In the Court of Appeals
State of Arizona
Division One

In re: the Matter of the Estate of:	)	1 CA-CV 17-0045
	)	
Charles H. Evitt	)	Maricopa County Superior
	)	Court No. PB 2015-051215
	)	
Judith Evitt-Thorne	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	
	)	
	)	
Leslie Hiatt, et al.	)	
	)	
Respondents-Appellees.	)	

APPELLEES' ANSWER BRIEF

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INTRODUCTION

Appellant Judith Evitt-Thorne makes a claim for $150,000 against the estate of her deceased, former husband based upon an agreement made during their divorce in 1987. The superior court did not need to reach the dispute over the validity of that claim. Pursuant to well-established law for probate nonclaim statutes, Ms. Evitt-Thorne's claim no longer existed because she did not preserve it by timely submitting her claim in the Wyoming domiciliary probate of her former husband's estate. The facts that Judith Evitt-Thorne sought to litigate her claim in an ancillary Arizona proceeding and that an Arizona court initially considered whether the claim could be resolved here, does not negate the ultimate conclusion of the Arizona court that the claim no longer existed because Ms. Evitt-Thorne did not timely submit her claim in the Wyoming probate. Summary judgment was appropriate because, whether previously valid or invalid, the claim thereafter was barred.

STATEMENT OF THE CASE

Following the death of Charles H. Evitt in Wyoming in 2013, Judith Evitt-Thorne, the former wife of Charles H. Evitt, initiated Arizona proceedings in 2015 seeking allowance of a claim in probate against the Estate of Charles H. Evitt. Items 1, 20.[1] Co-personal representatives Mary Jo Evitt,

[1] References to "Item" are to documents on the Clerk's Index to the Record on Appeal.

Leslie Hiatt, and Sandra Evitt,[2] the widow and two daughters of Charles Evitt, respectively, opposed the claim. Items 8, 26. The superior court agreed that Ms. Evitt-Thorne's claim was barred by the nonclaim statute of Wyoming as Ms. Evitt-Thorne had never submitted a claim in the pre-existing Wyoming probate. Item 48. Ms. Evitt-Thorne appealed from the judgment denying allowance of her claim and awarding attorneys' fees against her. Item 69. This court has jurisdiction pursuant to Ariz. Rev. Stat. § 12-2101(A)(9).

STATEMENT OF FACTS

Charles H. Evitt was formerly married to Judy Evitt-Thorne. Their marriage was dissolved by decree filed September 11, 1987, in Maricopa County Superior Court cause no. DR-238994. Item 36, Exh. D (decree enclosure to letter). Pursuant to Section 10 of a Settlement Agreement dated July 30, 1987 and ancillary to the decree, Charles Evitt (as Husband) agreed to provide certain death benefits to Judith Ann Evitt (as Wife nka Judy Evitt-Thorne) as follows:

> 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

[2] As indicated by the clarification filed in these proceedings by the former co-personal representatives, Mary Jo Evitt is now the sole personal representative.

> time obtain, including policies in which the Wife is now or in the future may be named as the owner and/or the beneficiary.

Id. (settlement agreement enclosure to letter).

Charles Evitt subsequently remarried, had a family, and was living in Wyoming when he died September 25, 2013, twenty-six years after the Arizona divorce. Item 36, ¶¶2, 4-6. Charles Evitt died testate in Johnson County, Wyoming. Item 12, ¶4. Pursuant to an order dated October 30, 2013, his widow, Mary Jo Evitt, and his daughters, Leslie Hiatt and Sandra Evitt, were appointed co-personal representatives in the resulting Wyoming domiciliary probate action, In the Matter of the Estate of Charles H. Evitt, Wyoming Fourth Judicial District of Johnson County, cause no. PR 2013-003. Item 10; Item 12, ¶4; Item 36 ¶¶2, 6.

As required by Wyoming probate statutes, on December 5, 12, and 19, 2013, Notice of Probate bearing the caption and cause number of the probate was published in a Wyoming newspaper. Item 36, Exh. B. Among other things, the notice stated that any claims against Charles Evitt or his estate were required to be filed in the office of the clerk of the court within three months of the first date of publication of the notice. Id.

With respect to identifying any creditors or potential creditors, the co-personal representatives reviewed available business records of Charles Evitt and they also consulted with his accountant, Dennis Lawrence. Item 36, ¶7. In

that regard, they identified two potential creditors (neither of which was Judy Evitt-Thorne)[3] and gave them direct notice of the probate. Id. ¶8 & Exh. A. See also id., Exh. E (enclosure to letter).

The expiration date for claims against the Estate of Charles H. Evitt was March 5, 2014 (being three months from the first publication of the Notice of Probate). Item 36, Exh. B. No claim by Judy Evitt-Thorne was filed with the clerk of the Wyoming court by that deadline. Id., ¶18.[4]

By May 2014, all claims with respect to the Estate of Charles H. Evitt had been addressed and the court in the Wyoming probate entered an order for

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[3] In response to the declaration and statement of facts of the personal representative that such investigation had occurred and had not identified Ms. Evitt-Thorne as a creditor, Ms. Evitt-Thorne merely stated "disputed." Item 43, ¶2. Arizona Rules of Civil Procedure 56(e), however, precluded her from resting upon "mere allegations or denials." "[T]he adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Id. Ms. Evitt-Thorne was obligated to present any controverting facts "either by affidavit or some other evidence." Sato v. Van Denburgh, 123 Ariz. 225, 228, 599 P.2d 181, 184 (1979). When the motion opponent fails to present such controverting evidence, the movant's facts "may be considered true." Id. See also Tilley v. Delci, 220 Ariz. 233, 237, 204 P.3d 1082, 1086 (Ct. App. 2009); GM Dev. Corp. v. Cmty. Am. Mortgage Corp., 165 Ariz. 1, 5-6, 795 P.2d 827, 831-32 (Ct. App. 1990). Her attorney's opposing legal memorandum merely asserted that "it is 'objectively unreasonable' to suggest that the Co-Personal Representatives did not know of, or could not have discovered through 'reasonable diligence,' the identity of a creditor holding a claim triggered by Decedent's death." Item 42 at 7. "Mere assertions of fact made by counsel in his memoranda or brief are not entitled to consideration." Cimino v. Alway, 18 Ariz. App. 271, 273, 501 P.2d 447, 449 (1972). Accord Woerth v. City of Flagstaff, 167 Ariz. 412, 420, 808 P.2d 297, 305 (Ct. App. 1990).

[4] It is undisputed that Ms. Evitt-Thorne has never at any time filed any claim in the Wyoming probate. Item 35, ¶16; Item 43, ¶7.

sale of real and personal property. Item 36, ¶10. A stipulation for final distribution of the Estate of Charles H. Evitt was filed August 27, 2014. Id., Exh. C.

On or about May 15, 2015, approximately a year after all claims in the Wyoming probate had been addressed, an attorney for Judy Evitt-Thorne sent a letter addressed to Jodi and Sandi Evitt in Wyoming with respect to the Estate of Charles H. Evitt. Item 36, Exh. D.[5] The letter quoted the above referenced Section 10, "Death Benefits to the Wife" provision of the 1987 divorce Settlement Agreement and additionally referred to certain personal property. Ms. Evitt-Thorne sought either insurance proceeds or payment from the estate of $150,000 and receipt of the identified personal property. Id.

[5] After summary judgment already had been granted, Ms. Evitt-Thorne submitted a supplemental declaration stating that she had learned of her ex-husband's death a year earlier (July 2014). Item 59 at 2; Item 60 ¶2. Although that is irrelevant to the issues here (and illustrates her own dilatoriness), such asserted fact also is not to be considered with respect to whether the trial court properly granted summary judgment before then. For such purposes, the record is confined to that which existed at the time of the ruling being challenged and does not include belatedly filed items after the trial court has already ruled. See Davies v. Beres, 224 Ariz. 560, 561 n.1, 233 P.3d 1139, 1140 n.1 (Ct. App. 2010) (appellate court disregards items not in the record at the time a dispositive ruling was made). See also Brookover v. Roberts Enterprises, Inc., 215 Ariz. 52, 57 n.1, 156 P.3d 1157, 1162 n.1 (Ct. App. 2007); Cella Barr Associates, Inc. v. Cohen, 177 Ariz. 480, 487 n.1, 868 P.2d 1063, 1070 n.1 (Ct. App. 1994); G M Development Corp. v. Cmty. American Mortgage Corp., 165 Ariz. 1, 3-5, 795 P.2d 827, 829-31 (Ct. App. 1990); Cimino v. Alway, 18 Ariz. App. 271, 272, 501 P.2d 447, 448 (1972).

