changes in the ability to communicate effectively; significant difficulties with abstraction and problem solving; real -- severe difficulties with learning and difficulties with language, both understanding and expressing oneself." She added that a person who was moderately impaired would have difficulty with bank statements and balancing a checkbook and would lack the ability to make important medical

[8] Dr. Willson testified that MMSE scores are generally recorded out of a possible 30 points, not 24 points as indicated in Warren's earlier 18/24 scores. Although noting the discrepancy, Dr. Willson found the drop in score from 18 to 12 to be meaningful.

decisions. Dr. Willson testified that, by the summer of 2005, Warren was cognitively impaired such that he could not look out for his own interests or protect himself from exploitation.

¶32 Lance argues Dr. Willson's testimony should be ignored because it was about a person she never met and was based on the review of "unauthenticated" medical records from Dr. Featherston that lacked foundation. Dr. Featherston, however, authenticated his medical records, which were admitted into evidence without objection. In addition, Lance did not object to Dr. Willson's testimony at trial and has waived any such objection on appeal. *See* Ariz. R. Evid. 103(a). Moreover, Dr. Willson was subject to cross-examination and the objection Lance tries to press on appeal goes to the weight of her testimony, not its admissibility. *State v. Moyer*, 151 Ariz. 253, 255-56, 727 P.2d 31, 33-34 (App. 1986).

¶33 Lance next cites various testamentary capacity cases, arguing the superior court erred in finding Warren was a vulnerable adult and "improperly invalidated the Codicil on grounds of incompetency." *See, e.g., In re Estate of Vermeersch*, 109 Ariz. 125, 506 P.2d 256 (1973); *In re Estate of Killen*, 188 Ariz. 562, 937 P.2d 1368 (App. 1996). In fact, however, the superior court, as expressly stated in its ruling, did "not determine whether the Codicil was valid when executed, because the Codicil cannot be implemented in accordance with its terms,"

given Lance's violations of the vulnerable adult statute. *See* A.R.S. § 46-456(D); *Newman*, 219 Ariz. at 269, ¶ 31, 196 P.3d at 872 (forfeiture of all benefits under estate mandatory for violation of § 46-456). Moreover, Warren's testamentary capacity and whether Warren was a vulnerable adult are decided based on different standards: "[a] vulnerable adult may still have the capacity to make financial decisions, deed property and transfer cash." *Davis*, 211 Ariz. at 527, ¶ 32, 123 P.3d at 1164.

¶34 There was abundant trial evidence showing that Warren had a mental impairment and was a vulnerable adult during the relevant time period. Warren suffered from senile dementia, Alzheimer's type, which was first noted by his primary care physician in May 2003. The evidence shows that Warren then deteriorated mentally until his death four and one half years later. The superior court painstakingly detailed the evidence, discussed the conflicting nature of the evidence and weighed and assessed credibility. The court did not err in finding Warren had a mental impairment and was a vulnerable adult.[9]

B. The Definition Of "Benefit."

¶35 As applicable here, "[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

[9] Given this conclusion, this court need not (and expressly does not) address whether Warren was physically impaired within the meaning of A.R.S. § 46-451.

trustee pursuant to [A.R.S. §§ 14-7301 et. seq.].” A.R.S. § 46-456(A). Lance argues the superior court erred in construing “benefit” to mean only economic benefit because the term also should include “emotional benefit or personal satisfaction or simply the wishes of Warren to help Lance through tough times as a ‘benefit’ to Warren.”

¶36 The superior court found Warren received “no economic benefit” from Lance’s actions, adding that “Lance did not produce any evidence that the loans benefited Warren in any economic sense.” Lance provides no authority to support his argument that, after a trustee has taken for his own use nearly all the assets held for a beneficiary, the trustee can then justify his actions by alleging undocumented, unverified “emotional benefit or personal satisfaction” to the beneficiary. Indeed, in context, it appears the Legislature enacted the vulnerable adult statute to prevent just such an argument. *Davis*, 211 Ariz. at 524, ¶ 19, 123 P.3d at 1161 (noting that, in enacting the vulnerable adult statute, the Legislature “determined that elder abuse in Arizona was a serious problem justifying legislative intervention”). The superior court did not err in concluding that A.R.S. § 46-456(A) requires economic (not psychic) benefit.

¶37 The superior court found Lance failed to deal with Warren’s assets in the manner that a prudent person would use in

dealing with the property of another. *See also* A.R.S. § 46-456(A); A.R.S. § 14-7302. Ample evidence supports that finding. Among other things, Lance transferred Warren's assets to himself without economic benefit to Warren but with substantial economic benefit to Lance, his wife and his businesses.

