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Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 09/18/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In the Matter of the Estate of: ) No. 1 CA-CV 11-0596  
)  
FRANK M. DUNASKIS, ) DEPARTMENT E  
)  
Deceased, )  
) **MEMORANDUM DECISION**  
)  
\_\_\_\_\_) (Not for Publication -  
) Rule 28, Arizona Rules of  
VARADEE DUNASKIS, ) Civil Appellate Procedure)  
)  
Petitioner/Appellant, )  
)  
v. )  
)  
)  
MATHEW DUNASKISS, )  
)  
)  
Personal Representative/ )  
Appellee. )  
\_\_\_\_\_)

Appeal from the Superior Court in Maricopa County

Cause No. PB2006-000083 and PB2007-002190 (Consolidated)

The Honorable David O. Cunanan, *Judge Pro Tempore*

**AFFIRMED**

Varadee Dunaskis  
Petitioner/Appellant *in Propria Persona*

Detroit, MI

Penilla Metzger PLLC  
By Perry E. Casazza  
Attorneys for Personal Representative/Appellee

Phoenix

**J O H N S E N**, Judge

¶1 Varadee Dunaskis appeals the superior court's denial of her petition to remove her brother, Mathew Dunaskiss, as the personal representative of the estates of their parents, Frank and Aldona Dunaskis. For the reasons that follow, we affirm the superior court's order.

**FACTS AND PROCEDURAL HISTORY**

¶2 Frank Dunaskis died in 2005, leaving his wife, Aldona, and their children, Mathew and Varadee, as the sole beneficiaries of his estate. Aldona was appointed personal representative of Frank's estate, but she died on June 20, 2007, before she could complete the administration of the estate. On November 16, 2007, Mathew was appointed successor personal representative of Frank's estate and personal representative of Aldona's estate.

¶3 Varadee's motion to remove Mathew as personal representative centered on title to property (the "Ocotillo Property") that Mathew purchased in 1981.<sup>1</sup> In 2007, Mathew discovered that in 2005, Varadee had recorded a false quit-claim deed, dated April 19, 1988, that purported to transfer the Ocotillo Property to Varadee and Aldona. On September 7, 2007,

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<sup>1</sup> We view the facts in the light most favorable to sustaining the superior court's judgment. *Pelletier v. Johnson*, 188 Ariz. 478, 480, 937 P.2d 668, 670 (App. 1996).

Mathew sued Varadee, asking the court to quiet title to the Ocotillo Property in his name.

¶4 Although Varadee was served with the complaint and appeared at the initial order-to-show-cause hearing, she failed to appear at the hearing the court set to take evidence on Mathew's claim. At that hearing, Mathew presented evidence that Varadee had forged the quit-claim deed by pasting together two different deeds, using Mathew's and his wife's signatures from a different deed. The notary public whose name appeared on the forged deed testified at the hearing and submitted an affidavit stating she did not notarize the deed and that the date of the expiration of her commission had been altered on the deed. Further, Mathew pointed out to the court that the deed listed Aldona as "Aldona Dunaskis, widow," even though at the time the deed purportedly was executed, Frank was living. The deed also stated it was "exempt per ARS 11-1134" even though Arizona Revised Statutes ("A.R.S.") section 11-1134 was not enacted until 1999. The superior court entered judgment against Varadee on November 19, 2007, finding that she had recorded a false deed knowing that "the document was forged, groundless, contained material misstatement or false claim, and was invalid." The court quieted title to the Ocotillo Property in favor of Mathew and ordered Varadee to pay Mathew's attorney's fees, costs and \$5,000 in damages.

¶15 Over the following year, Mathew filed inventories of both estates. Consistent with the judgment in the quiet-title action, he did not list the Ocotillo Property on the inventory he filed for Aldona's estate. In May 2008, Varadee filed a petition to remove Mathew as personal representative and to disqualify his attorney. There was an unsuccessful mediation, and Varadee requested numerous continuances and moved to disqualify the superior court judge, causing additional delay.

¶16 The superior court set an evidentiary hearing on the petition to remove Mathew on February 4, 2011. Varadee called Mathew as her only witness, and at the conclusion of the hearing, the superior court denied the petition.

