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**ARIZONA SUPREME COURT**

In re the Estate of:

CHARLES H. EVITT,  
Deceased.

JUDITH EVITT-THORNE,  
Petitioner-Appellant,  
v.  
LESLIE HIATT, SANDRA EVITT and  
MARY JO EVITT,  
Respondents-Appellees.

No. CV-18-0273-PR

1 CA-CV 17-0045

Maricopa County Superior Court  
Case No. PB2015-051215

**RESPONSE OPPOSING  
PETITION FOR REVIEW**

Appellee Mary Jo Evitt is now the Sole Personal Representative of the Estate of Charles H. Evitt and, pursuant to Ariz. R. Civ. App. P. 23, hereby responds opposing the Petition for Review and requests that review be denied with respect to the opinion of the Arizona Court of Appeals filed on August 23, 2018 (the “Decision”) and that Respondent-Appellee be awarded her costs and fees.

1           **I.     Introduction**

2           Petitioner Judith Evitt-Thorne had a (disputed) claim arising from a 1987  
3 divorce decree, although payment of the claim was contingent upon her surviving  
4 her former husband, Charles Evitt. She knew Charles had moved to Wyoming  
5 and established a family there, but she did not keep track of him nor when he  
6 died. She was not a reasonably ascertainable creditor entitled to direct notice so  
7 she was subject to notice by publication. *Tulsa Professional Collection Services,*  
8 *Inc. v. Pope*, 485 U.S. 489-90 (1988). Such notice of probate was published in  
9 accordance with Wyoming law. Ms. Evitt-Thorne did not timely submit any  
10 claim in the Wyoming probate. Her attempt to resurrect her claim via an ancillary  
11 probate in Arizona was properly resolved by summary judgment, and affirmed by  
12 the Decision, because Arizona bars a claim in an ancillary probate if barred by the  
13 probate nonclaim statute of the domiciliary probate.

14           **II.    Issues Presented**

15           Summary judgment was properly granted that the Arizona claim of Judith  
16 Evitt-Thorne was barred for failure to have timely submitted a claim in the  
17 Wyoming probate.

18           Attorney fees and costs of responding to this Petition are a burden on the  
19 Estate and should be awarded to Respondent Mary Jo Evitt, personal  
20 representative of the Estate as arising under contract.

21           **III.   Material Facts**

22           Charles H. Evitt was formerly married to Judith Evitt-Thorne. Their  
23 marriage was dissolved by a Maricopa County decree filed September 11, 1987.  
24 Item 36, Exh. D (decree enclosure to letter). (“Item” refers to documents on the  
25 Clerk’s Index.) Pursuant to Section 10 of a Settlement Agreement dated July 30,  
26 1987 and ancillary to the decree, Charles Evitt (as Husband) agreed to provide  
27 certain death benefits to Judith Ann Evitt (as Wife nka Judith Evitt-Thorne) as  
28 follows:

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

9 *Id.* (settlement agreement enclosure to letter).

10           Charles Evitt subsequently remarried, had a family, and was living in  
11 Wyoming when he died September 25, 2013, twenty-six years after the Arizona  
12 divorce. Item 36, ¶¶2,4-6. Charles died testate. Item 12, ¶4. His widow, Mary  
13 Jo Evitt, and his daughters, Leslie Hiatt and Sandra Evitt, were appointed co-  
14 personal representatives in the resulting Wyoming domiciliary probate action.  
15 Item 10; Item 12, ¶4; Item 36 ¶¶2, 6.

16           Notice of Probate was properly published in a Wyoming newspaper as  
17 provided by Wyoming probate statutes. Item 36, Exh. B. The expiration date for  
18 claims against the Estate was March 5, 2014 (being three months from the first  
19 publication of the Notice of Probate). *Id.* No claim by Ms. Evitt-Thorne was  
20 filed with the clerk of the Wyoming court by that deadline. *Id.*, ¶18.

21           By May 2014, all claims with respect to the Estate had been addressed and  
22 the court in the Wyoming probate entered an order for sale of real and personal  
23 property. Item 36, ¶10. A stipulation for final distribution of the Estate was filed  
24 August 27, 2014. *Id.*, Exh. C.

25           Ms. Evitt-Thorne never filed any claim in the domiciliary Wyoming  
26 probate. Item 36, Exh. B. Instead, on July 2, 2015, she filed a petition initiating  
27 ancillary proceedings in Maricopa County. Item 1. Ms. Evitt-Thorne's petition  
28 acknowledged the Wyoming domicile. *Id.* 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.

