

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

In re the Estate of:)	1 CA-CV 17-0045
)	
CHARLES H. EVITT,)	Maricopa County No. PB2015-051215
Deceased.)	
_____)	
JUDITH EVITT-THORNE,)	
)	
Petitioner/Appellant,)	
)	
v.)	
LESLIE HIATT, SANDRA EVITT)	
and MARY JO EVITT,)	
)	
Respondents/Appellees.)	
_____)	

APPELLANT'S OPENING BRIEF

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Estate of:) 1 CA-CV 07-0093
)
CHARLES H. EVITT,) Maricopa County No. PB2006-001880
Deceased.)
_____)
)
JUDITH EVITT-THORNE,)
)
Petitioner/Appellant,)
)
v.)
)
LESLIE HIATT, SANDRA EVITT and)
MARY JO EVITT,)
)
)
Respondents/Appellees.)
_____)

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

The estate of Decedent Charles Evitt (“Charles”) failed to make a \$150,000.00 payment owing to Appellant Judith Evitt Thorne (“Judith”) at the time of Charles’ death under a settlement agreement Charles and Judith entered into as an incident of their divorce on September 11, 1987 (the “Settlement Agreement”). This appeal arises from the trial court’s grant of summary judgment to Co-Personal Representatives Leslie Hiatt (“Leslie”) and Sandra Evitt (“Sandra”) based, in part, on its conclusion that Judith should have made her claim under the Settlement Agreement within 90 days after the publication of a notice of the probate of Charles’ estate in Wyoming but approximately five months before Judith first learned of Charles’ death.

On August 8, 2016, the trial court entered a signed judgment confirming its disposition of Leslie and Sandra’s summary judgment motion and awarding Charles’ estate a judgment against Judith for \$46,927.67 in attorney fees and costs. [I.R. 58]¹ On December 7, 2016, the trial court also entered a signed order denying Judith’s August 23, 2016 Motion to Reopen Judgment or, in the Alternative, for New Trial. [I.R. 68] Judith filed a timely Notice of Appeal on December 22, 2016. [I.R. 68] Because this appeal arises from a final judgment by the Superior Court

¹ Judith will support the factual contentions in this Brief with citations to the Index of Record transmitted by the Clerk of the Maricopa County Superior Court and Transcripts of Proceedings from hearings on August 10, September 29 and November 12, 2015 and on March 30, 2016, In the Matter of the Estate of Charles H. Evitt, Maricopa County Superior Court (Cause No. PB2015-051215). For convenience, this Brief will refer to the Index of Record as “I.R.” and to the Transcript of Proceedings as “T.P.”

entered in formal proceedings under Title 14 of the Arizona Revised Statutes, this Court has jurisdiction under A.R.S. § 12-2101(A)(9).

STATEMENT OF FACTS

Charles passed away on September 23, 2013. [I.R. 35 ¶ 2] The Fourth District Court of Johnson County, Wyoming, admitted Charles' will to probate on October 30, 2013 and appointed Leslie, Sandra and Mary Jo Evitt ("Mary Jo") as Co-Personal Representatives (collectively, the "Co-Personal Representatives"). [Id. ¶¶ 3-4] The Co-Personal Representatives sent notice of the probate to two of Charles' creditors. [Id.] At the time, they did not send notice to Judith. [See I.R. 43 ¶ 16] Instead, the Co-Personal Representatives published a notice of the probate proceeding in the Buffalo, Wyoming Bulletin on December 5, 12 and 18, 2013. [I.R. 35 ¶ 4]

A. The Settlement Agreement Calls for a \$150,000.00 Payment to Judith upon Charles' Death.

Charles and Judith divorced in Maricopa County, Arizona on September 11, 1987. [I.R. 35 ¶ 1] As an incident to their divorce, they entered into the Settlement Agreement. [I.R. 43 ¶ 10] The Settlement Agreement required a \$150,000.00 payment to Judith upon Charles' death:

10. Death Benefits to the Wife. If Wife shall survive Husband, Husband agrees to provide Wife, as additional adjustment of the property rights of Wife, the sum of \$150,000.00 upon Husband's death. This provision shall be deemed satisfied if Husband provides insurance proceeds from any existing policy of life insurance or any new policy which Husband may from time to time obtain, including policies in which the Wife is now or in the future may be named as the owner and/or beneficiary.