Prompted by the May 15 letter (more than a year after the claim expiration date), Leslie Hiatt, daughter of Charles Evitt, recalled that her father had told her he had previously paid all he owed to his former wife, Ms. Evitt-Thorne. Item 36, ¶14. By letter dated June 15, 2015, counsel for the personal representatives of the Estate of Charles H. Evitt responded to the May 15 letter on behalf of Judy Evitt-Thorne. Id., Exh. E. With respect to the claim based on the 1987 divorce Settlement Agreement, the letter replied:

> Please be advised that the settlement was modified by the parties subsequent to the divorce. Mr. Evitt paid your client for her portion of the house which she quitclaimed. He also provided her monies in lieu of the life insurance policy and provided additional schooling and maintenance in exchange for her quitclaiming the property to him and in final settlement. It is my understanding this happened in April of 1993, some 22 years ago. Jodi Evitt also confirms this settlement took place and your client was totally paid all monies due her. I am certain that your client has the correspondence, a record of the monies paid, and of the quitclaim deed she signed regarding this settlement.

Id. As a precaution, counsel for the personal representatives also sent to counsel for Ms. Evitt-Thorne a letter dated July 15, 2015, enclosing a copy of the December 3, 2013 Notice of Probate. Id., Exh. F.

Notwithstanding the foregoing, Judy Evitt-Thorne never filed any claim in the Wyoming probate of the Estate of Charles H. Evitt. Item 36, Exh. B. Instead, on July 2, 2015,[6] Ms. Evitt-Thorne filed a Petition for Appointment of

[6] This was after the June 15 letter disputing her claim and prior to the July 15 letter providing a copy of the 2013 Notice of Probate.

Personal Representative initiating these proceedings in Maricopa County Superior Court cause no. PB 2015-051215. Item 1. Ms. Evitt-Thorne's petition acknowledged the Wyoming domicile and stated:

> 5. To the best of Petitioner's knowledge, no Personal Representative for decedent's Estate has been appointed in this state or elsewhere.
>
> 6. Petitioner has not received a demand for notice and is not aware of any demand for notice by any interested person of any proceedings concerning decedent in this state or elsewhere.

Id. at 2. Although the petition identified Charles Evitt's widow and five surviving children, it sought a priority for the appointment of ex-wife Ms. Evitt-Thorne as personal representative. Id.

The co-personal representatives appointed in the domiciliary Wyoming probate (the widow and two daughters) filed an objection to Ms. Evitt-Thorne's Arizona petition. Item 8. They attached to it the will of Charles H. Evitt and the Wyoming order admitting it to probate and appointing the co-personal representatives. Id., Exhs. B & C. Following a hearing, the Arizona court appointed Mary Jo Evitt, Leslie Hiatt, and Sandra Evitt co-personal representatives for the ancillary Arizona proceedings. Item 9.

On August 31, 2015, Ms. Evitt-Thorne filed a Petition for Allowance of Claim. Item 20. That petition sought an order allowing a claim of $150,000, plus prejudgment interest from the date of death of Charles Evitt, and attorneys' fees. Id. at 2. Notwithstanding the previous communications

referred to above, the petition stated: "5. The claim has not been allowed or disallowed by the Personal Representatives." Id. Co-personal representatives Mary Jo Evitt, Leslie Hiatt, and Sandra Evitt objected to the claim and requested a hearing.

> Preliminarily, the Co-Personal Representatives believe that the Claimant's claim and Petition should be denied under A.R.S. Section 14-3803(B) to the extent that the Claimant's claim is barred under Wyoming law in connection with the decedent's domicile probate case filed in Wyoming. There may be additional bases for denying the Claimant's claim and Petition, ...

Item 26 at 2.

A motion for summary judgment was filed seeking disallowance of the claim of Judy Evitt-Thorne. Items 35-37. Wyoming's probate nonclaim statutes state that a creditor's claim is barred unless timely filed.

> Upon admission of a will or an estate . . . the personal representative shall cause to be published . . . a notice . . . . **The publication shall include a notice . . . to creditors having claims** against the decedent **to file them** with the necessary vouchers in the office of the clerk of court . . . **within three (3) months** from the date of the first publication of the notice, **or thereafter be forever barred**.

Wyo. Stat. Ann. § 2-7-201 (emphasis added).

> **[A]ll claims whether due, not due or contingent, shall be filed in duplicate with the clerk within the time limited in the notice to creditors and any claim not so filed is barred forever**. Any claimant to whom the personal representative has mailed a notice pursuant to W.S. 2-7-205(a)(ii) shall file his claim within three (3) months after the date of first publication of the notice in the newspaper, or before the expiration of thirty (30) days after

> the mailing, whichever date is later, and any claim not so filed is barred forever.

Wyo. Stat. Ann. § 2-7-703 (emphasis added). Since Judy Evitt-Thorne had never filed a claim in Wyoming at any time, the motion argued that her claim was barred. Items 35, 45.

In response, Ms. Evitt-Thorne largely ignored Wyoming law and instead relied upon Ariz. Rev. Stat. § 14-3803(C). Item 42. Ms. Evitt-Thorne denied knowing of the Wyoming probate before filing her July 2, 2015 Arizona petition (acknowledging she subsequently received the July 15, 2015 letter enclosing the Wyoming notice). Id. at 3. She argued that because her claim was filed within two years of the death of Charles Evitt, her claim should be deemed timely pursuant to the Arizona statute. Id. Although without providing any supporting evidence at all, Judy Evitt-Thorne also responded alleging that she was a "reasonably ascertainable" creditor of the Estate of Charles H. Evitt and so her claim should not barred in Wyoming. Id. at 6-7.

The reply again pointed out the effort made to ascertain creditors and that determining that Ms. Evitt-Thorne might have a claim from a divorce 26 years earlier was not reasonably ascertainable. Id. at 2-3. The reply argued that the cited Arizona statute did not preserve or revive Ms. Evitt-Thorne's claim. Id. at 3-4. The reply also pointed out that, apart from whether her claim was barred by the December 2013 Wyoming publication of notice of probate,

Ms. Evitt-Thorne acknowledged awareness of the Wyoming probate at least upon receipt of the July 15, 2015 directly mailed notice of probate, yet she still had not filed any claim in the Wyoming probate. Item 45 at 2.

The Arizona superior court granted the motion for summary judgment.

> **The Court believes that Ms. Evitt-Thorne was not a "reasonably ascertainable" creditor**. Her claim stems from a provision in a settlement agreement from 1987. While that agreement involved the Decedent, it did not involve any of the co-Personal Representatives. **The Decedent died 26 years after entering into the agreement, and there is no evidence that he and Ms. Evitt-Thorne remained in contact**. **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**.

Item 48 at 2 (emphasis added).

> In determining the deadline for creditors to present their claims against an estate, **Arizona law differentiates between claims that "arose before the death of the decedent" and those that "arise at or after the death of the decedent**." *See* A.R.S. 14-3803 (A) and (C). Each of those claims must be presented within specified time periods, or the law deems the claims barred. *See id*. In addition, if the Decedent died elsewhere and the creditor's claim arose before the Decedent's death, the claim is barred if "barred by the nonclaim statute of the decedent's domicile before the giving of notice to creditors in this state." *See* A.R.S. 14-3803(B).
>
> **The Court believes that Ms. Evitt-Thorne's claim arose before the death of the Decedent**. **Her claim stems from her and the Decedent's 1987 divorce**. While that claim would not become due until Decedent's death, and would not have existed if Ms. Evitt-Thorne had predeceased the Decedent, 14-3803(A) clearly contemplates that a claim arising before death could be

> "due or to become due," and could also be "contingent" on some other occurrence. *See* A.R.S. 14-3803(A). The definition of "arise" includes to "originate; to stem (from)," and to "emerge in one's consciousness; to come to one's attention." See Black's Law Dictionary (10th ed. 2014). **The question thus focuses on the origination of the claim itself, not when Ms. Evitt-Thorne could have enforced that claim**. *Compare* A.R.S. 12-542 (two-year statute of limitations for tort claims begins when "the cause of action accrues").
>
> Ms. Evitt-Thorne's claim against the Estate arose/ originated/stemmed from the 1987 agreement, not upon the Decedent's death. **That claim was barred under Wyoming law** as of February 5, 2014 [sic, March 5, 2014] (i.e., three months after the first publication required by Wyo. Stat. Ann. 2-7-703). **Because she did not file her claim within the time period required by Wyoming law, that claim is not enforceable in Arizona**.

Id. at 2-3 (emphasis added).

Following the grant of summary judgment that Ms. Evitt-Thorne's claim was barred, there was an application for attorneys' fees. Item 51. The superior court entered judgment against Ms. Evitt-Thorne regarding her claim and awarding $46,926.27 in attorneys' fees. Item 58. Judy Evitt-Thorne filed a motion for new trial which was denied. Items 59, 64. A signed, formal order denying the motion for new trial was filed, from which Ms. Evitt-Thorne filed a timely notice of appeal. Items 68, 69.

ISSUES PRESENTED ON REVIEW

- Summary judgment was properly granted that the claim of Judy Evitt-Thorne arose before the death of Charles Evitt and was barred for failure to have timely submitted a claim in the Wyoming probate. She presented no record warranting relief from the statutory bar. Allowing Ms. Evitt-Thorne to pursue her claim would defeat the purpose of nonclaim statutes.