1 A motion for summary judgment was filed seeking disallowance of the  
2 claim of Judith Evitt-Thorne. Items 35-37. Wyoming’s probate nonclaim statutes  
3 state that a creditor’s claim is barred unless timely filed. “**The publication shall**  
4 **include a notice . . . to creditors having claims . . . to file them . . . within**  
5 **three (3) months . . . or thereafter be forever barred.**” Wyo. Stat. Ann. § 2-7-  
6 201 (emphasis added). “[A]ll claims whether due, not due or contingent, shall  
7 **be filed in duplicate with the clerk within the time limited in the notice to**  
8 **creditors and any claim not so filed is barred forever.**” Wyo. Stat. Ann. § 2-7-  
9 703 (emphasis added). Since Judith Evitt-Thorne had never filed a claim in  
10 Wyoming at any time, the motion argued that her claim was barred. Items 35, 45.  
11 Pursuant to Ariz. Rev. Stat. § 14-3803(B), the claim also was barred in Arizona.

12 In response, Ms. Evitt-Thorne largely ignored Wyoming law and instead  
13 relied upon Ariz. Rev. Stat. § 14-3803(C). Item 42. She argued that because her  
14 claim was filed within two years of the death of Charles Evitt, her claim was  
15 timely pursuant to the Arizona statute. *Id.*

16 The Arizona superior court granted the motion for summary judgment.

17 **The Court believes that Ms. Evitt-Thorne was not a**  
18 **“reasonably ascertainable” creditor.** Her claim stems from a  
19 provision in a settlement agreement from 1987. While that  
20 agreement involved the Decedent, it did not involve any of the co-  
21 Personal Representatives. **The Decedent died 26 years after**  
22 **entering into the agreement, and there is no evidence that he and**  
23 **Ms. Evitt-Thorne remained in contact. A reasonable person in**  
24 **the co-Personal Representatives’ position would not think to**  
25 **review a 26-year-old divorce settlement agreement to determine**  
26 **whether a former spouse might have a claim** against the estate of a  
27 husband she divorced almost **three decades earlier.**

28 Item 48 at 2 (emphasis added).

In determining the deadline for creditors to present their  
claims against an estate, **Arizona law differentiates between claims**  
26 **that “arose before the death of the decedent” and those that**  
27 **“arise at or after the death of the decedent.”** See A.R.S. 14-3803  
28 (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,

1 if the Decedent died elsewhere and the creditor's claim arose before  
2 the Decedent's death, the claim is barred if "barred by the nonclaim  
3 statute of the decedent's domicile before the giving of notice to  
4 creditors in this state." See A.R.S. 14-3803(B).

5 **The Court believes that Ms. Evitt-Thorne's claim arose**  
6 **before the death of the Decedent. Her claim stems from her and**  
7 **the Decedent's 1987 divorce.** While that claim would not become  
8 due until Decedent's death, and would not have existed if Ms. Evitt-  
9 Thorne had predeceased the Decedent, 14-3803(A) clearly  
10 contemplates that a claim arising before death could be "due or to  
11 become due," and could also be "contingent" on some other  
12 occurrence. See A.R.S. 14-3803(A). The definition of "arise"  
13 includes to "originate; to stem (from)," and to "emerge in one's  
14 consciousness; to come to one's attention." See Black's Law  
15 Dictionary (10th ed. 2014). **The question thus focuses on the**  
16 **origination of the claim itself, not when Ms. Evitt-Thorne could**  
17 **have enforced that claim.** Compare A.R.S. 12-542 (two-year  
18 statute of limitations for tort claims begins when "the cause of action  
19 accrues").

20 Ms. Evitt-Thorne's claim against the Estate arose/  
21 originated/stemmed from the 1987 agreement, not upon the  
22 Decedent's death. **That claim was barred under Wyoming law** as  
23 of February 5, 2014 [sic, March 5, 2014] (i.e., three months after the  
24 first publication required by Wyo. Stat. Ann. 2-7-703). **Because she**  
25 **did not file her claim within the time period required by**  
26 **Wyoming law, that claim is not enforceable in Arizona.**

27 *Id.* at 2-3 (emphasis added).

28 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  
awarded attorneys' fees against her. Item 58. Judith Evitt-Thorne appealed the  
ruling and it was affirmed by the Decision of the Arizona Court of Appeals. Ms.  
Evitt-Thorne has now abandoned some of her previously asserted issues and is  
only presenting the question of whether Ariz. Rev. Stat. § 14-3803(B) or Ariz.  
Rev. Stat. § 14-3803(C) is applicable.