[Id. (emphasis added)]

B. The Co-Personal Representatives Did Not Notify Judith of the Wyoming Probate until after She Initiated Probate Proceedings in Arizona.

Judith first learned of Charles' death in July 2014, approximately seven months after the Co-Personal Representatives first published notice of the probate of Charles' estate. [I.R. 60 ¶ 2] She first sought to enforce her claim under the Settlement Agreement by having her counsel send a demand letter to Jodi Evitt and Sandra Evitt on May 15, 2015. [I.R. 36 Exhibit D] The letter asked whether Charles had life insurance, an option under the Settlement Agreement. [Id.] It also requested a response within 20 days and indicated that Judith otherwise would initiate probate proceedings in Arizona. [Id.]

A lawyer representing Mary Jo responded on June 15, 2015. [I.R. 36 Exhibit E] His letter addressed Judith's claim on the merits, asserting she "was totally paid all monies due her." [Id.] The letter made no mention of the Wyoming probate. [See id.]

In keeping with her counsel's letter, Judith initiated probate proceedings in Maricopa County, Arizona on July 2, 2015. [See I.R. 1] The only notice she received purporting to be a notice of the Wyoming probate proceeding was a Notice of Probate counsel for the Co-Personal Representatives sent to Judith's counsel on July 15, 2015, after she initiated probate proceedings in Arizona. [I.R. 43 ¶ 14] That notice informed her that the deadline for claims against Charles' estate had expired in early 2014. [Id.] None of the Co-Personal Representatives notified the trial court of the Wyoming probate until they filed their Objection to Petition for Appointment of Personal Representative and Application for

Appointment of Co-Personal Representatives on August 5, 2015. [See I.R. 8; I.R. 43 ¶ 15]

C. At the First Hearing, the Trial Court Indicated that this Matter Should Stay in Arizona.

The trial court held the first hearing in this matter on August 10, 2015. Judith's counsel explained that she had initiated formal probate proceedings to provide a "frame work" for her claim against Charles' estate. [T.P. (August 10, 2015) 4:9 to 4:13] Commissioner Russell, presiding over the matter, opined, "I don't think it's in anybody's best interest really to make them – make the claim go up to Wyoming if we can deal with it here." [Id. 6:19 to 6:21] He elaborated, "we have a lawyer here. We got property here. We have assets here. We have the decree here, et cetera." [Id. 6:21 to 6:23]

At the hearing, counsel agreed that the Co-Personal Representatives also should serve as Ancillary Co-Personal Representatives in the Arizona probate. [T.P. (August 10, 2015) 6:10 to 6:12] They agreed to place \$175,000.00 expected from the sale of a residence belonging to Charles in a restricted account and to record a restriction on other, unimproved real property Charles owned in Arizona. [Id. 10:1 to 10:4 & 10:17 to 10:21] The second restriction provided a potential source of payment if Judith's claim against the estate, plus interest and attorney fees, exceeded \$175,000.00 [Id. 10:3 to 10:7]

As to resolving Judith's claim against the estate, the trial court suggested that counsel work "to see if there is some agreement that can be reached, and if you go a couple of weeks and it doesn't seem to be going the direction you wanted to go,

then you would file a petition for allowance of claim and they would file an objection.” [T.P. (August 10, 2015) 12:14 to 12:19]

The trial court entered an Order of Formal Ancillary Probate and Appointment of Co-Personal Representatives, in a form prepared by counsel for the Co-Personal Representatives, on August 27, 2015. [I.R. 12] Consistent with the trial court’s instructions at the August 10, 2015 hearing, the formal order required the Co-Personal Representatives to hold \$175,000.00 in proceeds expected from the sale of Decedent’s personal residence in Arizona “in a restricted account until the final resolution of [Judith’s] claim.” [Id. at 3-4] The order also restricted any sale or other disposition of Charles’ unimproved real property in Arizona and gave the Co-Personal Representatives 30 days to file proof that they had recorded the order. [Id. at 4]