STANDARD OF REVIEW

An appellate court reviews the record below and applies the same standard as the trial court in determining whether an entry of summary judgment was proper. That is a de novo standard of review. United Bank v. Allyn, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (Ct. App. 1990).

The Notice of Appeal (item 69) stated that Ms. Evitt-Thorne intended to appeal from the judgment and the denial of her motion for new trial. The Opening Brief (OB), however, is directed only at the summary judgment and does not present any separate issue (OB at 10-11) that the motion for new trial was wrongfully denied. Any argument in that regard is waived. E.g., Joel Erik Thompson, Ltd. v. Holder, 192 Ariz. 348, 351, 965 P.2d 82, 85 (Ct. App. 1998); AMERCO v. Shoen, 184 Ariz. 150, 154 n.4, 907 P.2d 536, 540 n.4 (Ct. App. 1995).

The foregoing distinction is pointed out because the OB does rely upon some factual issues and argument that were not presented until the motion for

new trial.[7] Those should not be considered at all since only the record presented before the ruling is considered in reviewing summary judgment and the OB does not present any separate argument directed to the denial of the motion for new trial. If considered, however, then review in that regard is not de novo, but deferentially to the trial court because an abuse of discretion standard of review applies with respect to review of denial of a motion for new trial. First Financial Bank, N.A. v. Chassen, 238 Ariz. 160, 162, ¶8, 357 P.3d 1216, 1218 (Ct. App. 2015); Samsel v. Allstate Ins. Co., 199 Ariz. 480, 19 P.3d 621 (Ct. App. 2001).

ARGUMENT

I. Probate proceedings are in rem and nonclaim statutes serve the legislative purpose of facilitating speedy and orderly administration of an estate. Publication notice is sufficient for all but creditors who at the time of notice were known or reasonably ascertainable as creditors to the personal representative.

No suit may be initiated against a person after death because a court cannot obtain jurisdiction over a person who may not be summoned to appear.

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[7] Any evidence or arguments that were newly asserted in the motion for new trial could only be considered in the context of the propriety of the ruling on the rule 59 motion, which the Opening Brief abandons as an issue. Maricopa County Health Dept. v. Harmon, 156 Ariz. 161, 167, 750 P.2d 1364, 1370 (Ct. App. 1987); Cecil Lawter Real Estate School, Inc. v. Town & Country Shopping Center Co., 143 Ariz. 527, 538, 694 P.2d 815, 826 (Ct. App. 1984). Appellant also is not entitled to now use the Reply Brief to belatedly argue any error in the denial of the rule 59 motion. See Tripati v. Forwith, 223 Ariz. 81, 86, ¶ 26, 219 P.3d 291, 296 (Ct. App. 2009).

See Cox v. Progressive Bayside Ins. Co., 316 Ga. App. 50, 51, 728 S.E.2d 726, 728 (2012); Mercer v. Morgan, 86 N.M. 711, 712, 526 P.2d 1304, 1305 (Ct. App. 1974); Glover v. State Farm Mut. Auto. Ins. Co., 2008 Pa. Super. 110, ¶ 16, 950 A.2d 335, 339 (2008). When a person dies his individual capacity to carry out his contracts and pay his debts ceases. His financial obligations can only be met by his estate. Egnatic v. Wollard, 156 Kan. 843, 856, 137 P.2d 188, 197 (1943).

An estate, however, is a non-jural entity. See Simon v. Maricopa Medical Center, 225 Ariz. 55, 59, ¶10, 234 P.3d 623, 627 (Ct. App. 2010) (citing Oregon opinion). The estate itself is not a person or legal entity. An "estate is a collection of decedent's assets and liabilities and does not have capacity to bring or defend a suit, it can only sue and be sued through its personal representative." Gordon v. Estate of Brooks, 2017 WL 2332899, 1 CA-CV 14-0802, ¶12 (Ariz. Ct. App., filed May 30, 2017) (citing Ader v. Estate of Felger, 240 Ariz. 32, 39, ¶22, 375 P.3d 97, 104 (Ct. App. 2016) (estate "has no capacity to bring or defend a lawsuit," but may "only sue and be sued through its personal representative . . . on behalf of the estate"). See also In re Estate of Johnson, 129 Ariz. 307, 310, 630 P.2d 1039, 1042 (Ct. App. 1981).

To resolve the disposition of an estate, states have enacted probate statutes. Probate proceedings are in rem (against the thing, rather than the person). Shattuck v. Shattuck, 67 Ariz. 122, 129, 192 P.2d 229, 233 (1948); City of Show Low v. Owens, 127 Ariz. 266, 269, 619 P.2d 1043, 1046 (Ct. App. 1980). In re Milliman's Estate, 2 Ariz. App. 155, 158, 406 P.2d 873, 876 (1965). "Probate procedure differs from civil actions in general in that it is originally a creature of statute, and not of either equity or the common law, and is therefore much more strictly regulated by statute." Leiby v. Superior Court, 101 Ariz. 517, 519, 421 P.2d 874, 876 (1966). "Proceedings for the administration of decedent's estates are purely statutory." In re Wright's Estate, 132 Ariz. 555, 560, 647 P.2d 1153, 1158 (Ct. App. 1982). Accord Vargas v. Greer, 60 Ariz. 110, 117-18, 131 P.2d 818, 821 (1942); Sanders v. Sanders, 52 Ariz. 156, 163, 79 P.2d 523, 526 (1938).

Among the stated purposes of probate law is "speedy and efficient" administration of estates. Ader v. Estate of Felger, 240 Ariz. 32, 42, ¶31, 375 P.3d 97, 107 (Ct. App. 2016). "'Finality in the administration of estates' is a primary purpose of trust and probate law." In re Indenture of Trust Dated January 13, 1964, 35 Ariz. 40, 49, ¶ 26, 326 P.3d 307, 316 (Ct. App. 2014) (quoting In re Estate of Wood, 147 Ariz. 366, 368, 710 P.2d 476, 478 (Ct. App.1985). "This finality is 'intended to protect the decedent's successors and

creditors from disruptions to possession of the decedent's property.'" In re Indenture of Trust Dated January 13, 1964, 35 Ariz. 40, 49, ¶ 26, 326 P.3d 307, 316 (Ct. App. 2014) (quoting In re Estate of Winn, 214 Ariz. 149, ¶ 20, 150 P.3d 236, 240 (2007)). See also Ariz. Rev. Stat. § 14-1102(B)(3).

The Wyoming courts have similarly recognized the purpose of probate codes. "The legislature has expressly stated that the probate code is to be interpreted in keeping with 'the policy of the state of Wyoming that the administration of estates of decedents be completed as rapidly as possible consistent with due protection of the interests of creditors, taxing authorities and distributees.'" Accelerated Receivable Solutions v. Hauf, 2015 WY 71, ¶ 24, 350 P.3d 731, 737 (2015) (quoting Wyo. Stat. Ann. § 2–7–801(a)).

Probate codes typically have a short period of time in which to submit claims against an estate. Tulsa Professsional Collection Services, Inc. v. Pope, 485 U.S. 478, 480 (1988). Arizona's probate code provides for a four-month claim period, while it is three months in Wyoming.[8] "This is in keeping with

[8] Pursuant to Wyo. Stat. § 2-7-201, when a will is submitted for probate and a personal representative appointed to administer the estate, the personal representative "shall cause to be published" 3 times in 3 weeks a notice of the admission of the will to probate, the appointment of the personal representative, and a notice "to creditors having claims against the decedent to file them" in the clerk's office "within three (3) months from the date of the first publication of the notice, or thereafter be forever barred." See also Wyo. Stat. § 2–7–703(a). Ariz. Rev. Stat. § 14-3801 similarly requires publication and notice that claims are barred unless submitted within four months of first publication.

our state policy of speedy presentation and consideration of claims to prevent intolerable delay in settling estates." In re Pfeffer's Estate, 16 Ariz. App. 147, 150, 492 P.2d 27, 30 (1971).

Those probate statutes setting the time in which a claim must be submitted and barring those not timely submitted are referred to as nonclaim statutes. As stated, following death of a debtor, a court cannot acquire jurisdiction over the decedent, so a creditor's recourse then is to submit a claim to the estate pursuant to the applicable probate statutes, the purposes of which include speedy administration of the estate. "The purpose of the requirement to file claims and of the limitations of time thereon is to inform the personal representative and the court of the valid claims against the estate to the end that the estate be administered expeditiously." Barnett v. Hitching Post Lodge, Inc., 101 Ariz. 488, 491, 421 P.2d 507, 510 (1966). "Requiring that a creditor's claim be submitted in writing promotes the purpose of the statutory claims procedure by facilitating and expediting the speedy and orderly administration of estates." In re Estate of Barry, 184 Ariz. 506, 509, 910 P.2d 657 (Ct. App. 1996).

A nonclaim statute is: "A law that sets a time limit for creditors to bring claims against a decedent's estate. Unlike a statute of limitations, a nonclaim statute is usu[ally] not subject to tolling and is not waivable." In re Estate of

Van Der Zee, 228 Ariz. 257, 260, ¶18, 265 P.3d 439, 442 (Ct. App. 2011) (quoting Black's Law Dictionary 1449 (8th ed. 2004)). Accord Ader v. Estate of Felger, 240 Ariz. 32, 38, ¶18, 375 P.3d 97, 103 (Ct. App. 2016); Bell v. Schell, 2004 WY 153, ¶28, 101 P.3d 465, 473 (2004).

