

**ARIZONA SUPREME COURT**

<b>In re the Estate of:</b>	)	<b>1 CA-CV 17-0045</b>
<b>CHARLES H. EVITT,</b>	)	
<b>Deceased.</b>	)	<b>Maricopa County Superior Court</b>
<hr/>	)	<b>Case No. PB2006-001880</b>
	)	
<b>JUDITH EVITT-THORNE,</b>	)	
<b>Petitioner/Appellant,</b>	)	<b>PETITION FOR REVIEW</b>
<b>v.</b>	)	
<b>LESLIE HIATT, SANDRA EVITT</b>	)	
<b>and MARY JO EVITT,</b>	)	
<b>Respondents/Appellees.</b>	)	
<hr/>	)	

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**I. INTRODUCTION.**

This Petition for Review seeks to challenge a published opinion of the Court of Appeals (copy appended) (the “Opinion”) which addresses a purely legal issue of first impression having statewide importance. It concerns a settlement agreement Petitioner Judith Evitt-Thorne (“Judith”) and Decedent Charles H. Evitt (“Charles”) entered into as an incident to their divorce in Maricopa County in 1987 (the “Settlement Agreement”). The Court of Appeals treated a claim under the Settlement Agreement that would not have existed unless Charles died before Judith without providing her with \$150,000.00 upon his death as a claim arising before Charles’

death, rather than as a claim arising at his death, for purposes of Arizona's nonclaim statute, A.R.S. § 14-3803. In effect, the Court of Appeals found Judith's claim time-barred because she did not comply with a deadline, dating from the publication of a notice of probate in Wyoming, that expired months before she first learned of Charles' death.

## **II. ISSUES FOR REVIEW.**

1. 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 Court of Appeals held 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." In doing so, did it err by ignoring identical provisions for "contingent" claims and claims "due or to become due" in A.R.S. § 14-3803(C)?

2. If this Court grants review, should it reverse the trial court's award of attorney fees and costs against Judith and to Charles' estate and also award Judith her reasonable attorney fees and costs on appeal and in connection with this Petition?

## **III. FACTUAL BACKGROUND.**

Charles and Judith divorced in Maricopa County, Arizona on September 11, 1987. Index of Record ("I.R.") 35 ¶ 1. As an incident to their divorce, they entered

into a settlement agreement requiring a \$150,000.00 payment to Judith upon Charles' death:

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 names as the owner and/or beneficiary.

I.R. 36, Exhibit D at 6, ¶ 10 (Settlement Agreement between Charles and Judith) (Appendix) (emphasis added); I.R. 43 ¶ 10.

Charles passed away at his home in Wyoming on September 23, 2013. I.R. 35 ¶ 2. When he died, Charles' still owned real property in Maricopa County, Arizona. E.g., I.R. 12 at 4.

The Fourth District Court of Johnson County, Wyoming, admitted Charles' will to probate on October 30, 2013 and appointed Leslie Hiatt ("Leslie"), Sandra Hiatt ("Sandra") and Mary Jo Evitt 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. 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. The Co-Personal Representatives published the notice

approximately seven months before Judith first learned of Charles' death in July 2014. I.R. 60 ¶ 2.

Judith initiated probate proceedings in Maricopa County, Arizona on July 2, 2015, within two years after Charles' death. See I.R. 1. The trial court granted a motion for summary judgment filed by Leslie and Sandra, finding that A.R.S. § 14-3803(B) barred Judith's claim because she 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, Wyoming's nonclaim statute. I.R. 48 at 2.

A.R.S. § 14-3803(B) applies only to claims arising before a decedent's death, as defined in A.R.S. § 14-3803(A). The trial court acknowledged that Judith's claim "did not become due until [Charles'] death and would not have existed" if Judith had died first. I.R. 48 at 2. The trial court nevertheless found that Judith's claim arose before Charles' death because 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 because Judith's claim "arose/originated/stemmed from the 1987 agreement, not upon the Decedent's death." I.R. 48 at 2.

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. Following that statute would have afforded Judith at least two years after Charles' death to file her claim.<sup>1</sup>

The Court of Appeals affirmed. Framing the issue in terms of a "contract obligating [the decedent] to act while living to ensure a payment at or after his death," the Court held that "a claim for breach arises before the decedent's death." Opinion at 1 ¶ 1.

Characterizing Judith's argument as resting only on her ability to enforce her claim, the Court of Appeals acknowledged that "[b]oth A.R.S. § 14-3803(A) and (C) apply to 'claims whether due or to become due, absolute or contingent,'" but found that Judith's claim "was a contingent claim that arose before [Charles] death." *Id.*

The Court of Appeals supported its conclusion with a hypothetical referencing the words "due or to become due" in A.R.S. § 14-3803(A) without explaining how the identical words in A.R.S. § 14-3803(C) might apply to its hypothetical situation or Judith's claim. *Id.* at 2 ¶ 12. The Court also expressed concern that a decision in Judith's favor "would run afoul of "rulings in other Uniform Probate Code jurisdictions" with statutes similar to A.R.S. § 14-3803" and "require that a

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<sup>1</sup> 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."

decedent's estate remain open indefinitely,” frustrating “Arizona’s policy of promoting the ‘speedy and efficient’ settling of the estate.” [Id. at 2-3 ¶¶ 12-13]

Finding no genuine issues of material fact precluding summary judgment on the point, the Court of Appeals also rejected Judith’s related contention that, as a reasonably ascertainable creditor living in Arizona, she had a due process right to more notice than publication in Johnson County, Wyoming. See, e.g., Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 489-90 (1988) (“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.”).

