DIVISION ONE
FILED: 4/9/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of:	)	1 CA-CV 12-0326
	)	
SYLVIA M.H. LEVERING,	)	DEPARTMENT A
	)	
Deceased.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
JOHN MACMULLIN,	)	
	)	
Petitioner/Appellant,	)	
	)	
v.	)	
	)	
DON CHILDERS, as Special Administrator; MARION L. HUBBARD, conservator (now deceased),	)	
	)	
Respondents/Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. PB1995-001647; PB2003-004924

The Honorable David O. Cunanan, Judge

AFFIRMED

John MacMullin — Phoenix
Petitioner/Appellant *In Propria Persona*

Law Office of Scott E. Boehm, P.C. Phoenix
by Scott E. Boehm

and

Hadley, Poach & Anderson, P.C. Peoria
by William G. Poach, Jr.
Attorneys for Respondents/Appellees

S W A N N, Judge

¶1 This dispute arises from protracted proceedings involving the conservatorship and probate of the estate of Sylvia M. H. Levering, of which John MacMullin is a devisee. MacMullin appeals from the probate court's ruling determining that neither the Special Administrator nor his counsel acted in bad faith by erroneously asserting that MacMullin, rather than the estate, was accountable for certain fees and costs awarded in a previous appeal. MacMullin contends that the probate court improperly appointed a discovery master for the dispute, that the discovery master abused his discretion by denying discovery of attorney files and by refusing to consider a reply that MacMullin filed, and that the probate court's finding of no bad faith was not supported by the facts. We disagree with all of MacMullin's contentions, and therefore affirm.

FACTS AND PROCEDURAL HISTORY

I. APPELLATE FEE AND COST AWARDS

¶2 In June 2007, by memorandum decision in 1 CA-CV 06-0333, this court largely affirmed the probate court in an appeal

by which MacMullin, as the sole appellant, challenged an award of fees and costs to the Conservator. Related to that decision, in August 2007, this court entered an order "awarding Appellee attorney's fees in the amount of $13,065.36 and costs in the amount of $183.86." This award of appellate fees and costs was invalid, however, because MacMullin had filed for Chapter 13 bankruptcy before its entry. Accordingly, once the bankruptcy stay was lifted, the Conservator moved to reinstate the award. In July 2008, after holding a telephonic hearing, this court entered an order "reinstating the court's order dated August 20, 2007, against the Estate for Appellee's attorney's [fees] in the amount of $13,065.36 and $183.86 in costs."

II. PETITION FOR FINAL SETTLEMENT OF THE ESTATE

¶3 Almost two years later, in March 2011, the Special Administrator, Don Childers, filed a petition in the probate court requesting final settlement and distribution of the estate. The petition asserted that MacMullin had filed three appeals, all of the appeals had been resolved in favor of the estate, and attorney's fees and costs had been awarded against MacMullin in two of the appeals, including 1 CA-CV 06-0333. The Special Administrator argued that the amounts of the appellate fee and cost awards should be offset against MacMullin's share of the estate, and attached the August 2007 order from 1 CA-CV 06-0333. The July 2008 order, however, was not attached.

¶4 MacMullin filed an objection to that portion of the petition that sought to charge the fees and costs from 1 CA-CV 06-0333 against his share of the estate. Attaching a copy of the July 2008 order, MacMullin argued that that order clearly stated that the fees and costs were to be awarded "against the Estate."

¶5 In June 2011, the probate court held oral argument on the Special Administrator's petition and MacMullin's objection. At oral argument, the Special Administrator contended that the logical conclusion to be drawn from the award in 1 CA-CV 06-0333 was that the fees and costs were awarded against the appellant, MacMullin. MacMullin contended that the parties had argued in the Court of Appeals about whether the fees and costs should be applied against him, and that the court's July 2008 order specifically concluded that the fees and costs were to be awarded against the estate.

¶6 The probate court found that it was appropriate to assess the award against MacMullin, explaining:

> It doesn't make sense to the Court that under that particular scenario, in essence, the Court of Appeals would have awarded fees against the estate, which would have been paid by the same party that was, the same party that was prevailing. It doesn't make sense, logical sense that they would do that within that context.