The time element is built in to a nonclaim statute because "[f]inality in the administration of estates is implicit in this stated purpose ['to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors']." In re Estate of Wood, 147 Ariz. 366, 368, 710 P.2d 476, 478 (Ct. App.1985) (quoting Ariz. Rev. Stat. § 14-1102(B)(3)). See also Accelerated Receivable Solutions v. Hauf, 2015 WY 71, ¶ 24, 350 P.3d 731, 737 (2015) (object "to expedite and facilitate" so "administrator of an estate can wind up the affairs of a decedent in an orderly manner and make distribution of assets as speedily as practicable"). Once lapsed, a claim may not be paid. A nonclaim statute is neither subject to any discovery rule nor waivable. Latham v. McClenny, 36 Ariz. 337, 343, 285 P. 684, 686 (1930); Ader, 240 Ariz. at 38, ¶¶16-18, 375 P.3d at 103; Estate of Van Der Zee, 228 Ariz. at 260, ¶18, 265 P.3d at 442.

Nonclaim statutes are distinct from statutes of limitation.[9] Ader, 240 Ariz. at 38 n.4, 375 P.3d at 103 n.4. Nonclaim statutes establish a condition precedent to a lawsuit by a creditor with respect to its claim.[10] Unless the creditor has timely submitted a claim, the claim expires and a subsequent lawsuit is barred. Estate of Van Der Zee, 228 Ariz. at 260, ¶¶16-17, 265 P.3d at 442. See also Ray v. Rambaud, 103 Ariz. 186, 190-91, 438 P.2d 752, 756-57 (1968). If a claim is timely submitted and rejected, then there is a separate statute of limitations for the initiation of any lawsuit upon the rejected claim.[11]

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[9] "Wyo. Stat. § 2-7-703(a) is not a statute of limitations." In re Estate of Campbell, 950 P.2d 557, 560 (Wyo. 1997)(distinguishing the statute setting a time limit to submit a claim from the separate statute setting a deadline in which to bring an action if such a claim were rejected). "With respect to claims against an estate, there is no access to the courts, and thus no affirmative relief is sought until the claim has been denied by the personal representative." Id. Failure to adhere to the legislatively established procedure for making a claim against an estate bars the claim. In re Estate of George, 2011 WY 157, ¶ 62, 265 P.3d 222, 234(2011); In re Estate of Peterson, 75 Wyo. 416, 421, 296 P2d 504, 505 (1956).

[10] See Latham v. McClenny, 36 Ariz. 337, 341, 285 P. 684, 685 (1930); In re Estate of Hall, 948 P.2d 539, 541 n.3 (Colo. 1997); In re Estate of Tracy, 36 Kan. App. 2d 401, 404, 140 P.3d 1045, 1048 (2006); In re Estate of Ostler, 2009 UT 82, ¶ 17, 227 P.3d 242, 245 (2009); Brown v. City of Casper, 2011 WY 35, ¶ 40, 248 P.3d 1136, 1145 (2011); Bell v. Schell, 2004 WY 153, 101 P.3d 465 (2004).

[11] Pursuant to Wyo. Stat. § 2-7-712(a) and (d), when a creditor claim has been timely filed with the clerk, the personal representative is to allow or reject it within 30 days after the expiration of the time for filing all claims and to notify the claimant of any rejection by certified mail. The claimant may not bring an action upon the claim while allowance or rejection remains pending (Wyo. Stat. § 2-7-717), but if rejected, then "the holder shall bring suit in the proper court against the personal representative within thirty (30) days after the date of mailing the notice [of rejection], otherwise the claim is forever barred." Wyo. Stat. § 2-7-718. Pursuant to Wyo. Stat. § 2-7-714: "No claim shall be allowed by the personal

See Ariz. Rev. Stat. § 14-3804 (sixty days from disallowance); Wyo. Stat. Ann. § 2–7–718 (thirty days from rejection).

As in rem proceedings, the court's authority is with respect to estate property and there is no particular defendant party to be served and summoned to court. Notice is generally by publication of the estate proceedings following appointment of a personal representative and it is up to interested parties to become aware of the administration of the estate and submit a claim or make an appearance in the proceedings. "The notice under a nonclaim statute . . . does not make the creditor a party to the proceedings, but merely notifies him that he may become one if he wishes." Gano Farms, Inc. v. Kleweno's Estate, 2 Kan. App. 2d 506, 508, 582 P.2d 742, 744 (1978). See also Davidek v. Wyoming Inv. Co., 77 Wyo. 141, 152-53, 308 P.2d 941, 945 (1957); Hartt v. Brimmer, 74 Wyo. 356, 366-67, 287 P.2d 645, 648-49 (1955).

The operation of state probate nonclaim statutes with respect to due process requirements for notice was addressed in Tulsa Professsional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988). In that case Mr. Pope had died in a hospital. His widow initiated probate proceedings in which she was the executrix or personal representative. She published the notice of probate which in Oklahoma set a two-month period in which creditors were to

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representative which is barred by the statute of limitations." Accord In re Estate of Peterson, 75 Wyo. 416, 421, 296 P.2d 504, 505 (1956).

file claims or be barred thereafter. The hospital's affiliated collection company to which its claim was assigned did not apply for payment until well after that time had expired. Its claim was denied and it successfully challenged whether publication notice afforded it due process. Extending the analysis it had applied in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Supreme Court held that since the operation of the nonclaim statute deprived claimants of a property right, then due process should be afforded. The Court, however, also recognized the interest of a State in regulating the prompt resolution of estates. The Court held that a proper balance of interests required a more reliable form of notice (i.e., mail rather than publication) for known or reasonably ascertainable creditors, but that publication notice was sufficient for all others (including conjectural claims).[12]

> At the same time, **the State undeniably has a legitimate interest in the expeditious resolution of probate proceedings**. Death transforms the decedent's legal relationships and a State could reasonably conclude that swift settlement of estates is so important that it calls for very short time deadlines for filing claims. As noted, the almost uniform practice is to establish such short deadlines, and to provide only publication notice. . . . Providing actual notice to known or reasonably ascertainable creditors, however, is not inconsistent with the goals reflected in

[12] As to conjectural claims, in Mullane, the Court did not apply any "reasonably ascertainable" standard and indicated that actual notice would be required only for such conjectural claims as actually known. "Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee." 339 U.S. at 317.

> nonclaim statutes. Actual notice need not be inefficient or burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice. . . . In addition, Mullane disavowed any intent to require "impracticable and extended searches . . . in the name of due process." . . . As the Court indicated in Mennonite, all that the executor or executrix need do is make "reasonably diligent efforts," . . . to uncover the identities of creditors. **For creditors who are not "reasonably ascertainable," publication notice can suffice**. **Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice**. Here, as in Mullane, **it is reasonable to dispense with actual notice to those with mere "conjectural" claims**.

485 U.S. at 489-90 (emphasis added).

Following the Supreme Court's opinion in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988), many states (including Arizona and Wyoming) amended their probate notice statutes to provide that some form of actual notice, such as mailing a copy of the notice, was required for known or reasonably ascertainable creditors. Arizona and Wyoming have similar procedures. Ariz. Rev. Stat. § 14-3801(A) requires notice by publication once a week for three successive weeks. With respect to "known creditors," Arizona additionally requires notice by mail. Ariz. Rev. Stat. § 14-3801(B). Wyo. Stat. § 2-7-201 also requires notice publication once a week for three successive weeks. A copy of such notice is additionally to be mailed to "[e]ach creditor of the decedent whose identity is reasonably ascertainable." Wyo. Stat. § 2-7-205(a)(ii). The Supreme Court has indicated that limiting

mail notice to reasonably ascertainable creditors and providing publication notice for all others is sufficient.[13]

In this matter, Ms. Evitt-Thorne was not someone who the personal representative should have recognized in 2013 as a known or reasonably ascertainable creditor with respect to an asserted claim based on her 1987 divorce from Charles Evitt. The publication notice was sufficient. If she did retain such a claim, then Ms. Evitt-Thorne should have remained better informed as to the status of her former husband and timely submitted a claim in the Wyoming domiciliary probate. Since she did not, her claim was barred by the Wyoming nonclaim statute and that bar was properly recognized by the Arizona court when Ms. Evitt-Thorne sought to assert her untimely claim via an ancillary Arizona probate.

II. A domiciliary probate of the Estate of Charles Evitt was established in his home state of Wyoming, publication notice made in compliance with the Wyoming statute, and no timely claim (nor any claim) ever submitted by Ms. Evitt-Thorne in Wyoming, resulting in the bar of any claim thereafter (whether in Wyoming or Arizona) by the nonclaim statute.

It is undisputed that Charles Evitt died domiciled in Wyoming, that probate proceedings were established there, personal representatives appointed to administer the estate, and notice to submit claims published in Wyoming.