¶17 Varadee timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(9) (West 2012).<sup>2</sup>

## **DISCUSSION**

### **A. Jurisdiction.**

¶18 Varadee initially appealed both the February 4, 2011 unsigned minute entry denying her petition to remove Mathew as personal representative and a March 4, 2011 unsigned minute entry denying her motion to disqualify Mathew's attorney. This court consolidated the appeals, then revested jurisdiction in

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<sup>2</sup> Absent material revisions after the relevant date, we cite a statute's current version.

the superior court for the purpose of entering a signed appealable order. We ordered that if a signed order was not filed before June 10, 2011, the appeal would be dismissed without further notice. Because no signed order was issued before that date, we dismissed the consolidated appeal without prejudice.

¶19 Varadee asked the superior court to sign both the February 4, 2011 and the March 4, 2011 minute entries as final judgments. The superior court signed the February 4, 2011 minute entry but specifically declined to sign the minute entry denying Varadee's petition to disqualify Mathew's attorney. Varadee thereafter timely appealed the signed judgment denying her petition to disqualify Mathew.

¶10 The result of these events is that the only issue properly before this court is whether the superior court erred by denying Varadee's petition to disqualify Mathew as the personal representative. We therefore will not consider Varadee's arguments that Mathew's attorney should be disqualified for a conflict of interest, that the superior court judge should have disqualified himself, or that the superior court in the quiet-title action lacked jurisdiction.

**B. Breach of Fiduciary Duty and Conflict of Interest.**

¶11 Varadee first argues the superior court should have disqualified Mathew because he breached his fiduciary duty to the estate when he filed the quiet-title action.

¶12 By statute, a personal representative has a fiduciary duty to act in "the best interests of successors to the estate." A.R.S. § 14-3703(A) (West 2012). The superior court's order appointing Mathew as personal representative described this fiduciary duty as "a legal duty of undivided loyalty to the beneficiaries and the creditors of the estate" and prohibited him from "participating in transactions that are a conflict of interest between you, as Personal Representative, and you as an individual." A personal representative is liable to interested persons for any loss resulting from breach of his fiduciary duty. A.R.S. § 14-3712 (West 2012). Likewise, an interested person may petition for removal of the personal representative if the personal representative "has failed to perform any duty pertaining to that office." A.R.S. § 14-3611(B)(3) (West 2012).

¶13 We accept the premise of Varadee's argument that, under normal circumstances, an estate's personal representative may breach a duty to the estate by suing on his own behalf to deprive the estate of an asset that ostensibly belongs to it. But the record here does not present normal circumstances.

¶14 As recounted above, the court that heard the quiet-title action found that the deed purportedly transferring the Ocotillo Property from Mathew to Varadee and Aldona was a fraud. By its judgment, the court in that case found that Varadee had caused the false deed to be recorded "knowing, and having reason to know, that the document was forged, groundless, contained material misstatement or false claim, and was invalid." Varadee did not appeal that judgment, which is now final; nor did she move to vacate it.

¶15 Besides Mathew, Varadee is the only other beneficiary of Frank and Aldona's estates. To the extent that Mathew's lawsuit caused the estates to be reduced, therefore, only Varadee may complain. Although under normal circumstances a personal representative may breach his duty to the estate by suing in his personal capacity to invalidate the estate's interest in property, equity will not allow Varadee to complain that Mathew breached his duty to the estate by asking the court to invalidate her attempted fraud. As Mathew noted in his response to the petition for removal, "[t]he stated basis for the requested removal is Varadee's own fraud."

¶16 Varadee appears to argue, however, that a letter and a pair of data tables she presented to the superior court in this case show that Mathew deeded the Ocotillo Property to her and Aldona while Aldona was alive. When Varadee questioned Mathew

about these documents at the hearing, Mathew admitted he drafted them, but explained they were among numerous documents created before Frank and Aldona died in an attempt to reach agreement on how their estates would be distributed. He said the documents therefore were hypothetical and did not prove Varadee actually had received any ownership interest in the property. The first table's designation of "future ownership" in the column listing Varadee's name supports this characterization. In denying Varadee's motion to remove Mathew, the superior court appeared to reject Varadee's argument and accept Mathew's explanation. In the absence of clear error, we will not disturb its factual findings. *In re Estate of Newman*, 219 Ariz. 260, 265, ¶ 13, 196 P.3d 863, 868 (App. 2008).