Accordingly, the probate court entered an order approving the Special Administrator's final account.

III. SPECIAL ACTION

¶7 MacMullin promptly filed a petition for special action in this court, arguing, *inter alia*, that the probate court's order violated the June 2008 order. In a July 2011 decision order, this court accepted jurisdiction and granted relief to MacMullin regarding the 1 CA-CV 06-0333 award,[1] concluding that the July 2008 order assessed fees and costs against the estate and not against MacMullin.

IV. SECOND PETITION FOR FINAL SETTLEMENT OF THE ESTATE

¶8 After the decision order issued, the Special Administrator again filed a petition in probate court for the final settlement and distribution of the estate. The petition included a request under A.R.S. § 14-3720 for an award of $7,962.89 in attorney's fees and expenses incurred between July 1, 2010, and July 31, 2011. The requested amount included fees and costs incurred in asserting the first petition for settlement and in defending against MacMullin's special action.

¶9 MacMullin objected to the fees and costs incurred in asserting the previous petition, responding to the previous

[1] MacMullin had also asserted in the special action that the fees and costs awarded in another of his appeals, 1 CA-CV 06-0675, were wrongly assessed against him. This court denied relief on that claim.

objection, and defending the special action. MacMullin argued that the Special Administrator's counsel, William G. Poach, Jr., did not act in good faith or for the benefit of the estate, as required by A.R.S. § 14-3720, when he attempted to impose the fees and costs awarded in 1 CA-CV 06-0333 against MacMullin's share of the estate. MacMullin argued that Poach sought to impose the fees against him despite actual knowledge of the proceedings in this court and the July 2008 order assessing the fees against the estate. MacMullin further argued that Poach and Peter Williams, counsel for the Conservator, had not been honest in the proceedings before the probate court concerning their knowledge of the prior appellate proceedings and orders.

¶10 The court set an evidentiary hearing on MacMullin's objection. In the course of seeking a possible continuance of the hearing, MacMullin sent an e-mail to Poach stating: "ok, as to documents I want all documents from you and Peter Williams, privileged or otherwise, mentioning the $13,000+ fees in Court of Appeals order 1 CA-CV 06-0333." MacMullin then filed a motion that requested: a continuance, a subpoena that would require Williams to produce all documents mentioning the fees awarded in 1 CA-CV 06-0333, and an order that would require the Special Administrator and Poach to produce all documents mentioning those fees. MacMullin argued that his discovery request was directly relevant to the issue of bad faith,

alleging that Poach and Williams had lied to the probate court and the Court of Appeals, and had "failed to disclose . . . the fact that [MacMullin] was not obligated for the fees and costs at issue in that [July 2008] order."

¶11 In November 2011, the probate court held a brief telephonic status conference with MacMullin, Poach, and Williams, at which the parties discussed the pending discovery requests. Because the parties disputed both the appropriate scope of discovery, and whether or not the requested information was privileged, the court appointed the Honorable Robert D. Myers (Ret.) as discovery master.

A. Proceedings Before Discovery Master

¶12 MacMullin submitted an "Overview of Issues" to the discovery master. He contended that Poach and Williams knew that the Court of Appeals had decided in July 2008 that he was not responsible for the fees, and that they were dishonest about this fact during the June 2011 oral argument to the probate court on the original petition for settlement. MacMullin further argued that during the telephonic hearing before the Court of Appeals on his special action, Williams, in response to a direct question by the Honorable Daniel Barker, had lied about his knowledge of the earlier appellate orders. MacMullin explained that it was his objective to obtain testimony from Judge Barker at the evidentiary hearing, and that the goal of

his discovery requests was to prove that Poach filed his fee application in bad faith.

¶13 In response to MacMullin's arguments, Williams argued that he attended the June 2011 oral argument regarding a matter other than the fees issue. He further explained that he recalled having told Judge Barker at the telephonic hearing on the special action that he could not remember events that had happened years earlier.