[13] "[T]he statutory notice [by publication] is sufficient" for those "whose interests or whereabouts could not with due diligence be ascertained." Mullane v. Central Hanover Bank, 339 U.S. 306, 317 (2004).

Item 35, ¶¶2-5; Item 43, ¶1. According to Wyo. Stat. § 2-7-703, any creditor having a claim was required to submit it within 3 months of publication.

> [A]ll claims whether due, not due or contingent, shall be filed in duplicate with the clerk within the time limited in the notice to creditors and any claim not so filed is barred forever. Any claimant to whom the personal representative has mailed a notice pursuant to W.S. 2-7-205(a)(ii) shall file his claim within three (3) months after the date of first publication of the notice in the newspaper, or before the expiration of thirty (30) days after the mailing, whichever date is later, and any claim not so filed is barred forever.

It is undisputed that Ms. Evitt-Thorne has never filed any claim with the clerk of the court in Wyoming.[14] It does not matter that she does not reside in Wyoming nor that she says she did not become aware of Charles Evitt's death and the probate proceedings by virtue of the publication nor otherwise within the 3 month period. The discovery rule does not apply to nonclaim statutes. Latham v. McClenny, 36 Ariz. 337, 343, 285 P. 684, 686 (1930); Ader, 240 Ariz. at 38, ¶¶16-18, 375 P.3d at 103; Estate of Van Der Zee, 228 Ariz. at 260, ¶18, 265 P.3d at 442. Part of the purpose of the probate code is to "put[] the burden on a creditor to keep informed of the status of a debtor and to promptly

[14] Ms. Evitt-Thorne did not submit a claim in Wyoming even after a copy of the published notice was mailed to her counsel in 2015. She has elected to rely exclusively on her effort to assert her claim in Arizona after the expiration of the time for submittal of a claim in Wyoming.

pursue his or her claims if the debtor dies."[15] Ader v. Estate of Felger, 240 Ariz. 32, 41, ¶29, 375 P.3d 97, 106 (Ct. App. 2016). "[C]reditors have a responsibility to timely pursue claims." Id. ¶35. See also Nelson v. Nelson, 38 Kan. App. 2d 64, 82, 162 P.3d 43, 55 (2007), aff'd, 288 Kan. 570, 205 P.3d 715 (2009) ("[T]here is a duty on the creditor to keep track of both the debtor and the creditor's own property interests."); Salvation Army v. Pryor's Estate, 1 Kan. App. 2d 592, 598, 570 P.2d 1380, 1386 (1977) ("The duty to protect their interests rightly falls on those who would make a claim against the estate of a decedent. It follows that those who have a claim must be vigilant in ascertaining whether a potential debtor is dead or alive."); In re Estate of Fessler, 100 Wis. 2d 437, 449, 302 N.W.2d 414, 420 (1981) (noting the contract claimant's "failure to keep in close enough contact with the decedent to know that he had died"), questioned on other grounds, In re Estate of Barthel, 161 Wisc. 2d 587, 597-98, 468 N.W.2d 689, 693 (1991). It is the duty of a creditor to remain sufficiently apprised of the debtor and to make a timely claim in the event of the debtor's death.

[15] "A claim against an estate of a decedent not presented within the time and in the manner prescribed is barred. . . . Compliance with this requirement is not excused even if the attorney representing the deceased's estate represents that a claim against the estate need not be filed." Ray v. Rambaud, 103 Ariz. 186, 190, 438 P.2d 752, 756 (1968).

In opposing summary judgment, Ms. Evitt-Thorne relied upon two arguments in her effort to avoid the expiration of her claim pursuant to the nonclaim statute. She argued that her claim is not one barred by Ariz. Rev. Stat. § 14-3803 because it could not have been asserted prior to the death of Charles Evitt. She alternatively argued that her identity as a claimant was "reasonably ascertainable" as provided in Wyo. Stat. § 2-7-703(c)(ii) and so not barred by the Wyoming nonclaim statute. The OB identifies (at 10-11) **three issues** presented.[16] Her OB now reverses the order of her summary judgment arguments and adds a third argument she did not raise until her motion for new trial.[17]

A. Ms. Evitt-Thorne was not a reasonably ascertainable creditor; she did not controvert the fact of due diligence by the personal representative; she did not present any evidence of her own.

The **first** issue Ms. Evitt-Thorne presents is whether the Wyoming statutes required specific notice to her as a reasonably ascertainable creditor,

[16] No issue is presented that the trial court abused its discretion in denying her motion to re-open judgment or new trial.

[17] Counsel for Ms. Evitt-Thorne did make casual reference to "peculiar circumstances" (now the third issue) appearing in the Wyoming statute during oral argument of the summary judgment motion. 3/30/2016 Transcript at 17. It had not been previously mentioned nor briefed and opposing counsel had no opportunity to address it. See Northwest Fed. S&L v. Tiffany Constr. Co., 158 Ariz. 100, 105, 761 P.2d 174 (Ct. App. 1998). Counsel for the personal representative noted that it was being mentioned for the first time at oral argument. 3/30/2016 Transcript at 21. The trial court did not address that as an issue in ruling on the summary judgment motion. Item 48. See Weitz Co. v. Heth, 235 Ariz. 405, 412, ¶ 24, 333 P.3d 23, 30 (2014).

which she characterizes as a material issue of fact that precluded summary judgment. Ms. Evitt-Thorne has never asserted that she was a known creditor and presented absolutely no facts in support of her position that she was a reasonably ascertainable creditor. She also presents no cogent authority in support of her factually unsupported position.

1. Ms. Evitt-Thorne presented no evidence that she was a reasonably ascertainable creditor and presented no evidence to counter the personal representative's evidence that her own investigation had not disclosed Ms. Evitt-Thorne as a creditor.

In opposing summary judgment, Ms. Evitt-Thorne had primarily argued that Ariz. Rev. Stat. § 14-3803(C) governed, rather than Ariz. Rev. Stat. § 14-3803(A) and (B). Her response memorandum had done no more than state unsupported opposition to the personal representative on the issue of whether she was a reasonably ascertainable creditor.[18] Item 42. As to that latter issue, Ms. Evitt-Thorne presented **no** evidence. Her declaration (item 44) did **not** set

[18] Wyo. Stat. § 2-7-703(c)(ii) states that the bar of part (a) does not apply "if the court in adversary proceedings finds that the identity of the claimant was reasonably ascertainable by the personal representative within the time limited in the notice to creditors published." But Ms. Evitt-Thorne has not presented any triable issue that she was "reasonably ascertainable." She merely observes that such an exception would support her, if it existed, "disputes" the declaration of the personal representative of the effort made to ascertain creditors which did not disclose any continuing claim by her, and relies upon the unsupported conjecture of her counsel that the existence of her claim should have been discovered within the 3 month period.

forth facts contradicting the description by the personal representative of what had been done to identify creditors; it did **not** set forth facts identifying a search more reasonably diligent than that performed by the personal representative that she says should have been performed, and was not, but would have revealed the existence of Evitt-Thorne's claim; it did **not** set forth evidence of any continuing payments (as apparently there were none) to her by her ex-husband that should have alerted to a claim; it did **not** set forth evidence of any continuing contact by her (as apparently there were none) with her ex-husband or his Wyoming family that should have made the personal representative aware of her claim; it did **not** set forth any facts that might have shown how she should have been identified as a reasonably ascertainable creditor. Her attorney's response memorandum opposing summary judgment, thus, did not rely upon any genuine dispute of facts, but merely argued: "Contrary to the Motion, moreover, it is 'objectively unreasonable' to suggest that the Co-Personal Representatives did not know of, or could not have discovered through 'reasonable diligence,' the identity of a creditor holding a claim triggered by Decedent's death." Item 42 at 7.[19]

[19] The only argument following that statement was the erroneous challenge to the personal representative's declaration as hearsay. Item 42 at 7-8. The evidence regarding review of the business papers and inquiry of the accountant was the evidence of the reasonably diligent investigation – the activity or conduct, not hearsay. E.g., State v. Dickens, 187 Ariz. 1, 20, 926 P.2d 468, 487 (1996); Penn-

The personal representative presented a declaration as to what had been done (review the decedent's business papers and consult with his accountant).

> Frequently, a motion for summary judgment involves an assertion by a defendant that the plaintiff has insufficient evidence to meet its burden of production at trial. The well-accepted logic of the argument is that because plaintiff cannot establish a prima facie case worthy of submission to a jury, defendant is necessarily entitled to judgment as a matter of law.

Comerica Bank v. Mahmoodi, 224 Ariz. 289, 292, ¶18, 229 P.3d 1031, 1034 (Ct. App. 2010). Ms. Evitt-Thorne did obtain leave for discovery and received a response to a document request, yet she did not present any evidence to support the position that she was reasonably ascertainable as a creditor. Ms. Evitt-Thorne did not present any evidence contradicting what the personal representative said had been done, nor present evidence of any other inquiry that might have been made by a reasonable, prudent person that would have led to discovery of her claim, nor present any evidence at all.[20] Merely refusing to

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America Ins. Co. v. Sanchez, 220 Ariz. 7, 14, ¶38, 202 P.3d 42, 49 (Ct. App. 2008). See also Public Serv. Co. v. Bleak, 134 Ariz. 311, 320, 656 P.2d 600, 609 (1982). In any event, the OB does not make the hearsay argument.