**C. Alleged Violation of Court Orders.**

¶17 Varadee also argues the superior court erred by denying her petition because Mathew violated the court's orders by failing to include the Ocotillo Property in the estate's inventory and by failing to deposit other estate property in a restricted account. Under A.R.S. § 14-3611, a personal representative may be removed if the petitioner shows the personal representative has "disregarded an order of the court." A.R.S. § 14-3611(B)(3).

¶18 The court ordered Mathew to "prepare an inventory or list of the decedent's probate assets and their values as of the



date of death" pursuant to A.R.S. § 14-3706. See A.R.S. § 14-3706 (West 2012) (personal representative's duty of inventory and appraisal). Because the court in the quiet-title action found that the deed and the purported transfer were fraudulent, the superior court in this case concluded that the Ocotillo Property was never part of the estate. It found the property "shouldn't have been there to begin with." We agree with the superior court's reasoning. The judgment quieting title was entered before Mathew filed the inventory. Because the judgment established that the Ocotillo Property was not part of the estate, Mathew did not violate the court's order by omitting it from the inventory.

¶19 The superior court also ordered that "[a]ll bonds/stocks and accounts shall be placed in a restricted account (in excess of \$100,000.00)." At the hearing, Varadee seemed to assert that Mathew violated the order by merely restricting a pre-existing American Mutual account rather than establishing a new restricted account.

¶20 On appeal, we accept the superior court's factual findings unless they are clearly erroneous. *In re Estate of Newman*, 219 Ariz. at 265, ¶ 13, 196 P.3d at 868. The superior court found Mathew complied with its order by restricting the existing account and that the circumstances of the estate did

not require that he establish a new account. We agree with the superior court's conclusion.

**D. Discovery Issues.**

¶21 Finally, Varadee argues the superior court erred by not allowing her pretrial discovery. We review the superior court's ruling on a discovery motion for abuse of discretion. *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, 518, ¶ 41, 144 P.3d 519, 532 (App. 2006).

¶22 Although Varadee's brief fails to identify which documents she unsuccessfully requested or how she was prejudiced by her asserted failure to receive them, we construe her argument to refer to her "Ammended [sic] Request for Production of Document to Mathew Dunaskiss." The superior court ruled that Varadee was entitled to four of the items in her request, but denied her request for the other items. Varadee has not provided the transcript of the hearing on her discovery request. The minute entry reflected that one of the documents was provided to Varadee in open court that day. Shortly thereafter, Mathew filed a notice of compliance with the court's order for expedited production, detailing and providing the court with copies of the rest of the documents provided to Varadee.

¶23 At the hearing on the petition to remove Mathew as personal representative, Varadee argued that Mathew did not adequately comply with the court's order to provide copies of

all maintenance records for each property in the estate because he only provided a list of all the expenses the estate paid to maintain the properties. Mathew's attorney explained that there were no other maintenance records to be produced and that Mathew had provided records detailing all expenses paid on the properties. The superior court reviewed the records provided to Varadee and ruled Mathew had complied with its order.

¶24 Mathew provided a detailed accounting of all money spent from the estate to maintain the properties. There is no indication that the court abused its discretion in its ruling.

**E. Attorney's Fees on Appeal.**

¶25 Mathew requests his attorney's fees on appeal pursuant to Arizona Rule of Civil Appellate Procedure 25. Rule 25 permits the appellate court to award reasonable attorney's fees if an appeal "is frivolous or taken solely for the purpose of delay." These sanctions are imposed for "the discouragement of like conduct in the future." ARCAP 25. An appeal is frivolous "when it is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit." *Ariz. Tax Research Ass'n v. Dep't of Revenue*, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (1989) (quoting *In re Marriage of Flaherty*, 646 P.2d 179, 187 (Cal. 1982)).

¶26 We grant the request for sanctions. The arguments Varadee makes on appeal are frivolous and unsupported by any reasonable legal theory. Mathew asks us to order the superior court to impose an award of attorney's fees as a set-off against Varadee's portion of the estate after the final distribution order. Although we grant the request for fees, we defer to the superior court the question of how Varadee must satisfy the award.

**CONCLUSION**

¶27 For the foregoing reasons, we affirm the superior court's denial of Varadee's petition to remove Mathew as personal representative. Contingent on his compliance with Arizona Rule of Civil Appellate Procedure 21, Mathew is awarded his attorney's fees and costs of appeal in an amount to be determined.

/s/  
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/  
PATRICIA K. NORRIS, Presiding Judge

/s/  
JON W. THOMPSON, Judge