¶38 Lance also commingled funds and engaged in transactions that benefitted Lance without advising Warren to consult another family member or a professional. *Newman*, 219 Ariz. at 270, ¶ 35, 196 P.3d at 873. Indeed, Lance himself testified that, aside from taking Warren to Lance's own lawyer in May 2005 to execute the Codicil to Warren's Will, Lance never suggested or effectuated consultation between Warren and, for instance, a lawyer or accountant before entering significant transactions. Furthermore, the Estate's forensic accountant Julia Meissner testified that transfers of funds were so frequent and so complex that she considered all of the accounts under Lance's control to be effectively commingled. As the superior court also found, a prudent person would not "loan[] hundreds of thousands of dollars of Warren's funds without promissory notes, interest terms, repayment terms or security."

¶39 Lance argues Warren wanted to give his property to Lance and that Warren had sufficient regular income to cover all his expenses including his medical expenses. Warren's participation, such as it was, in transferring his property to

Lance does not resolve the issue. *See Davis*, 211 Ariz. at 526, ¶ 30, 123 P.3d at 1163 (noting "[e]xploitation may occur with the full participation of the victim, but it is no less exploitation"). In transferring to himself almost all of Warren's assets, Lance did not deal with Warren's assets in a way "that would be observed by a prudent [person] dealing with the property of another." A.R.S. § 14-7302. The superior court did not err in finding Warren received no benefit from Lance's actions.[10]

C. Undue Influence.

¶40 The superior court found Lance exercised undue influence by having Warren sign a deed transferring the Edgemont home to Lance in May 2006. After considering the evidence, the court found that, by May 2006, Warren had been suffering from dementia for some time and was a vulnerable adult; Lance had a confidential and fiduciary relationship with Warren; Lance was

[10] Lance suggests that he did not owe Warren a duty of loyalty, claiming "A.R.S. § 14-7301 et. seq. also does not impose a duty of loyalty, only a requirement that the trustee" act as a prudent person. Lance does not suggest that any loyalty issue would alter the outcome and, because Lance's actions clearly violated his duty of prudence, this court need not address any duty of loyalty. Nevertheless, Lance's suggestion ignores clear authority indicating he owed his father a duty of loyalty. *See, e.g.*, A.R.S. § 14-7301 ("Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this title."); *Davis*, 211 Ariz. at 527, ¶ 33, 123 P.3d at 1164 ("The first duty of any trustee is to act with undivided loyalty to the trustor.") (citation omitted).

active in procuring the deed and was the sole beneficiary of the deed; Lance did not arrange for Warren to obtain independent advice about the transaction and Lance was Warren's sole financial manager. The court found those facts created a presumption that the deed was invalid. *See Estate of Shumway*, 198 Ariz. 323, 328, ¶ 16, 9 P.3d 1062, 1067 (2000); *Mullin v. Brown*, 210 Ariz. 545, 548, ¶ 11, 115 P.3d 139, 142 (App. 2005); *see also Stewart v. Woodruff*, 19 Ariz. App. 190, 194, 505 P.2d 1081, 1085 (1973) (finding presumption of undue influence applies to deeds as well as wills). Given this presumption, the court found Lance was required to prove "by clear and convincing evidence that the transaction was fair and voluntary." *Shumway*, 198 Ariz. at 328, ¶ 16, 9 P.3d at 1067. Because Lance "did not overcome that presumption," the court found for the Estate on the undue influence claim. Lance argues this undue influence finding was "without any factual basis."

¶41 Lance claims the superior court erred by ignoring Exhibit 200, Lance's testimony and a quitclaim deed for the Edgemont home from Warren and Ruby to Lance in 2005. As relevant here, Exhibit 200 includes an unsigned affidavit from the individual who notarized the May 2006 deed. An unsigned affidavit, however, is not persuasive evidence. *Cf.* Ariz. R. Civ. P. 80(i) (allowing signed but unsworn written declaration, if signed in compliance with the rule).

¶42 Lance was not a disinterested witness on the point and it is clear the superior court did not find Lance's testimony particularly credible in several respects. "[T]he credibility of witnesses is a matter peculiarly within the province of the trier of facts." *Brevick v. Brevick*, 129 Ariz. 51, 53, 628 P.2d 599, 601 (App. 1981). The court did not abuse its discretion in assessing Lance's testimony.

¶43 Finally, the evidence showed that the early 2005 quitclaim deed from Warren and Ruby to Lance was signed under very different circumstances. At that time, Ruby was hospitalized for what would turn out to be her fatal illness and the evidence demonstrated the quitclaim was signed in an attempt to protect the home from potential creditors for medical or healthcare services to be provided to her. More importantly, the superior court found that Ruby was able to protect Warren from Lance's undue influence before her death. Given this evidence, and because the circumstances had changed dramatically by the time Warren executed the May 2006 deed, the court did not abuse its discretion in finding undue influence infected that deed.

D. Power Of Attorney.

¶44 Lance argues the superior court's finding that he violated A.R.S. § 14-5506 by using the power of attorney to obtain funds from the National City line of credit is not supported by the evidence. At all times relevant here, Lance

held a durable power of attorney naming Lance as Warren's attorney in fact. In documents Warren alone signed, the Edgemont home was used to secure what became a $350,000 line of credit from National City. Although Warren was the only authorized signatory for the National City line of credit, Lance signed *all* of the checks drawn on that line of credit. Proceeds from the line of credit were used to pay Lance's personal expenses and for the benefit of Lance's business.