[20] The OB (at 8) cites a statement of counsel for the personal representative at oral argument of the summary judgment motion that "there may be a factual dispute," but omits that that was merely an acknowledgment that Ms. Evitt-Thorne had the opportunity to present evidence demonstrating if there was a factual dispute, but did not present such evidence on the subject of constructive notice by publication. 3/30/2016 Transcript at 5. As counsel noted later in that same argument, Ms. Evitt-Thorne was afforded discovery as to whether she was reasonably ascertainable, "we are at the summary judgment phase," and "they don't have any evidence on that point." Id. at 22-23.

agree to the adversary's statement by characterizing it as "disputed" and failing to present any other evidence beyond an attorney's conjecture that it was not "objectively reasonable" that Evitt-Thorne's claim was not discovered wholly fails as a prima facie case and fails to meet the summary judgment standard to avoid the relief requested by the personal representative. State v. Mecham, 173 Ariz. 474, 479, 844 P.2d 641, 646 (Ct. App. 1992) (denial of movant's facts as "wrong" or "irrelevant" without producing controverting evidence was insufficient).

Ms. Evitt-Thorne did not meet her burden in opposing summary judgment in the superior court and does not meet her burden in this appeal by merely disputing the personal representative's statement without offering evidence. It is "incumbent upon plaintiffs to set forth specific facts" in opposing a motion for summary judgment. Burrington v. Gila County, 159 Ariz. 320, 325, 67 P.2d 43, 48 (Ct. App. 1988). "[G]eneralized and unsupported statements are not sufficient to withstand a motion for summary judgment." Burrington, 159 Ariz. at 325, 767 P.2d at 48.

Ms. Evitt-Thorne seeks to characterize as a possible fact dispute (OB at 8, 14-15 & n.2) that the trial court had ignored references to Charles Evitt having made statements to his daughter about Judith Evitt-Thorne having been paid in full. First, this assertion was not made by Ms. Evitt-Thorne in

opposing summary judgment, but only in her motion for new trial. Item 42. Second, prior to responding to the motion for summary judgment Ms. Evitt-Thorne had conducted some discovery[21] regarding the investigation of any creditors of Charles Evitt (item 44, Exhibit B), but she did not produce any evidence to contradict the personal representative. Third, according to the letter sent to counsel for Ms. Evitt-Thorne disputing her claim, these statements by Charles Evitt to his daughter were that he had paid off his ex-wife back in 1993. Item 36, Exhibit E. Evidence of statements made years before his death that he had **paid** his ex-wife are not evidence that when his personal representative investigated the existence of creditors following his death in 2013, the years-earlier statements should have been recalled, and then, contrary of what had been said, it should have been assumed instead that the ex-wife had not been paid and was still a creditor.[22] There was no fact record made that Ms. Evitt-Thorne was a reasonably ascertainable creditor.

[21] The record does not reflect that Ms. Evitt-Thorne sought any depositions nor requested any continuance pursuant to Ariz. R. Civ. P. 56(f) to conduct any other discovery as necessary to be able to respond to the motion for summary judgment.

[22] This is an unreasonable premise that would require personal representatives to investigate every obligation a decedent ever had to verify whether they were actually satisfied or not. The requirement is only reasonable diligence. Moreover, what is being considered, any debt the decedent ever had, would merely be a conjectural claim and the Supreme Court authority on that is that actual notice is not required. Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478,

Upon the personal representative stating her evidence that she had conducted an investigation to determine creditors and it had not disclosed Ms. Evitt-Thorne, it was incumbent upon Ms. Evitt-Thorne to present any evidence she had that contradicted that statement and showed a genuine dispute requiring resolution at trial.[23] "It is incumbent on a motion for summary judgment that the parties 'lay their cards on the table.'" Howell v. Mid-State Homes, Inc., 13 Ariz. App. 371, 373, 476 P.2d 892, 894 (1970). "A party cannot rely upon unsupported contentions that a dispute exists to create a factual issue that would defeat summary judgment." State v. Mecham, 173 Ariz. 474, 478, 844 P.2d 641, 645 (Ct. App. 1992). When a party such as Ms. Evitt-Thorne "cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." Orme Sch. v. Reeves, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

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490 (1988). "Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice." Id.

[23] Arizona and Wyoming law are in accord. Mere opposing allegations that a factual issue exists are insufficient. Molever v. Roush, 152 Ariz. 367, 370-71, 732 P.2d 1105, 1108-09 (Ct. App. 1986); Kendrick v. Barker, 2001 WY 2, ¶23, 15 P.3d 734, 741 (2001). Ms. Evitt-Thorne did not demonstrate a prima facie case that she was a reasonably ascertainable creditor without submitting evidence to warrant presenting the issue to a jury. Middleton v. Wallichs Music & Entertainment Co., 24 Ariz. App. 180, 182, 536 P.2d 1072, 1074 (1975); Shanor v. A-Pac, Ltd., 711 P.2d 420, 421 (Wyo. 1986).

2. The case law does not support Ms. Evitt-Thorne's claim that she was a reasonably ascertainable creditor.

The Wyoming Supreme Court addressed "reasonably ascertainable" in In re Estate of Novakovich, 2004 WY 158, 101 P.3d 931 (2004). In that case the decedent had been involved in an automobile accident less than 12 months before he died. His daughter was appointed personal representative of his estate and published the statutory notice for submission of creditor claims, but did not mail notice directly to Stringari who was injured in that automobile accident. The estate was closed after a year and Stringari moved to reopen the estate a year after that, arguing that he was a reasonably ascertainable creditor entitled to actual notice, which he did not receive. The trial court denied his petition, holding that Stringari failed to make a "serious showing" that he was reasonably ascertainable and that he was not entitled to discovery nor any further hearing absent such a showing. Upon his appeal, the court held that a "serious showing" (as described by the trial court) was not the appropriate standard to be entitled to discovery, but rather a prima facie showing ("presented some evidence of their claim") and the matter was remanded for further consideration under that standard. With respect to determination of whether a creditor was reasonably ascertainable,[24] the appellate court stated

[24] As noted above, in Tulsa Professional, the Supreme Court held that it is reasonable to dispense with actual notice to those with mere conjectural claims. 485 U.S at 490. This conclusion is buttressed by Mullane v. Central Hanover

that a personal representative must make "reasonably diligent efforts" and quoted its opinion from another case as to what that entailed: "Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." Id. ¶27, 101 P.3d at 938 (citation omitted).[25]

In Soriano v. Estate of Manes, 177 So. 3d 677 (Fla. Dist. Ct. App. 2015), Luis Manes died and his widow was appointed personal representative and published a required statutory notice directing that any claims be filed within two months. After the claim period had expired, Soriano submitted a claim and petitioned to have it declared timely. Soriano characterized herself as a reasonably ascertainable creditor who had not received actual notice pursuant to the Florida statute. Soriano asserted she was the victim in a vehicular battery matter. Personal representative Manes filed an affidavit attesting, inter

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Bank, 339 U.S. 306 (2004), which is referenced in Tulsa for this point. Mullane states, in the context of a trust, that actual notice may be dispensed with for "those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to [the] knowledge of the common trustee." 339 U.S. at 317.

[25] "[D]ue diligence is that diligence 'which is reasonable under the circumstances and not all possible diligence which may be conceived.'" Robert L. Kroenlein Trust ex rel. Alden v. KirchheferEyeglasses, 2015 WY 127, ¶ 33, 357 P.3d 1118, 1129 (2015) (citation omitted).

alia, that her husband had never mentioned any claim by Soriano, she had searched her husband's business records, and she had never heard of Soriano's claim until the statement filed in probate. Soriano responded with three affidavits: (1) from the criminal prosecutor that there was a criminal case against Mr. Manes; (2) from the decedent's criminal defense attorney to the same effect; and (3) from Soriano's attorney that he had spoken to decedent's criminal defense attorney to identify himself as representing Soriano. The trial court denied Soriano's claim as untimely and she appealed. The appellate court affirmed, agreeing with the trial court that Soriano had not established that she was a reasonably ascertainable creditor entitled to actual notice. Id. at 680-81.

> **There is nothing in the affidavits** filed by Ms. Soriano **to suggest that [personal representative] Ms. Manes**, or Decedent's criminal defense counsel, **had any actual knowledge of Soriano's civil claim** against Decedent. **Nor is there any evidence** (or assertion in the affidavits) **that a search more diligent than that conducted by Ms. Manes would have revealed the existence of Ms. Soriano's claim**. Neither Ms. Soriano nor her attorney placed Ms. Manes on notice of any such claim. In fact, the affidavits fail to contain an averment that Ms. Soriano or her attorney placed anyone on notice that she was pursuing, or intended to pursue, a civil claim against Decedent or his estate.