D. The Co-Personal Representatives Eschewed a Settlement Conference in Favor of a Summary Judgment Motion.

In keeping with the discussion at the August 10, 2015 hearing, Judith filed a Petition by Claimant for Allowance of Claim on August 31, 2015, four days after the Co-Personal Representatives’ appointment, and on the same day they accepted their appointments, as Co-Personal Representatives in the Arizona probate. [See I.R. 12, 17-19 & 20] The Co-Personal Representatives filed an Objection on September 24, 2015, asserting for the first time that A.R.S. § 14-3803(B) and Wyoming law might bar Judith’s claim due to the probate filed in the Wyoming Court. [See I.R. 26 at 2]

At a status conference on September 29, 2015, the Co-Personal Representatives counsel indicated, “I think we will probably at some point file a motion for summary judgment.” [T.P. (September 29, 2015) at 4:8 to 4:10] Counsel readily accepted the trial court’s suggestion that the parties participate in a settlement conference to “help and save your clients the preparation of a summary judgment motion.” [Id. at 4:20 to 4:25] The trial court left further discussions in the hands of counsel for both parties and set a telephonic status conference to discuss whether to set such a conference or whether the case would proceed by summary judgment or go to trial. [See id. at 5:9 to 5:15 & 6:13 to 7:3]

New counsel appeared for Leslie and Sandra at the telephonic status conference on November 12, 2015. [See T.P. (November 12, 2015) at 2:15 to 2:15] As to mediation, Mary Jo’s counsel stated, “the personal representatives would be inclined to possibly consider a mediator, but I did not commit to that.” [Id. at 6:13 to 6:15] Leslie and Sandra’s new counsel asserted that mediation would have little effect until the trial court determined whether Arizona and Wyoming non-claim statutes barred Judith’s claim. [Id. at 7:12 to 8:2]

The trial court allowed the parties to propound discovery limited to “the notice of claim issue.” [T.P. (November 12, 2015) at 11:4 to 11:6] It set deadlines of November 20, 2015 for discovery, mid-December for discovery responses and the end of the year for dispositive motions. [Id. at 13:1 to 13:11]

E. The Co-Personal Representatives Produced only Two Documents in Response to Judith’s Request.

On November 19, 2015, Judith’s counsel issued a Document Request seeking copies of documents evidencing the Co-Personal Representatives efforts to identify the decedent’s debts and communications and agreements among themselves regarding Judith’s claim and the ensuing letters exchanged between Judith’s counsel and Mary Jo’s counsel. [I.R. 44 ¶ 15 & Exhibit A] The Request yielded just two responsive documents: an Affidavit of Publication relating to a notice published in the Buffalo, Wyoming Bulletin and a Stipulation for Distribution of Estate filed in the Wyoming Court on August 27, 2014. [Id. ¶ 16 & Exhibit B] The Co-Personal Representatives stated they had no other documents responsive to Judith’s request. [Id. Exhibit B]

F. In Granting Leslie and Sandra Summary Judgment, the Trial Court Ignored the Conversations between Charles and Leslie about Judith’s Claim, a Statute Governing Claims Arising at or after the Decedent’s Death, and a Wyoming Savings Statute.

On December 28, 2015, the Co-Personal Representatives filed the Motion, focusing on whether Arizona and Wyoming’s non-claim statutes barred Judith’s claim against Charles’ estate. They supported the Motion with a Separate Statement of Facts and a Declaration recounting Leslie Hiatt’s “specific recollection of Charles] telling her that he no longer owed [Judith] anything and that any obligation [Charles] had to [Judith] had long ago been paid in full.” [I.R. 35 ¶ 12; I.R. 36 ¶ 14] Charles made these statements to Leslie “[o]n multiple occasions prior to his death.” [I.R. 35 ¶ 12; I.R. 36 ¶ 14] Leslie and Sandra’s counsel conceded, at oral argument on the summary judgment motion, that “[t]here may be a factual dispute as to whether [Judith]’s also subject to constructive notice

because notice of the probate was published in Wyoming.” [T.P. (March 30, 2016) at 5:13 to 5:15]