¶45 When asked whether he wrote the checks on the National City line of credit using the power of attorney, Lance testified as follows:

> Q: So is it fair to say that you were writing these checks under the power of attorney that you had?
> A: I can't answer that legally. But I can tell you that every check, every dollar, was accounted for and was discussed.
> Q: Was it your understanding that you were on as a borrower on the equity line?
> A: I acted on behalf of my father. I guess that's the best way to put it.
> Q: Okay. And in acting on behalf of your father, you knew at the time you had the power of attorney that was still good, correct?
> A: It never crossed my mind. But yes, I know that I had the power of attorney.

¶46 Lance correctly notes the National City records admitted at trial "did not show the presentation, assertion or use of" any power of attorney by Lance. Lance, however, has not suggested that he had any authority *other than* the power of

attorney to properly sign checks on Warren's National City line of credit. Therefore, the superior court was left with two possible conclusions: (1) Lance signed checks on the National City line of credit pursuant to the power of attorney or (2) Lance signed checks on the National City line of credit without any authority, thereby defrauding the bank. *See also* A.R.S. § 13-2002(A) ("A person commits forgery if, with intent to defraud, the person . . . [f]alsely makes, completes or alters a written instrument; or . . . [o]ffers or presents . . . a forged instrument"). The court found the evidence more properly supported the first of these alternatives, a finding properly supported by the evidence (albeit circumstantial) at trial.

E. Relief Awarded.

¶47 The judgment awards the Estate the following restitution, fees and costs: (1) $422,821 as the "[a]mount diverted or borrowed by Lance," plus interest; (2) $63,027 as the "[a]dditional withdrawal from" the National City line of credit on the Edgemont home, plus interest; (3) $155,813 in remaining equity in the Edgemont home (recognizing that title to the property "remains vested in Lance"); (4) $63,519 as the "[r]ental income" from the Edgemont home and (5) nearly $428,000 in attorneys' fees, expert fees and costs. On appeal, Lance challenges a portion of the first component of the award, arguing the Bank of America accounts were held by Warren and

Lance jointly and, accordingly, "the funds belonged as much to Lance as to Warren because Warren had wanted it that way after Ruby's death." This is not the law in Arizona.

¶48 For a joint account, "during the lifetime of all parties an account belongs to the parties in proportion to the net contribution of each to the sums on deposit unless there is clear and convincing evidence of a different intent." A.R.S. § 14-6211(A). The Estate's forensic accountant, Julia Meissner, traced the relevant funds awarded in the judgment to Warren's contributions to the accounts. Lance does not make any argument on appeal that Ms. Meissner's accounting did not correctly trace funds placed into and withdrawn from the joint accounts. Particularly given the finding Warren was a vulnerable adult and the absence of clear and convincing evidence of a different intent, the superior court did not err in concluding that funds Lance removed from the Bank of America accounts during Warren's lifetime were Warren's funds. Accordingly, the court did not err by including these amounts when calculating the restitution award.

¶49 For the first time in his reply on appeal, Lance argues the judgment improperly awards $422,821 (rather than $221,000, representing the "net amount of the mortgage debt at the date of Warren's death"), which he claims improperly fails to account for "debt assumed by Lance personally after Warren's

death" and improperly exceeds what Lance took during Warren's lifetime as well as the line of credit. Lance has waived these arguments by failing to raise them in his opening brief. *See Nelson v. Rice*, 198 Ariz. 563, 567 n.3, ¶ 11, 12 P.3d 238, 242 n.3 (App. 2000); *cf.* ARCAP 13(c) (reply brief "shall be confined strictly to rebuttal of points urged in the appellee's brief"). Even on the merits, Lance's arguments fail.

¶50 First, the evidence does not reflect any debt owed by Warren that Lance legitimately assumed at Warren's death. Second, the line of credit limit does not reflect the value of Warren's other assets that Lance took. Third, the judgment is based on a calculation quite different than the basis for Lance's argument.

¶51 Along with the net draw-down of $221,000 on the National City line of credit, Ms. Meissner testified that Lance also had taken $156,000 from Warren's checking account, $18,000 from Warren's money market account and $28,000 from Warren's certificates of deposit and CD account. Ms. Meissner testified that she "netted" the accounts, tracing the funds that were transferred back and forth between the various accounts to ensure that she was not double counting. The superior court found Ms. Meissner's summaries to be accurate, and that "approximately $423,000 of Warren's funds were borrowed and/or used by Lance for something other than Warren's benefit." The

final judgment, reflecting a restitution award of $422,821, is consistent with this finding. On this record, the court did not err in its calculation of restitution.

CONCLUSION

¶52 The superior court's judgment is affirmed. The Estate is awarded costs on appeal upon compliance with ARCAP 21.

/S/_____
SAMUEL A. THUMMA, Presiding Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Judge

/S/_____
DIANE M. JOHNSEN, Judge