Id. at 681 (emphasis added). The appellate court stated that no evidentiary hearing was warranted by the opposing affidavits. Id. n.4. Soriano had at most presented allegations that the existence of a victim in the criminal traffic

prosecution might have been deduced by the personal representative, but not that there was evidence which might have been found by the personal representative of a claim being asserted. "[A] personal representative has no duty to speculate and conjecture that someone might possibly have a claim against the estate." Id. at 681 (citation omitted) (also noting the holding in Tulsa Professional that "not everyone who may conceivably have a claim [is] properly considered a creditor entitled to actual notice" and that actual notice was not required for merely "conjectural claims").

In In re Estate of Spears, 314 Ark. 54, 858 S.W.2d 93 (1993), the other party in a real property exchange discovered after his grantee's death that the grantee had conveyed the received property and the obligation secured had become in default, making the original party liable on a deficiency judgment after foreclosure. A claim was made against the estate of the grantee, but it was long after the nonclaim statute bar time. Neither the trial court nor the appellate court agreed with the claimant's argument that such a claim was reasonably ascertainable to the personal representative (administratrix) within the nonclaim period. Notably, the appellate court acknowledged the claimant's argument that the personal representative had not been diligent, but also noted "there was no evidence of record presented to the probate court . . . to support that fact that she was not." Id. at 61, 858 S.W.2d at 97.

None of these cases required the personal representative here to do more than was done. None of these cases required the personal representative to speculate as to potential claims. Upon the record before the trial court here, there was no authority pursuant to which Ms. Evitt-Thorne was a reasonably ascertainable creditor.

3. Ms. Evitt-Thorne could not avoid summary judgment without presenting evidence that she was a reasonably ascertainable creditor to counter the personal representative's evidence that her own investigation had not disclosed the now-asserted claim.

Ms. Evitt-Thorne "was not a known or reasonably ascertainable creditor simply because she eventually filed a claim against the estate." Blackwell v. Williams, 594 So. 2d 56, 60 (Ala. 1992). The record of the personal representative before the trial court was not contradicted by any evidence. Following the death of Charles Evitt his personal representative sought to identify any creditors by reviewing his available business records and consulting with his accountant. That investigation disclosed two creditors, but not any claim by Ms. Evitt-Thorne. There was no evidence presented that she was a reasonably ascertainable creditor at the time. Accordingly, the publication notice in Wyoming was sufficient as to her. She failed to keep track of her ex-husband's status and did not submit any claim in his estate within the statutory time permitted by Wyoming law. Her claim, if any she

had, then expired. It was thereafter barred under Wyoming law and barred under Arizona law. Summary judgment was properly granted.

B. Ms. Evitt-Thorne's claim is one that arises before death as provided by Ariz. Rev. Stat. § 14-3803(A) and Ariz. Rev. Stat. § 14-3803(C) is not applicable.

The **second** issue Ms. Evitt-Thorne presents (OB at 10-11) is whether her claim should be governed by Ariz. Rev. Stat. § 14-3803(C), rather than Ariz. Rev. Stat. § 14-3803(A) and (B). Her claim is barred if Ariz. Rev. Stat. § 14-3803(A) applies, because then Ariz. Rev. Stat. § 14-3803(B) also applies, and pursuant to that statute a claim that is "barred by the nonclaim statute of decedent's domicile . . . is barred in this state," and her claim is barred by the Wyoming nonclaim statute.

Ms. Evitt-Thorne's argument in this regard distinguishes claims "that arose before the death of the decedent" (Ariz. Rev. Stat. § 14-3803 (A) & (B)) from claims "that arise at or after the death of the decedent" (Ariz. Rev. Stat. § 14-3803(C)). Her argument (OB at 16) is that her claim arose at the moment of the death of Charles Evitt, and she construes that to require application of Ariz. Rev. Stat. § 14-3803(C).

That is not how courts interpret such language in probate statutes. The case law points out that probate statutes do not refer to when a cause of action **accrues**, but when a claim **arises** and that such language refers to the events

that are the basis for the claim. See Ader v. Estate of Felger, 240 Ariz. 32, 39, ¶19, 375 P.3d 97, 104 (Ct. App. 2016) (acknowledging different meanings of "accrue" and "arise' and stating that "'arise' refers to the decedent's act or conduct upon which a claim is based").

For example, an agreement made in a divorce was also involved in In re Estate of Hadaway, 668 N.W.2d 920 (Minn. Ct. App. 2003). Dan Hadaway had agreed as part of his divorce from Joy Hadaway "to either maintain life insurance providing a lump-sum death benefit in the amount of $175,000 payable to appellant [ex-wife Joy Hadaway] upon his death, or, alternatively, to provide in some other manner for the tax-free payment of that amount to appellant within 60 days following his death." Id. at 921. He died in December 2001. His widow Mary Hadaway was personal representative of his estate. There was payment to Joy Hadaway of $30,000 from life insurance, but not the balance agreed as part of the divorce. At issue in determining whether ex-wife Joy Hadaway's claim was timely pursuant to the nonclaim statute was whether it arose before death (Minn. Stat. § 524.3-803(a)) or arose at or after death (Minn. Stat. § 524.3-803(b)). (Like Arizona, Minnesota has adopted the Uniform Probate Code.) Notwithstanding that the payment would not be made until after death, the court held that the claim arose before death.

> This obligation of the decedent, which he entered into years before his death, is therefore the functional equivalent of a

> contractual relationship between decedent and appellant. **The judgment obligated decedent to take action, while living,** to ensure that appellant would receive $175,000 upon decedent's death. . . . [T]he contractual agreement entered into in 1994 became an obligation of decedent's estate. **Simply because the payment was made absolute when decedent died, it does not follow that the contractual duty necessarily *arose* at the time of decedent's death**. Rather it is apparent that from the time of the settlement agreement and district court judgment, that decedent was obligated to make arrangements to provide $175,000 for appellant, either in his will, by life insurance, or by other means.
>
> The fact that appellant's right to the $175,000 could not have been enforced on decedent during his lifetime is irrelevant.

Id. at 923 (emphasis added) (also quoting a treatise on probate and noting that claims arising after death generally referred to administrative services rendered to the estate). The appellate court held that because the claim was "a contractual obligation entered into prior to decedent's death," Minn. Stat. § 524.3-803(a) applied which required claims "which arise before the decedent's death [to] be filed within four months of the [publication of notice]." Id. at 924.

For another instance, in In re Estate of Hooey, 521 N.W.2d 85 (N.D. 1994), Ms. Hooey had received federal disability benefits during the latter years of her life. Such benefits are administered through local agencies which are authorized, upon death of the recipient, to seek reimbursement of some amounts. Ms. Hooey died in March 1991 and her estate initially was administered informally, without probate. In August 1993, the North Dakota

Department of Human Services sought to recover over $100,000 in benefits by having a personal representative appointed and submitting a claim against the estate. Ms. Hooey's daughter challenged the claim as untimely. "Whether a creditor's claim against an estate is filed in a timely manner depends, in part, upon whether the creditor's claim arose during the decedent's lifetime or whether it arose at or after death." Id. at 86. Because federal law precluded the local agency from seeking reimbursement prior to the decedent's death, it was argued that such "a claim may arise only at or after death." Id. The court rejected that argument. "[T]he obligation to repay, if any, arises upon receipt of the benefits, i.e., prior to the decedent's death. Although the Department's ability to enforce the claim was tolled until Hooey's death, the obligation was incurred by Hooey during her lifetime." Id. at 87. Thus, the claim was one arising before death, not at or after death, for purposes of the probate claim statute.[26] See also Department of Public Welfare v. Anderson, 377 Mass. 23, 28, 384 N.E. 628, 632 (1979) (giving as examples of claims arising at or after death: "taxes on income received by the estate after the decedent's death, taxes

[26] This issue has arisen in other cases where reimbursement has been sought from an estate for benefits provided to the decedent during life, but as to which no claim is permitted to be asserted until after death. See In re Estate of Jones, 280 S.W.3d 647, 654 (Mo. Ct. App. 2009) (noting other jurisdictions addressing the recovery after death of such benefits as "characteriz[ing] the debt as one created during the lifetime of the decedent").

on property held by the estate, . . . and debts and liabilities incurred in the course of settling the estate.").

As with Minnesota and North Dakota, Florida is another Uniform Probate Code state. As reported in Spohr v. Berryman, 589 So. 2d 225 (Fla. 1991), in his 1954 divorce William Spohr agreed that he would prepare a will to leave to his ex-wife and their children at least one-half of his estate. He remarried in 1955 and died in 1986. His will left his entire estate to his widow. Based on the Florida probate statutes, claims against the estate were to be filed by April 9, 1987. His former wife and their children filed a lawsuit on April 7, 1987, but did not submit a probate claim in the estate. The lawsuit was dismissed by summary judgment. At the court of appeals, the ex-wife and children were successful in obtaining a reversal based on the same argument that Ms. Evitt-Thorne makes here – that the statutory bar relied on in the probate court applied only "to claims which arose before the death of the decedent," whereas the decedent's "failure to devise at least half of his estate to his ex-wife and his children did not occur until after his death." Id. at 227. The Florida Supreme Court disagreed with the court of appeals.