The trial court granted the motion, entering a signed Judgment that also awarded the Co-Personal Representatives \$46,926.27 in attorney fees and costs on August 8, 2016. [I.R. 58]

The trial court explained its decision in a May 28, 2016 Under Advisement Ruling (the “Ruling”). [I.R. 48] It found that Judith “was not a reasonably ascertainable creditor,” for purposes of Wyoming law, because a “reasonable person in the co-Personal Representatives position would not think to review a 26-year old divorce settlement agreement to determine whether a former spouse might have a claim against the estate of a husband she divorced almost three decades earlier. [Id. at 2]

The trial court also found that Judith’s claim arose before Charles’ death, reasoning that A.R.S. § 14-3803(A) “clearly contemplates that a claim arising before death could be ‘due or become due’ and could also be ‘contingent’ on some other occurrence” and that Judith’s claim “arose/originated/stemmed from the 1987 agreement, not upon the Decedent’s death.” [Id.] The trial court ignored identical language regarding “contingent” claims and claims “due or become due” in A.R.S. § 14-3803(C), the statute governing claims arising at or after the decedent’s death. Because it found that Judith’s claim arose before Charles’ death, it also found the claim barred because Judith did not file it within three months after the first publication of the notice of probate as required by Wyo. Stat. Ann. 2-7-703.

Despite a discussion of the issue during the oral argument on the Motion on March 30, 2016, [T.P. (March 30, 2016) at 17:22 to 19:9], the Ruling did not mention a provision sparing “[c]laimants entitled to equitable relief due to peculiar circumstances, if so found by the court in adversary proceedings,” from the bar imposed by Wyoming’s non-claim statute. See Wyo. Stat. Ann. 2-7-703(c)(i).

Judith focused the trial court’s attention on these issues in a Motion to Reopen Judgment or in the Alternative for New Trial filed on August 23, 2016. [See I.R. 59] The trial court denied the motion by a signed Order on December 7, 2016. [I.R. 68] This appeal followed.

ISSUES PRESENTED FOR REVIEW

1. Under applicable Wyoming statutes, each creditor whose identity is reasonably ascertainable by the personal representative of an estate within the time limit set by a published notice to creditors must receive written notice of a probate. Here, one of the Co-Personal Representatives “specifically recall[ed Charles] telling her,” “[o]n multiple occasions prior to his death,” “that he no longer owed [Judith] anything and that any obligation [he] had to [Judith] had long ago been paid in full.” Under the circumstances, would a genuine issue of material fact preclude the trial court from finding that Judith was not a reasonably ascertainable creditor for purposes of the notice requirement?

2. A.R.S. § 14-3803(C) allows creditors holding “claims against a decedent’s estate that arise at or after the death of the decedent” at least two years after the decedent’s death to present their claims against the estate. The trial court found that Judith’s claim arose under A.R.S. § 14-3803(A), which sets a much earlier

deadline for the submission of a claims arising before the decedent's death, because that statute includes "contingent" claims and claims "due or to become due." Did the trial court err in ignoring identical provisions for "contingent" claims and claims "due or to become due" in A.R.S. § 14-3803(C)?

3. Section 2-7-703(c)(i) of the Wyoming Statutes Annotated provides that the bar otherwise resulting from noncompliance with the claim's procedure does not apply to "[c]laimants entitled to equitable relief due to peculiar circumstances, if so found by the court in adversary proceedings." In this case, the Co-Personal Representatives did not bring the existence of the Wyoming probate to Judith's attention or the trial court's attention until almost two years after Charles' death and responded to Judith's initial inquiry about her claim on the merits, with no mention of the Wyoming probate. The trial court also told the parties, "it is in no one's best interests to have Judith's claim go to Wyoming," encouraged the parties to resolve their dispute informally, sequestered funds to pay Judith's claim, encouraged Judith's counsel to wait to see if the parties could resolve their dispute before petitioning to allow the claim -- only to rule, in effect, that Judith should have made her claim in Wyoming months before she first learned of Charles' death. Under these circumstances, did the trial court err in neglecting to conduct an adversary proceeding to explore the peculiar circumstances of this case?