¶14 After reviewing the parties' briefing, the discovery master heard oral argument in December 2011. At oral argument, MacMullin alleged bad faith based on Poach and Williams' failure to provide the July 2008 order to the probate court and their failure to advise the probate court that the Court of Appeals did not intend to assess the fees against him. MacMullin contended that both Poach and Williams knew that the fees had not been imposed against him because they were present at the telephonic hearing that preceded the July 2008 order. He asserted that the purpose of the discovery was to obtain any documents from Poach and Williams "concerning that order and what their knowledge is of that order that's not privileged," and to have any allegedly privileged documents reviewed in camera to determine whether they could be released.

¶15 Poach argued that he had not appeared at the hearing that preceded the July 2008 order because that matter did not involve his client.

¶16 Williams denied that he had made misrepresentations to the probate court. He also explained that when he had moved to reinstate the fee award in the Court of Appeals, he had requested that the fees be awarded against MacMullin because, in his view, it made no sense to ask the court to affirm fees in the conservatorship. Williams recalled a contentious hearing before the Court of Appeals, with the court taking positions he disagreed with. He argued that no additional discovery was needed and that the probate court could decide the bad faith issue based on the information already available.

¶17 After oral argument, the discovery master denied MacMullin's discovery request without explanation. MacMullin filed an objection, arguing, *inter alia*, that the probate court's order appointing the discovery master ordered the discovery master to determine "how to proceed," and did not authorize him to deny discovery.

B. Evidentiary Hearing Before Probate Court

¶18 In January 2012, the probate court held an evidentiary hearing on MacMullin's objections to the Special Administrator's fees and the discovery master's order.

¶19 At the hearing, MacMullin testified that the Special Administrator had asked the probate court to impose the fees from 1 CA-CV 06-0333 against his share of the estate without ever mentioning the July 2008 order assessing the fees and costs against the estate. MacMullin further testified that at the hearing on the special action, Williams had answered a question by saying "I don't remember" in such a way that MacMullin felt it important to obtain the tape recording he believed Williams had made of the hearing.

¶20 Poach testified that he did not participate in the hearing that preceded the July 2008 order. Poach also stated his belief that despite the language of that order, MacMullin was the party against whom the fees were to be assessed because he was the party who took the appeal and lost. Poach testified that he did not tell the probate court that the Court of Appeals had entered an order charging fees to the estate because the Court of Appeals order indicated that it was reinstating the earlier order, and he therefore believed that the fees were owed by MacMullin. He testified that until the ruling on the special action, he did not know that MacMullin was not responsible for

the fees. Poach further argued that MacMullin himself had believed the fees had been awarded against him because he had listed them in his bankruptcy proceeding.

¶21 Williams testified that when he asked the Court of Appeals to reinstate the award of fees against MacMullin, he believed that the original award had imposed such fees. Williams also opined that the July 2008 order was not clear, because he believed the initial order was against MacMullin and its reinstatement would then also be against MacMullin. Williams also denied having made a recording of the special action argument.

¶22 The probate court questioned why and under what authority the Court of Appeals had awarded fees against a prevailing-party estate. The court found that the language of the August 2007 Court of Appeals order "awarding Appellee attorney's fees" appeared to be awarding attorney's fees to the prevailing party, which was the estate, and against the only appellant, MacMullin, and concluded that:

> Given the language in the order(s) and the procedural history of this case, the Court does not find that the Special Administrator or his attorney acted in bad faith in pursuing attorney fees and costs in the appellate action from [MacMullin]. While the Court of Appeals may have ended up ordering the estate to pay these amounts, the language of the orders, especially the order dated August 20, 2007, could be

> logically construed to require [MacMullin] to pay these amounts.

The court overruled MacMullin's objection to the petition for final dissolution of the estate, and granted the petition.

¶23 MacMullin appealed from the unsigned minute entry. This court suspended the appeal to allow MacMullin to obtain a signed final order. The probate court entered a signed order and the appeal was reinstated.

JURISDICTION

¶24 The Special Administrator argues that we lack jurisdiction over this appeal because MacMullin filed a notice of appeal from an unsigned minute entry and did not file an amended notice of appeal from the signed order. Generally, a notice of appeal filed before entry of a final, signed judgment "is 'ineffective' and a nullity." *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13, 253 P.3d 624, 626 (2011). But pursuant to *Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981), a limited exception exists where the notice of appeal is filed after the court has made a final decision but before it has entered a final signed judgment. *Craig*, 227 Ariz. at 107, ¶ 13, 253 P.3d at 626. In such circumstances, where no decision of the court remains and entry of the signed order is ministerial, we have jurisdiction over the appeal once the final judgment is entered. *Id*.