> While the claim of [ex-wife] Anna Spohr and the children did not come into fruition until the contents of Mr. Spohr's will were ascertained following his death, the claim, itself, was based upon an agreement which was made many years before his death.

Id. The future event of whether Mr. Spohr did or did not fulfill his obligation to make the agreed provision by will merely made the claim contingent, but did not postpone or eliminate the requirement to timely submit the claim against the estate. "If claims based upon agreements to make a will are not required to be filed in three months, a lawsuit could be filed at any time until three years . . . and the payment of claims and the distribution to beneficiaries could be substantially delayed or disrupted." Id. at 228. Thus, the claim was held to be one arising before death even though the claim was contingent[27] and the agreement could not be breached until after the decedent's death.

Ms. Evitt-Thorne (OB at 17-19) seeks to distinguish cases relied upon in the trial court to support the summary judgment, but she offers no cases that support her interpretation. Pursuant to Ariz. Rev. Stat. § 14-3803(A) a claim does not have to accrue and become actionable for it to have arisen before the death of decedent. Ariz. Rev. Stat. § 14-3803(A) expressly states that it is

[27] "A contingent claim is one 'that has not yet accrued and is dependent upon some future event that may never happen.'" Hullett v. Cousin, 204 Ariz. 292, 296 n. 3, 63 P.3d 1029, 1033 n. 3 (2003) (citation omitted) (finding that a claim under the Uniform Fraudulent Transfer Act may have existed even though the claim was not yet actionable). Similarly, in Poleson v. Willis, 998 P.2d 469 (Colo. 2000), the Colorado Court of Appeals found that a legal malpractice suit had arisen before the death of an attorney even though the malpractice claim was contingent and was not yet actionable because an appeal remained pending on the underlying litigation at the time of the attorney's death. The events giving rise to the obligation and claim arose prior to the decedent's death.

applicable to all claims 'whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort or other legal basis . . . .'

Here, Ms. Evitt-Thorne asserts that her claim "arises from . . . the Settlement Agreement . . . she and Charles entered into on July 30, 1987 as an incident of their divorce in Maricopa County, Arizona." Item 59 at 2. While her claim was dependent upon her surviving the decedent, Ms. Evitt-Thorne clearly had a $150,000 contingent "claim" upon executing the 1987 Settlement Agreement. Accordingly, she had a contingent claim that existed and "arose before the death of decedent," pursuant to Ariz. Rev. Stat. § 14- 3803(A).

As demonstrated by the other Uniform Probate Code cases cited above, Ms. Evitt-Thorne's claim arose before the decedent's death even though the debt was contingent and did not become due until after the decedent passed away. As the trial court correctly stated:

> The Court believes that Ms. Evitt-Thorne's claim arose before the death of the Decedent. Her claim stems from her and the Decedent's 1987 divorce. While that claim would not become due until Decedent's death, and would not have existed if Ms. Evitt-Thorne had predeceased the Decedent, 14-3803(A) clearly contemplates that a claim arising before death could be "due or to become due," and could also be "contingent" on some other occurrence. . . . The question thus focuses on the origination of the claim itself, not when Ms. Evitt-Thorne could have enforced that claim.

Item 48 at 2. Ariz. Rev. Stat. § 14-3803(C) did not apply and so does not relieve Ms. Evitt-Thorne from the consequences of having failed to submit a

timely claim in the Wyoming probate. The summary judgment should be affirmed.

C. Ms. Evitt-Thorne's claim does not qualify as peculiar circumstances nor was this issue preserved for appeal.

The **third** issue Ms. Evitt-Thorne presents (OB at 11) is whether the provisions of Wyo. Stat. § 2-7-703(c)(i) apply for "equitable relief due to peculiar circumstances . . . found by the court in adversary proceedings." This argument was not asserted in the memorandum responding to the motion for summary judgment and so was not preserved below. Item 42. Ms. Evitt-Thorne first articulated this argument in her motion to re-open judgment or for new trial. Item 59 at 8. Her appeal argument (OB at 19-21) is essentially a reproduction of that post-judgment argument and should not be considered now as her appeal is limited to challenging the summary judgment ruling.

Even if considered, though, the argument is meritless. As a starting point, while Ms. Evitt-Thorne wishes the reference to "adversary proceedings" in the Wyoming statute meant that her raising the issue entitled her to avoid summary judgment and receive an evidentiary hearing, the law in Wyoming does not support her. In In re Estate of Novakovich, 2004 WY 158, 101 P.3d 931 (2004), the Wyoming Supreme Court held that the statutory requirement of "adversary proceedings" did not mandate an evidentiary hearing, but merely that the proceedings be contested, rather than ex parte. Id. ¶17, 101 P.3d at 935.

These Arizona proceedings were adversary proceedings and the trial court did not abuse its discretion by declining to find peculiar circumstances existed to warrant equitable relief from the nonclaim statute.

The Wyoming Supreme Court has interpreted Wyo. Stat. § 2-7-703(c)(i) as meaning that ‘‘the claimant may be excused for failure to file a claim if the failure to file was caused by circumstances that are out of the ordinary and it is fair to excuse the failure.” Scott v. Scott, 918 P.2d 198, 201 (Wyo. 1996). The OB recites several factors or events as if they support the validity of this claim (like the trial court suggesting that maybe the parties could reach a resolution), but those are all irrelevant to whether Ms. Evitt-Thorne timely submitted a claim or was somehow prevented from doing so by circumstance warranting equitable relief. She knew Charles Evitt lived in Wyoming. Item 44, ¶7. It is not peculiar that he died there. As cited earlier, her delay in discovering her ex-husband’s death there is not grounds to avoid the nonclaim statute. Whether she was a known or reasonably ascertainable creditor is determined as of the time the personal representative was appointed and notice was published. Those later events which she recites are meaningless to this issue. See In re Estate of Spears, 314 Ark. 54, 61, 858 S.W.2d 93, 97 (1993); Massey v. Fulks, 2011 Ark. 4, 8-9, 376 S.W.3d 389, 393-94 (2011); In re Estate of Ragsdale, 19 Kan. App. 2d 1084, 1086, 879 P.2d 1145, 1146 (1994).

This third issue was not preserved. Beyond citation to the statute, Ms. Evitt-Thorne offers no authority in support of her argument. The items she recites also are not peculiar circumstances. Ms. Evitt-Thorne did not present any out of the ordinary circumstances that would justify her failure to have ever submitted a claim in the Wyoming probate. She relies on events irrelevant to the time during which notice was given and when she should have submitted any claim. In adversary proceedings, by denying her motion for new trial, the trial court declined to agree that the events asserted constituted peculiar circumstances entitling her to equitable relief from the bar of the nonclaim statute. No abuse of discretion has been shown with respect to that ruling.

D. Summary – summary judgment was properly granted.

Pursuant to well-established law for probate nonclaim statutes, appellant Judith Evitt-Thorne's $150,000 claim against the estate of her former husband Charles Evitt ceased to exist because she did not timely submit it in the Wyoming domiciliary probate. Ms. Evitt-Thorne presented no evidence contradicting that of the personal representative that her investigation following the 2013 death of Mr. Evitt failed to reveal that Ms. Evitt-Thorne might have some claim based upon the 1987 divorce. Accordingly, she was neither a known nor a reasonably ascertainable creditor and publication notice

was sufficient. Ms. Evitt-Thorne's failure to timely submit a claim in Wyoming rendered it thereafter barred. She is incorrect in her attempt to avoid the recognition by Ariz. Rev. Stat. § 14-3803(A) and (B) of the bar of the Wyoming nonclaim statute by attempting instead to rely upon Ariz. Rev. Stat. § 14-3803(C). That latter statute does not apply because the claim arose before death. She also failed to preserve for appeal her final argument that she was entitled to equitable relief from the bar of the nonclaim statute by Wyo. Stat. § 2-7-703(c)(i). Ms. Evitt-Thorne did not present evidence of any peculiar circumstances nor demonstrate any abuse of discretion by the trial court's failure to grant such relief. Summary judgment was appropriately granted.

ATTORNEYS' FEES ON APPEAL

Ms. Evitt-Thorne's petition asserted a right to attorneys' fees based upon the 1987 divorce Settlement Agreement she sought to enforce, Section 11 of which specifically provided for same. Item 36, Exh. D. In defeating her contract claim, the appellee personal representative is entitled to an award of her attorneys' fees on appeal. Mary Jo Evitt, as personal representative of the Estate of Charles H. Evitt, requests an award for the costs and attorneys' fees incurred with respect to this appeal. Ariz. Rev. Stat. §§ 12-341; 12-341.01.

CONCLUSION

The judgment herein should be affirmed in all respects. Appellee requests award of attorneys' fees and taxable costs on appeal.

RESPECTFULLY SUBMITTED this 12th day of July, 2017.

BURCH & CRACCHIOLO, P.A.

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