ARGUMENT

I. The Trial Court Erred in Granting Leslie and Sandra's Motion for Summary Judgment.

The trial court granted Leslie and Sandra’s Motion for Summary Judgment, in part, because it concluded that Judith was not a “reasonably ascertainable creditor” entitled to actual notice under Wyoming law. It made this finding despite Leslie’s declarations that she and Charles discussed Judith’s claim “on numerous occasions before his death.” The trial court also found Judith’s claim subject to A.R.S. § 14-3803(A), the statute governing claims arising before the decedent’s death, because the statute encompasses “contingent” claims and claims “due or to become due.” In doing so, the trial court ignored the same words in A.R.S. § 14-3803(C), the statute governing claims arising at or after the decedent’s death. Finally, the trial court did not conduct an adversary proceeding to examine the peculiar circumstances of this case, as required by Wyo. Stat. Ann. § 2-7-703(c)(i). Any one of these errors would require this Court to reverse the trial court’s decision as a matter of law.

A. Standard of Review.

This Court applies a de novo standard of review in evaluating whether the trial court properly granted summary judgment and will affirm a summary judgment only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. E.g., Weitz Co. L.L.C. v. Heth, 235 Ariz. 405, 409, ¶ 11, 333 P.3d 23, 27 (2014); Andrews v. Blake, 205 Ariz. 236, 240, ¶¶ 12-13, 69 P.3d 7, 11 (2004). This appeal also raises questions of statutory interpretation requiring de novo review. See, e.g., Scottsdale Healthcare, Inc. v. Arizona Health Care Cost Containment System Administration, 206 Ariz. 1, ¶ 10, 75 P.3d 91, 94 (2003) (“We review questions of law involving statutory interpretation de novo.”); Hoag v. French, 238 Ariz. 118, 121, ¶ 10, 357 P.3d 153, 156 (2015) (same).

In reviewing the grant of a summary judgment, this Court must view the facts, the evidence and any reasonable inferences to be drawn from the facts and the evidence in the light most favorable to Judith as the party opposing the motion. E.g., Weitz, 235 Ariz. at 408, ¶ 2, 333 P.3d at 26; Andrews, 205 at 240, ¶ 13, 69 P.3d at 11. This Court also must construe all such inferences in Judith’s favor. E.g., Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002). “If reasonable persons could come to different conclusions from the evidence, summary judgment is improper.” Salerno v. Atlantic Mutual Insurance Co., 198 Ariz. 54, 56 ¶ 2, 6 P.3d 758, 760 (App. 1 2000); Transamerica Insurance Co. v. Doe, 173 Ariz. 112, 114, 840 P.2d 288, 290 (App. 1992) ([i]f, when drawing all reasonable inferences in favor of the party opposing the motion, “reasonable people could differ, summary judgment is not appropriate”) (citing Orme School v. Reeves, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990)).

B. The Trial Court Erred in not Considering Judith a Reasonably Ascertainable Creditor for Purposes of Constitutionally Required Notice of Probate Proceedings.

“The Due Process Clause of the United States Constitution requires the personal representative of an estate to provide actual notice of probate proceedings to known or reasonably ascertainable creditors.” Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 489-90 (1988); Estate of Novakovich, 101 P.3d 931, 938, ¶ 27 (Wyo. 2004); Harris v. Taylor, 929 P.2d 142, 145 (Wyo. 1998) (“Actual notice to a known or reasonably ascertainable creditor is constitutionally required.”) The Wyoming Supreme Court has held that a creditor’s due process

rights outweigh the “strong interest in not disturbing the sanctity of a closed probate estate.” Novakovich, 101 P3d at 937-39, ¶¶ 26-30 (the trial court erred in requiring a claimant seeking to reopen an estate to make a serious showing, rather than a prima facie showing, of likely success on the merits before requiring the personal representative to submit to discovery as to whether the claimant was a reasonably ascertainable creditor). This Court should exhibit similar leniency in evaluating Judith’s contention that she was a known or reasonably ascertainable creditor of the estate.