¶25 The unsigned minute entry from which MacMullin appealed was a final determination of the Special Administrator's petition for final settlement of the estate and MacMullin's objection thereto. Because nothing remained to be decided, the entry of a signed order was ministerial and the premature notice of appeal fell within the *Barassi* exception. This court properly had jurisdiction, under A.R.S. § 12-2101(A)(9), once the signed order was entered.

DISCUSSION

I. MACMULLIN WAIVED ANY OBJECTION TO THE APPOINTMENT OF THE DISCOVERY MASTER.

¶26 MacMullin first contends that the probate court failed to comply with the rules governing the discovery master's appointment. We review the court's appointment of a special master for an abuse of discretion. *See Chartone, Inc. v. Bernini*, 207 Ariz. 162, 168, ¶ 20, 83 P.3d 1103, 1109 (App. 2004).

¶27 MacMullin contends that the probate court violated Ariz. R. Civ. P. 53(a)(1)(C), which provides that a court "may appoint a master only to . . . address pretrial and post-trial matters that cannot be addressed effectively and timely by an available superior court judge in the county in which the court sits." He contends that the appointment of the discovery master was unnecessary because the probate court could have and should

have handled the discovery issues itself, and did not appoint an available Maricopa County Superior Court judge. MacMullin also contends that the court failed to comply with Ariz. R. Civ. P. 53(b), specifically noting only that portion of that rule requiring the court to give the parties notice and an opportunity to be heard before appointing a master.

¶28 The record reflects that MacMullin did not raise these arguments in the probate court. We will not consider arguments raised for the first time on appeal. *Scottsdale Princess P'ship v. Maricopa Cnty.*, 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995). The reason for this rule is simple -- the trial court should be afforded an opportunity to consider objections to its ruling and correct any error before appellate intervention is necessary. Though it appears that the appointment of a discovery master may not have been warranted, we have no transcript of the proceedings that led to the appointment and must therefore assume that the transcript would support the probate court's decision. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶29 MacMullin further contends that based on the order appointing the discovery master, he expected to be able to take discovery and was unfairly denied that opportunity. We conclude that an order disallowing discovery was properly within the scope of the authority granted to the discovery master.

II. THE DISCOVERY MASTER DID NOT ABUSE HIS DISCRETION BY DENYING THE DISCOVERY MACMULLIN REQUESTED.

¶30 MacMullin next contends that the discovery master and the probate court erred by denying discovery related to his allegation that Poach acted in bad faith by trying to charge MacMullin rather than the estate with the fees and costs awarded in 1 CA-CV 06-0333. A trial court has broad discretion in discovery matters, and we will not disturb a decision regarding discovery absent an abuse of that discretion. *Brown v. Superior Court (Cont'l Nat'l Assurance, Inc.)*, 137 Ariz. 327, 331, 670 P.2d 725, 729 (1983).

¶31 Under A.R.S. § 14-3720, any personal representative that "defends or prosecutes any proceeding in good faith, whether successful or not" is entitled to receive his necessary expenses, including attorney's fees, from the estate. "Good faith" is determined objectively from all of the circumstances surrounding the conduct. *In re Estate of Gordon*, 207 Ariz. 401, 405-06, ¶¶ 23-24, 87 P.3d 89, 93-94 (App. 2004). The personal representative's state of mind can be inferred from the circumstances and from any subjective expressions regarding the motive in conducting the litigation. *Id*. at 406, ¶ 24, 87 P.3d at 94. Whether the litigation was for the benefit of the estate is one circumstance to consider in determining the motive of the litigation. *Id*. at ¶ 25.

¶32 MacMullin relies on *Gordon* to argue that he was entitled to discovery to determine Poach's motive and state of mind. But while *Gordon* discusses the need for an evidentiary inquiry in resolving a dispute over "good faith," it does not hold that a party is entitled to discovery to a greater extent than any civil litigant.