1           **IV. Reasons Review Should Be Denied -- Ms. Evitt-Thorne's claim is**  
2           **one that arises before death as provided by Ariz. Rev. Stat. § 14-**  
3           **3803(A)&(B) and Ariz. Rev. Stat. § 14-3803(C) is not applicable.**

4           The sole issue Ms. Evitt-Thorne presents (apart from whether the fee award  
5 survives) is whether her claim should be governed by Ariz. Rev. Stat. § 14-  
6 3803(C), rather than Ariz. Rev. Stat. § 14-3803(B). Her claim is barred if Ariz.  
7 Rev. Stat. § 14-3803(B) applies because, pursuant to that statute, a claim that is  
8 “barred by the nonclaim statute of decedent’s domicile . . . is barred in this state,”  
9 and her claim is undisputedly barred by the Wyoming nonclaim statute.

10           Ms. Evitt-Thorne’s argument in this regard seeks to distinguish claims  
11 “that arose before the death of the decedent” (Ariz. Rev. Stat. § 14-3803 (A) &  
12 (B)) from claims “that arise at or after the death of the decedent” (Ariz. Rev. Stat.  
13 § 14-3803(C)). Her argument is that her claim arose at the moment of the death  
14 of Charles Evitt, and she construes that to require application of Ariz. Rev. Stat.  
15 § 14-3803(C).

16           In the Appendix to this Response, the statutory language of Section A and  
17 Section C is presented side-by-side, with common language in bold. It may thus  
18 be seen that the distinction between the two is **not** based on such claim qualifiers  
19 as “contingent,” but solely whether claims “arose before” or “arise at or after”  
20 death. It is in those words that the distinct meanings are found.

21           Ms. Evitt-Thorne’s argument errs by imposing on those words the concept  
22 of when the claim “accrues.” That is a different word; a word the legislature  
23 could have used if the statute were meant to be so construed; and that is not how  
24 courts have construed those different words used in probate statutes. The case law  
25 points out that probate statutes do not refer to when a cause of action **accrues**, but  
26 rather when a claim **arises** and that such language refers to the events that are the  
27 basis for the claim, rather than when the claim becomes actionable. *See Ader v.*  
28 *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

1 “‘arise’ refers to the decedent’s act or conduct upon which a claim is based”).

2       Moreover, Arizona is a Uniform Probate Code (“UPC”) state. This issue  
3 has been resolved in other UPC states unfavorably to Ms. Evitt-Thorne’s  
4 argument in all instances. She cites no supporting authority. The UPC cases  
5 confirm that the language does **not** refer to when the claim accrues, but to when  
6 the events occurred that originated the claim. Almost all claims arise before  
7 death; it is only claims associated with the final expenses of death and the  
8 administration of the estate after death that arise at or after death.

9       As here, an agreement made in a divorce was involved in *In re Estate of*  
10 *Hadaway*, 668 N.W.2d 920 (Minn. Ct. App. 2003). Dan Hadaway had agreed as  
11 part of his divorce from Joy Hadaway “to either maintain life insurance providing  
12 a lump-sum death benefit in the amount of \$175,000 payable to appellant [ex-  
13 wife Joy Hadaway] upon his death, or, alternatively, to provide in some other  
14 manner for the tax-free payment of that amount to appellant within 60 days  
15 following his death.” *Id.* at 921. He died in December 2001. His widow Mary  
16 Hadaway was personal representative of his estate. There was payment to Joy  
17 Hadaway of \$30,000 from life insurance, but not the balance agreed as part of the  
18 divorce. At issue in determining whether ex-wife Joy Hadaway’s claim was  
19 timely pursuant to the nonclaim statute was whether it arose before death (Minn.  
20 Stat. § 524.3-803(a)) or arose at or after death (Minn. Stat. § 524.3-803(b)).  
21 Notwithstanding that the payment would not be made until after death, the court  
22 held that the claim arose before death.

23       This obligation of the decedent, which he entered into years before  
24 his death, is therefore the functional equivalent of a contractual  
25 relationship between decedent and appellant. **The judgment**  
26 **obligated decedent to take action, while living**, to ensure that  
27 appellant would receive \$175,000 upon decedent’s death. . . . [T]he  
28 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**

1 **death.** Rather it is apparent that from the time of the settlement  
2 agreement and district court judgment, that decedent was obligated  
3 to make arrangements to provide \$175,000 for appellant, either in his  
4 will, by life insurance, or by other means.