Leslie and Sandra’s Separate Statement of Facts and supporting Declaration betray Leslie’s knowledge of Judith’s identity as a potential creditor. Judith, Leslie and Sandra agree on the admissibility of Leslie’s “numerous” conversations with Charles about Judith’s claim as evidence of “the personal representatives’ state of mind.”² Viewing all facts, evidence and inferences in Judith’s favor, as the standard of review requires, leads inescapably to the conclusion that a genuine issue of material fact relating to Judith’s status as a “reasonably ascertainable creditor” precludes summary judgment on the point. Judith need not demonstrate success on the merits, only that “reasonable people” could reach different conclusions based on the evidence presented. This Court should reverse the trial court’s award of summary judgment to Leslie and Sandra as a result.

² Compare I.R. 42 at 7 and 59 at 5 n.1 (“Judith relies on Leslie Hiatt’s reported conversations with Charles as evidence of Leslie’s awareness of Judith’s identity as a creditor.”) with I.R. 60 at 2-3 (“During his lifetime, decedent informed the personal representatives on numerous occasions that he no longer owed Claimant anything. While this evidence might not be admissible to establish the validity of the claim, it certainly is admissible to prove the personal representatives’ state of mind and [their] diligent efforts to identify creditors ‘based upon the information available to the personal representatives.’”)

c. Judith's Claim Arose at the Moment of Charles' Death.

Under A.R.S. § 14-3803(C), creditors holding “claims against a decedent’s estate that arise at or after the death of the decedent” may present those claims at any time within “two years after the decedent’s death plus the time remaining in the period commenced by an actual or published notice pursuant to § 14-3801, subsection A or B.”³ Judith first presented her claim, initiated formal probate proceedings and petitioned the trial court to allow her claim within two years after decedent’s death on September 25, 2013. The trial court’s conclusion that, under A.R.S. § 14-3803(B), Wyoming law bars Judith’s claim fails as a matter of law.

c.1. The Words “Contingent” or “Due or to Become Due” Do Not Indicate Whether Judith’s Claim Arose Before, At or After Charles’ Death.

Leslie, Sandra and the trial court focused on the words “due or to become due” and “contingent” in A.R.S. § 14-3803(A), the statute governing claims arising before the decedent’s death. Their analysis does not answer the question of when Judith’s claim against Charles’ estate arose because the same words appear in A.R.S. § 14-3803(C), the statute governing claims arising at or after the decedent’s death. The trial court correctly identified the question in terms of when the claim “originated.” But it answered that question incorrectly.

³ Except for claims "based on a contract with the personal representative," A.R.S. § 14-3803(C) allows a creditor holding any claim to present it "within the later of four months after it arises or the time specified in [A.R.S. § 14-3803(A)(1)]." A.R.S. § 14-3803(C)(2). A.R.S. § 14-3803(A)(1), in turn, allows a creditor to present a claim “within [t]wo years after the decedent's death plus the time remaining in the period commenced by an actual or published notice pursuant to §14-3801, subsection A or B.”

Contrary to the Ruling, Judith’s claim “originated” at the moment of Charles’ death, not before. The Settlement Agreement required no further action by Charles, and gave nothing for Judith to enforce, before his death. Instead, it provided for an automatic payment upon Charles’ death – contingent on Judith surviving Charles.

C.2. This Court Must Read a Statute as a Whole, Give Effect to All its Provisions but not Render any of its Language Superfluous.

Judith’s proposed approach satisfies the maxims that “[w]hen a statute’s words do not disclose legislative intent,” this Court “must read the statute as a whole, and give meaningful operation to all of its provisions,” Wyatt v. Wehmuller, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991); Doty-Perez v. Doty-Perez, 241 Ariz. 372, ¶ 20, 388 P.3d 9, 14 (App. 2016) (similar), but may “not read a statute in such a way as to render any of its language superfluous,” Owner–Operator Independent Drivers Association v. Pacific Finance Association, Inc., 241 Ariz. 406, ¶ 19, 388 P.3d 556, 561 (App. 2017). Treating Judith’s claim as arising before Charles’ death, based on the words “contingent” and “due or to become due” in A.R.S. § 14-3803(A), effectively would erase those words from A.R.S. § 14-3803(C) as to claims arising at Charles’ death. Treating Judith’s claim as arising at Charles’ death, based on the same words, would leave the corresponding provision in A.R.S. § 14-3803(A) intact as to claims arising before his death. This Court therefore should treat Judith’s claim as a claim arising at the time of Charles’ death.