¶33 Parties are entitled to discovery on any non-privileged matter that is relevant to the subject matter in the pending action, and reasonably calculated to lead to the discovery of admissible evidence. Ariz. R. Civ. P. 26(b)(1)(A). However, items prepared in anticipation of litigation are discoverable "only upon a showing that the party seeking discovery has substantial need of the materials" and is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Ariz. R. Civ. P. 26(b)(3). And even if such a showing is made, the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation." *Id.* Material involving mental impressions is discoverable only when those impressions, conclusions, opinions, or legal theories are directly at issue. *Brown*, 137 Ariz. at 338, 670 P.2d at 736.

¶34 Moreover, communications between an attorney and client are privileged unless they are used to perpetrate a crime

or fraud. *Kline v. Kline*, 221 Ariz. 564, 573, ¶ 34, 212 P.3d 902, 911 (App. 2009). A party seeking disclosure under the "crime-fraud" exception may obtain in camera review of the communications upon presenting "evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the . . . exception's applicability." *Lund v. Myers*, 230 Ariz. 445, 454, ¶ 29, 286 P.3d 789, 798 (App. 2012) (citation omitted).

¶35 MacMullin sought disclosure of all documents in Poach's and Williams' records pertaining to the fee award in 1 CA-CV 06-0333. He does not dispute that the material sought may be privileged, but argues generally that documents might still be discoverable under the crime-fraud exception and should have been reviewed in camera to determine whether privilege applied. He does not, however, argue that he satisfied the requirement of submitting evidence that would support a reasonable belief that there might be evidence of crime or fraud in those records. Nor does he appear to argue that he has shown a substantial need for the records and the inability without undue hardship to obtain the information through other means. Further, he does not dispute that the materials he sought constitute work product and concern Poach's and Williams' mental impressions, strategies, and opinions. And MacMullin does not argue that those mental impressions are directly at issue. Instead, he appears to rely

on *Brown* to support his contention that he is entitled to the records.

¶36 In *Brown*, the plaintiff brought a bad faith action alleging that an insurance company had intentionally denied his claim without a reasonable basis. 137 Ariz. at 336, 670 P.2d at 734. Noting that such a bad faith action could be proved only by showing how the company processed the claim and why it acted as it did, the court found that the plaintiff had a substantial need for the company's records regarding the claim. *Id*. The court further found that the reasons why the company denied the claim were central to the bad faith action and directly at issue, and therefore concluded that materials dealing with the mental impressions of the company's representatives were discoverable. *Id*. at 337, 670 P.2d at 735.

¶37 While this case, like *Brown*, involves questions of bad faith, the facts here are distinguishable from those in *Brown*. "[B]ad faith is a question of reasonableness under the circumstances." *Id*. at 336, 670 P.2d at 734. The issue here is whether Poach acted in good faith by persisting in his attempts to make MacMullin responsible for the award in 1 CA-CV 06-0333 despite the language of the July 2008 order.

¶38 Unlike in *Brown*, MacMullin's claim is based on information already within his possession. The critical issue is whether Poach reasonably believed that the fees had been

awarded against MacMullin and whether he acted reasonably in attempting to hold MacMullin responsible for them. The relevant orders and the legal positions and arguments made by Poach are all part of the record. MacMullin has not shown he has a substantial need for the work product of the attorneys.[2] The discovery master did not abuse his discretion by denying the discovery MacMullin requested.

III. THE DISCOVERY MASTER DID NOT ABUSE HIS DISCRETION BY REFUSING TO CONSIDER A REPLY THAT MACMULLIN FILED IN SUPPORT OF HIS "OVERVIEW OF ISSUES" BRIEFING.

¶39 MacMullin next contends that the discovery master abused his discretion by failing to consider a reply that MacMullin filed in support of his Overview of Issues. The discovery master refused to consider MacMullin's reply on the grounds that it had not been authorized. MacMullin asserts he was entitled to file a reply pursuant to Ariz. R. Civ. P. 7.1(a).