5 The fact that appellant's right to the \$175,000 could not have  
6 been enforced on decedent during his lifetime is irrelevant.

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

13 As reported in *Spohr v. Berryman*, 589 So. 2d 225 (Fla. 1991), also  
14 involving a divorce, William Spohr agreed that he would prepare a will to leave  
15 to his ex-wife and their children at least one-half of his estate. He remarried in  
16 1955 and died in 1986. His will left his entire estate to his widow. Based on the  
17 Florida probate statutes, claims against the estate were to be filed by April 9,  
18 1987. His former wife and their children filed a lawsuit on April 7, 1987, but did  
19 not submit a probate claim in the estate. The lawsuit was dismissed by summary  
20 judgment. At the court of appeals, the ex-wife and children initially were  
21 successful in obtaining a reversal based on the same argument that Ms. Evitt-  
22 Thorne made here – that the statutory bar relied on in the probate court applied  
23 only "to claims which arose before the death of the decedent," whereas the  
24 decedent's "failure to devise at least half of his estate to his ex-wife and his  
25 children did not occur until after his death." *Id.* at 227. The Florida Supreme  
26 Court disagreed with the court of appeals.

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

31 *Id.* The future event of whether Mr. Spohr did or did not fulfill his obligation to



1 make the agreed provision by will merely made the claim contingent, but did not  
2 postpone or eliminate the requirement to timely submit the claim against the  
3 estate. “If claims based upon agreements to make a will are not required to be  
4 filed in three months, a lawsuit could be filed at any time until three years . . . and  
5 the payment of claims and the distribution to beneficiaries could be substantially  
6 delayed or disrupted.” *Id.* at 228. Thus, the claim was held to be one arising  
7 before death even though the claim was contingent and the agreement could not  
8 be breached until after the decedent’s death.

9       In *In re Estate of Hooey*, 521 N.W.2d 85 (N.D. 1994), Ms. Hooey had  
10 received federal disability benefits during the latter years of her life. Such  
11 benefits are administered through local agencies which are authorized, upon death  
12 of the recipient, to seek reimbursement of some amounts. Ms. Hooey died in  
13 March 1991 and her estate was administered informally, without probate. In  
14 August 1993, the North Dakota Department of Human Services sought to recover  
15 over \$100,000 in benefits by having a personal representative appointed and  
16 submitting a claim. Ms. Hooey’s daughter challenged the claim as untimely.  
17 “Whether a creditor’s claim against an estate is filed in a timely manner depends,  
18 in part, upon whether the creditor’s claim arose during the decedent’s lifetime or  
19 whether it arose at or after death.” *Id.* at 86. Because federal law precluded the  
20 local agency from seeking reimbursement prior to the decedent’s death, it was  
21 argued that such “a claim may arise only at or after death.” *Id.* The court rejected  
22 that argument. “[T]he obligation to repay, if any, arises upon receipt of the  
23 benefits, *i.e.*, prior to the decedent’s death. **Although the Department’s ability to**  
24 **enforce the claim was tolled** until Hooey’s death, **the obligation was incurred**  
25 by Hooey **during** her **lifetime.**” *Id.* at 87 (emphasis added). Thus, the claim was  
26 one arising before death, not at or after death, for purposes of the probate claim  
27 statute. *See also Department of Public Welfare v. Anderson*, 377 Mass. 23, 28,  
28 384 N.E. 628, 632 (1979) (giving as examples of claims arising at or after death:

1 “taxes on income received by the estate after the decedent’s death, taxes on  
2 property held by the estate, . . . and debts and liabilities incurred in the course of  
3 settling the estate.”).

4 Ms. Evitt-Thorne tries and fails to distinguish the UPC cases and she offers  
5 no cases that support her interpretation. Pursuant to Ariz. Rev. Stat. § 14-  
6 3803(A) a claim does not have to accrue and become actionable for it to have  
7 arisen before the death of decedent. Ariz. Rev. Stat. § 14-3803(A) expressly  
8 states that it is applicable to all claims ‘whether due or to become due, absolute or  
9 contingent, liquidated or unliquidated, founded on contract, tort or other legal  
10 basis . . . .’ It is Ms. Evitt-Thorne’s proposed interpretation that would render  
11 language meaningless. It would also conflict with the goal of probate statutes to  
12 expeditiously complete the administration of probate estates. *See Barnett v,*  
13 *Hitching Post Lodge, Inc.*, 101 Ariz. 488, 491, 421 P.2d 507, 510 (1966).