C.3. The Cases Leslie and Sandra Cite Support Judith’s Position.

The cases from other jurisdictions cited by Leslie and Sandra illustrate the point. Poleson v. Wills, for example, concerned a potential legal malpractice action based on a claim that the lawyer had improperly drafted a promissory note so as to subject his client to personal liability. 998 P.2d 469 (Colo. App. 2000). The lawyer died (1) after the holder of the note asserted that the note created personal liability for his client; (2) after his client responded denying personal liability on the note; but (3) before an adjudication of the client's personal liability on the note. 998 P.2d at 471. The client's claim against the lawyer's estate hinged on the uncertain outcome of the litigation on the note the lawyer had drafted, litigation still pending when the lawyer died. It did not arise from the lawyer's death. It comprised a contingent claim arising before his death.

In Spohr v. Berryman, the Florida Supreme Court considered the decedent's failure to fulfill a contractual promise to devise half his estate to his wife and children. 589 So.2d 225, 227-28 (Fla. 1991). That promise bears no resemblance to the Settlement Agreement's provision for an automatic \$150,000.00 payment to Judith should Charles predecease her. Apart from Charles' option to purchase life insurance, nothing he or Judith or anyone else could have done before he died would have changed the operation of that provision. Spohr involved a contingent claim arising before the decedent's death; this case involves a contingent claim arising at the time of the decedent's death.

In arguing for a different result, the Co-Personal Representative relied on the Arizona Supreme Court's decision in Hullett v. Cousin for the definition of "contingent claim." 204 Ariz. 292, 63 P.3d 1029 (2003). Hullett considered a

definition of “claims” in the Uniform Fraudulent Transfer Act as broad as the definitions in A.R.S. §§ 14-3803(A) & (C). See Hullett, 204 Ariz. at 296, ¶ 16, 63 P.3d at 1033 (“A “claim” is defined as “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.”) (citation omitted). The precise question the Arizona Supreme Court considered was whether “an unknown and presumably time-barred claim must be considered in determining if a partnership was insolvent when it transferred its assets to its limited partners” for purposes of a fraudulent transfer claim. Id. 204 Ariz. at 295, ¶ 9, 63 P.3d at 1032. Hullett held that the trial court should have addressed the validity of a creditor’s claim, for purposes of fraudulent transfer analysis, at the moment the partnership dissolved and transferred its assets to the limited partners. 204 Ariz. at 297, ¶ 22, 63 P.3d at 1034. Similar logic suggests addressing the validity of Judith’s claim at the moment of Charles’ death, not before.

Judith filed her claim before the statutory deadline for claims arising at or after the decedent’s death. As a result, this Court should reverse the trial court’s summary judgment as a matter of law.

D. “Peculiar Circumstances” Entitle Judith Equitable Relief from the Wyoming Non-Claim Statute.

Section 2-7-703(c)(i) of the Wyoming Statutes Annotated provides that the bar otherwise resulting from noncompliance with the claim’s procedure does not apply to “[c]laimants entitled to equitable relief due to peculiar circumstances, if so

found by the court in adversary proceedings.” Wyo. Stat. Ann. § 2-7-703(c)(i). The “peculiar circumstances presented by this case include:

- The Co-Personal Representatives’ pursuit of probate proceedings in Wyoming shortly after Charles’ death coupled with their failure to file anything in Arizona, despite Charles’ substantial real estate holdings here, before Judith commenced this proceeding almost two years later;
- The failure of the lawyer responding to Judith’s initial demand to mention the Wyoming probate in his response;
- Judith’s commencement of this proceeding, in her capacity as a creditor, to administer her claim under the 1987 divorce settlement;
- The trial court’s finding, at the hearing on August 10, 2015, that “it is in no one’s best interests to have Judith’s claim go to Wyoming”;
- The trial court’s instructions to both sides, at the same hearing, to try to work out Judith’s claim “in the next couple of weeks”;
- The trial court’s directions to Judith’s counsel, at the same hearing, to file a petition seeking adjudication of her claim in the event settlement efforts proved unavailing;
- The delay in the appointment of the Co-Personal Representatives until August 27, 2015;
- The Co-Personal Representatives preparation of an order, in accordance with the trial court’s directive, requiring them to place \$175,000.00 from the sale of Charles’ Arizona residence in a restricted

account and to restrict unimproved real estate in Arizona belonging to Charles until the final resolution of Judith's claim; and

- The trial court's implicit finding that Judith should have made her claim months before she first learned of Charles' death.

Even given the trial court's interpretation of A.R.S. § 14-3803, it should have conducted an adversary proceeding to determine whether the peculiar circumstances of this case entitled Judith to equitable relief from the bar Wyoming law otherwise might impose against her claim.

II. This Court Should Set Aside the Trial Court's Award of Attorney Fees to the Co-Personal Representatives and Award Judith her Reasonable Attorney Fees and Costs on Appeal.

If this Court reverses the trial court's decision to grant Leslie and Sandra's Motion for Summary Judgment, it necessarily also should set aside the trial court's related award of attorney fees and costs to the estate. Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons, 201 Ariz. 474, 499, ¶ 105, 38 P.3d 12, 37 (2002). Instead, this Court should award Judith her reasonable attorney fees and costs as the prevailing party on appeal. This Court should make such an award under the Settlement Agreement, A.R.S. § 12-341.01 and A.R.S. § 12-341.

The Settlement Agreement entitles a party who successfully enforces its provisions to recover his or her attorney fees and costs. Under Section 11 of the agreement,

In the event either party is required to bring legal action against the other party to enforce any of his or her rights under this Agreement, the prevailing party shall be entitled to recover from the other all reasonable costs and expenses incurred in bringing such an action, including, but not limited to, reasonable attorneys' fees.

[I.R. 36, Exhibit D, at 11 (emphasis added)] Judith initiated the action giving rise to this appeal to enforce her rights under the Settlement Agreement. If she prevails on appeal, this Court should award Judith her reasonable attorney fees and costs on the strength of the Settlement Agreement. E.g., American Power Products, Inc. v. CSK Auto, Inc., 241 Ariz. 564, ¶ 22, 390 P.3d 804, 810 (2017) (“As long as a contract is legal and enforceable, parties of course may fashion all aspects of an attorney fee provision . . . in whatever way they see fit.”).

Unless interpreted in a manner that “effectively conflicts” with the Settlement Agreement’s provision for attorney fees, A.R.S. § 12-341.01 would support an award of Judith’s reasonable attorney fees as the prevailing party on appeal, see, e.g., American Power Products, 241 Ariz. at ¶ 14, 390 P.3d at 808; Jordan v. Burgbacher, 180 Ariz. 221, 228-29 883 P.2d 458, 465-66 (App. 1994), while A.R.S. § 12-341 would mandate an award of Judith’s costs.

CONCLUSION

For the reasons set forth in this Brief, this Court should reverse the trial court’s award of summary judgment to Leslie and Sandra. It also should set aside the trial

court's award of attorney fees and costs to the estate. Finally, this Court should award Judith her reasonable attorney fees and costs on appeal.

Dated April 24, 2017.

Respectfully submitted,

By /s/_____

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CERTIFICATE OF COMPLIANCE

This Certificate of Compliance concerns a Brief and is submitted in accordance with ARCAP 14(a)(5).

I certify that the attached Brief uses proportionately spaced type of 14 points or more, is double spaced using a roman font and contains 5,405 words.

The document accompanying this Certificate complies with ARCAP 14.

Date: April 24, 2017.

/s/ _____

Charles Van Cott, Attorney for
Appellant