¶40 Rule 7.1 pertains to civil motion practice. The discovery master was appointed to resolve the discovery dispute;

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[2] MacMullin contends that he is entitled to discovery requiring Williams to provide a tape he made of the hearing that preceded the July 2008 order, because he believes that at that hearing the Court of Appeals stated that it never intended to hold him responsible for the fees. The only information suggesting that a tape of the hearing exists is MacMullin's contention that Williams appeared with a transcript at the hearing before the discovery master. But Williams testified under oath that he did not tape the hearing, and Poach testified that he was not present.

a motion and response had already been filed with the probate court prior to his appointment. The Overview of Issues that MacMullin filed was not a motion, but a statement of the facts and circumstances giving rise to the dispute to be decided. MacMullin provides no authority that Rule 7.1 applies in these circumstances, and we find none. Moreover, even if the reply should have been considered, MacMullin has not explained how he was prejudiced by the discovery master's decision, given that he still had the opportunity to present his case at oral argument before the discovery master.

¶41 MacMullin further contends that the discovery master made prejudicial, biased, and unfair remarks. We disagree. In explaining his decision not to consider the reply, the discovery master simply asked MacMullin not to file anything without authorization and to "[f]ollow the rules." These remarks were informative and instructive, not prejudicial, biased, or unfair.

IV. THE PROBATE COURT DID NOT ERR BY FINDING THAT POACH HAD ACTED IN GOOD FAITH.

¶42 MacMullin finally contends that the probate court erred by finding that Poach had acted in good faith.[3] Good faith is measured objectively, taking into account any subjective expressions of the estate representative whose actions are at issue. *Gordon*, 207 Ariz. at 406, ¶ 24, 87 P.3d at 94. We view the evidence and reasonable inferences from the evidence in the light most favorable to the prevailing party, and must affirm if any evidence supports the probate court's ruling. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992). We are bound by the probate court's findings of fact unless they are shown to be clearly erroneous, and we defer to its determinations of witness credibility. *In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5, 12 P.3d 1203, 1205 (App. 2000).

[3] As a related matter, MacMullin contends that the probate court erred by sustaining a hearsay objection by Poach concerning statements made by the Court of Appeals at the telephonic hearing that preceded the July 2008 order. He acknowledges, however, that the information excluded based on that objection was actually included in the exhibits he submitted. MacMullin therefore could not have been prejudiced by the court's evidentiary ruling, and we will not consider his claim of error further. *See Gasiorowski v. Hose*, 182 Ariz. 376, 382, 897 P.2d 678, 684 (App. 1994) (even if the exclusion of evidence is improper, court of appeals will not reverse if admission of the evidence would likely not have changed the result).

¶43 MacMullin outlines the procedural history of the case and the evidence from his perspective, and contends that the probate court must have ignored the evidence. MacMullin appears to be asking this court to reconsider and reweigh the evidence to reach a different conclusion. We do not reweigh the evidence. *See In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999). We reject MacMullin's contention that the probate court improperly considered "the procedural history of this case" in reaching its decision. The procedural history that the court described, including the events from the entry of the August 2007 order to this court's decision on the special action, was unquestionably relevant to the disputed issue -- and covers precisely the same period that MacMullin describes when complaining that the court ignored the facts.

¶44 The probate court focused on the language of the orders to conclude that the orders, particularly the initial order of August 2007 awarding fees to the appellee, could be construed as imposing fees on MacMullin. The probate court's reading of the August 2007 order was not unreasonable. We also recognize that, in "reinstating" the August 2007 order "against the Estate," the July 2008 order was perhaps not as clear as it could have been. In addition, we infer that the court, in finding that Poach acted in good faith, found his testimony about his interpretation of the orders to be credible.

¶45 The probate court's decision is supported by the record. The court did not err by finding that Poach acted in good faith.

CONCLUSION

¶46 We affirm the probate court's ruling for the reasons set forth above. The Special Administrator requests an award of attorney's fees on appeal against MacMullin under A.R.S. §§ 12-341.01(C), 12-349, 14-1105, and ARCAP 25. In our discretion, we deny the Special Administrator's request.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
MARK R. MORAN, Judge*

*The Honorable Mark R. Moran, Judge of the Coconino County Superior Court, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (2003).