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

21 As demonstrated by the other Uniform Probate Code cases cited above,  
22 Ms. Evitt-Thorne’s claim arose before the decedent’s death even though the debt  
23 was contingent and did not become due until after the decedent passed away. As  
24 the trial court correctly stated: “The question thus focuses on the origination of  
25 the claim itself, not when Ms. Evitt-Thorne could have enforced that claim.”  
26 Item 48 at 2. Ariz. Rev. Stat. § 14-3803(C) did not relieve Ms. Evitt-Thorne from  
27 the consequences of having failed to submit a timely claim in the Wyoming  
28 probate. The Decision properly affirmed summary judgment.

1           **V. Respondent should receive an award of costs and fees for**  
2           **responding to this Petition.**

3           If this Petition were granted and that resulted in vacating the underlying  
4 summary judgment award, that would similarly affect the underlying award of  
5 costs and fees. But this Petition should be denied and instead costs and fees  
6 associated with responding to this Petition should be awarded against Petitioner  
7 Evitt-Thorne. In the lower court Ms. Evitt-Thorne asserted a right to attorneys'  
8 fees based upon the 1987 divorce Settlement Agreement she sought to enforce,  
9 Section 11 of which specifically provided for same. Item 36, Exh. D. With  
10 respect to this Petition, Mary Jo Evitt, as personal representative of the Estate of  
11 Charles H. Evitt, requests such an award for the costs and attorneys' fees in  
12 defeating that contract claim. Ariz. Rev. Stat. §§ 12-341; 12-341.01.

12           **VI. Conclusion**

13           The court of appeals reached the correct result and review of the Decision  
14 should be denied. Respondent-Appellee should be awarded her costs and fees  
15 with respect to responding to the Petition for Review.

16           DATED this 22nd day of October, 2018.

17                               **BURCH & CRACCHIOLO, P.A.**

18                               By: /s/ Daryl Manhart

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**APPENDIX**

Ariz. Rev. Stat. § 14-3803(A)-(C)

<b>A.R.S. § 14-3803(A)</b>	<b>A.R.S. § 14-3803(C)</b>
<p data-bbox="310 436 883 506"><b>A. All claims against a decedent's estate that</b></p> <p data-bbox="310 533 492 569">arose before</p> <p data-bbox="310 596 883 665"><b>the death of the decedent, including claims of the state and any</b></p> <p data-bbox="310 693 703 728">of its political subdivisions,</p> <p data-bbox="310 756 883 888"><b>whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort or other legal basis,</b></p> <p data-bbox="310 915 883 984">if not barred earlier by any other statute of limitations or nonclaim statute,</p> <p data-bbox="310 1012 883 1144"><b>are barred against the estate, the personal representative and the heirs and devisees of the decedent, unless presented</b></p> <p data-bbox="310 1171 683 1207">within the earlier of either:</p> <p data-bbox="310 1234 883 1394">1. Two years after the decedent's death plus the time remaining in the period commenced by an actual or published notice pursuant to section 14-3801, subsection A or B.</p> <p data-bbox="310 1421 883 1619">2. The time prescribed by section 14-3801, subsection B for creditors who are given actual notice and within the time prescribed in section 14-3801, subsection A for all creditors barred by publication.</p>	<p data-bbox="906 436 1479 506"><b>C. All claims against a decedent's estate that</b></p> <p data-bbox="906 533 1118 569">arise at or after</p> <p data-bbox="906 596 1479 665"><b>the death of the decedent, including claims of the state and any</b></p> <p data-bbox="906 693 1200 728">political subdivision,</p> <p data-bbox="906 756 1479 888"><b>whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort or other legal basis,</b></p> <p data-bbox="906 1012 1479 1144"><b>are barred against the estate, the personal representative and the heirs and devisees of the decedent, unless presented</b></p> <p data-bbox="906 1171 1268 1207">as either of the following:</p> <p data-bbox="906 1234 1479 1360">1. A claim based on a contract with the personal representative, within four months after performance by the personal representative is due.</p> <p data-bbox="906 1388 1479 1514">2. Any other claim, within the later of four months after it arises or the time specified in subsection A, paragraph 1 of this section.</p>
<p data-bbox="310 1665 1479 1761"><b>A.R.S. § 14-3803(B).</b> A claim that is described in subsection A of this section and that is barred by the nonclaim statute of the decedent's domicile before the giving of notice to creditors in this state is barred in this state.</p>	