#### **IV. REASONS FOR GRANTING THE PETITION.**

##### **A. The Opinion Renders Parts of The Pertinent Statute Meaningless.**

A court must “read [a] statute as a whole, and give meaningful operation to all of its provisions.” See Wyatt v. Wehmueller, 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). It must not “render any of its language superfluous.” E.g., Owner-Operator Independent Drivers Association v. Pacific Finance Association, 241 Ariz. 406, ¶ 19, 388 P.3d 556, 561 (App. 2017). The Opinion acknowledges that A.R.S. § 14-3803(A) & (C) both include “claims whether due or to become due, absolute or contingent.” But it does not give effect to both provisions.

By treating Judith's claim as arising before Charles' death, based on the words "contingent" or "due or to become due" in A.R.S. § 14-3803(A), the Court of Appeals effectively erased those words from A.R.S. § 14-3803(C) as to claims arising at Charles' death. Had the Court treated Judith's claim as arising at Charles' death, based on the same words, it would leave the corresponding provision in A.R.S. § 14-3803(A) intact as to claims arising before his death. Giving "meaningful operation" to both provisions, while rendering neither superfluous, necessitates treating Judith's claim as a claim arising at the time of Charles' death. The Court of Appeals erred in ruling otherwise.

**B. The Settlement Agreement Supports Judith's Claim.**

The Court of Appeals also erred in holding that Judith's claim "originated" when she and Charles entered into the Settlement Agreement, not when he failed to provide Judith with \$150,000.00 upon his death, years later. The ordinary meaning of the verb "provide," when used in relation to the object of a sentence, is "to make available" or "to supply" something needed or desired, a change from its archaic meaning of "to make ready ahead of time" or to "prepare." E.g., The American Heritage Dictionary of the English Language (5th Ed. 2018). The Settlement Agreement gave Charles the option to satisfy his obligation with life insurance but did not require him to do so. The agreement required no further action by Charles, and gave nothing for Judith to enforce, before his death. Judith's claim arose at

Charles' death not just because she could not enforce it before then, but also as the trial court correctly found, because the claim "would not have existed" had Judith died first.

**C. The Authorities the Opinion Cites from Other Jurisdictions Are Readily Distinguishable.**

The automatic payment required by the Settlement Agreement distinguishes this case from the other Uniform Probate Code precedents cited in the Opinion (at 3 ¶ 13). The Minnesota Court of Appeals' decision in Estate of Hadaway, for example, hinged on a finding that the settlement agreement at issue obligated the decedent "to make arrangements to provide \$175,000 for appellant, either in his will, by life insurance or by other means," 668 N.W.2d 920, 923 (Minn. App. 2003), facts not found or supported by the record in this case. In Spohr v. Berryman, the Florida Supreme Court considered an "agreement[] to make a will" also not present in this case. 589 So.2d 225, 226 & 28 (Fla. 1991).

The Spohr court apparently considered a statutory scheme that did not expressly address claims arising at or after the decedent's death, while the Hadaway court interpreted applicable statutes so as to extend the deadline for the creditor's claim. See Spohr, 589 So.2d at 228 ("We believe that the reference in the statute to claims arising before the death of the decedent is intended to make clear that it is unnecessary to file a statement of claim in order to prosecute an action against the estate that is predicated upon events that take place after the decedent's death.");



Hadaway, 668 N.W.2d at 920-21 & 924 (reversing the trial court’s denial of a claim based on the shorter period afforded by Minnesota law for claims arising at or after, rather than the longer period accorded claims arising before the decedent’s death).

Contrary to the Opinion, giving effect to Judith’s claim would mark no inconsistency with precedents from other Uniform Probate Court jurisdictions.

**D. Granting Judith Relief Would Not “Frustrate Arizona’s Policy of Promoting The ‘Speedy and Efficient’ Settling of The Estate.”**

In Estate of Winn, this Court recognized that “efficient administration and finality are not ends in themselves, but rather are intended to protect the decedent’s successors and creditors from disruptions to possession of the decedent’s property.” 214 Ariz. 149, 153, ¶ 20, 150 P.3d 236, 240 (2007) (emphasis added). This Court went on to hold that allowing a personal representative appointed more than two years after the decedent’s death to litigate an elder abuse claim would further the interests of efficiency and finality despite provisions in A.R.S. § 14-3108(4) that otherwise would have curtailed the personal representative’s power.

Contrary to the Opinion, a ruling in Judith’s favor would not “require that a decedent’s estate remain open indefinitely.” Instead, such a ruling would require the presentation of claims subject to A.R.S. § 14-3803(C) within “two years from the date of death plus the time remaining of the four month period that begins to run after the personal representative provides notice to potential creditors.” See A.R.S. § 14-3803(A)(1). The Court of Appeals erred in holding otherwise.

### **E. Attorney Fees.**

If this Court grants Judith's Petition for Review, it also should set aside the trial court's award of attorney fees and costs to Charles' estate, e.g., Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons, 201 Ariz. 474, 499, ¶ 105, 38 P.3d 12, 37 (2002), and award Judith her reasonable attorney fees and costs as the prevailing party on appeal and in connection with this Petition. The Settlement Agreement, A.R.S. § 12-341.01 and A.R.S. § 12-341 justify such awards.

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) (copy included as Appendix 2 Judith initiated the action giving rise to her appeal and this Petition to enforce her rights under the Settlement Agreement. If she prevails, 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 also 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

This Court should grant review to correct the Court of Appeals' erroneous interpretation of Arizona's nonclaim statute. If it grants review, this Court also should reverse the trial court's award of attorney fees and costs to Charles' estate and grant Judith her reasonable attorney fees on appeal and in connection with this Petition.

Dated October 1, 2018.

Respectfully submitted,

By /s/\_\_\_\_\_

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