

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

---

In the Matter of the Guardianship and Conservatorship of:

DOROTHY RUTH KISTLER, Deceased.

---

RICHARD JAMES KISTLER, et al., *Petitioners/Appellees*,

*v.*

THOMAS KISTLER, *Respondent/Appellant*.

---

DOROTHY RUTH KISTLER, *Ward/Appellee*.

No. 1 CA-CV 17-0010  
FILED 5-31-2018

---

Appeal from the Superior Court in Maricopa County  
No. PB2015-001121  
The Honorable Andrew G. Klein, Judge

**AFFIRMED**

---

COUNSEL

Kile & Kupiszewski Law Firm LLC, Scottsdale  
By Jennifer L. Kupiszewski, Emily B. Kile, Christina M. Stoneking,  
Stephen J. P. Kupiszewski  
*Counsel for Petitioners/Appellees*

---

**MEMORANDUM DECISION**

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Randall M. Howe joined.

---

**C A T T A N I**, Judge:

¶1 Thomas (“Tom”) Kistler appeals from the probate court’s order interpreting a settlement agreement that he entered into with his mother and brothers. For reasons that follow, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 Dorothy and Charles Kistler had four sons: Tom, Gerald, Richard, and Lawrence. Dorothy and Charles separated in 2005, and Charles passed away nine years later.

¶3 After Charles’s death, Richard petitioned the probate court to appoint a guardian and conservator for Dorothy, asserting that she suffered from dementia. Simultaneously, Gerald and Richard filed a complaint against Tom alleging that he had financially exploited Dorothy and Charles in violation of Arizona’s vulnerable adult protections. *See* Ariz. Rev. Stat. (“A.R.S.”) § 46-456. The complaint specifically asserted that, among other things, Tom had loaned Dorothy’s money to his sons (one for a business and the other for a house) and that neither loan was for Dorothy’s benefit.

¶4 The probate court appointed a temporary and limited special conservator to review the history and status of Dorothy’s accounts, assets, and medical records. After the special conservator prepared a report describing questionable financial transactions between Dorothy, Tom, and Tom’s sons, the court appointed a licensed fiduciary as Dorothy’s guardian and conservator.

¶5 All parties then participated in a settlement conference and reached an agreement, which they placed on the record in accordance with Arizona Rule of Civil Procedure 80(d). The parties agreed that the remaining balances on the loans to Tom’s sons (owed to Dorothy) totaled

KISTLER, et al. v. KISTLER  
Decision of the Court

\$247,000, and that Tom would assume “these balances, including interest and payments thereon.” The aggregate value of the loans would be deducted from Tom’s share of his father’s estate (\$290,397.75), leaving him to inherit only \$43,397.97 and “nothing further from Charles’[s] estate.” The agreement was silent as to the disposition of the \$247,000 deducted from Tom’s share of the estate, specifically whether it would be repaid to Dorothy (and whether one quarter of it would thereby pass to Tom through Dorothy’s estate). The agreement also provided, however, that Tom would keep Dorothy’s house (then valued at \$250,000) upon her death, and that he would only be required to pay his siblings half of the value of the house (rather than three quarters of the value that he otherwise would have been required to pay). The remainder of Dorothy’s estate would be divided equally among the four siblings upon her death.

¶6 Five months later, Tom moved for clarification of the settlement agreement regarding the disposition of the \$247,000 deducted from Tom’s share of his father’s estate. Tom urged that the probate court direct payment of \$247,000 from Charles’s estate to Dorothy to compensate her for the loans she transferred to Tom, and that he be included in an equal distribution of the monies upon Dorothy’s death.

¶7 The probate court issued a ruling interpreting the agreement and directed that (1) Charles’s estate transfer \$247,000 to Dorothy, and (2) Tom would be barred from inheriting any portion of the \$247,000 (or whatever residue remained after Dorothy’s death). Dorothy passed away shortly after the court issued its ruling.

¶8 Tom appealed from the ruling interpreting the agreement, and we have jurisdiction under A.R.S. § 12-2101(A)(9).

## DISCUSSION

¶9 The construction of a settlement agreement is “governed by general contract principles.” *Emmons v. Superior Court*, 192 Ariz. 509, 512, ¶ 14 (App. 1998). Contract construction presents a question of law that we review de novo. *See Hanson v. Tempe Life Care Vill., Inc.*, 216 Ariz. 26, 27, ¶ 7 (App. 2007).

### I. Construction of the Agreement.

¶10 Tom argues that the agreement unambiguously directed an equal division of Dorothy’s estate between all four brothers, including the \$247,000 transferred from Charles’s estate, and that the probate court erred by concluding otherwise. But—as the probate court recognized—the

KISTLER, et al. v. KISTLER  
Decision of the Court

agreement was ambiguous insofar as it did not address whether the \$247,000 would be returned to Dorothy based on Tom's assumption of the loans. See *J.D. Land Co. v. Killian*, 158 Ariz. 210, 212 (App. 1988).

¶11 When the parties to a contract "have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." Restatement (Second) of Contracts ("Restatement") § 204 (1981); see *AROK Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291, 298 (App. 1993) (relying on § 204 of the Restatement). Under this approach, terms omitted from a contract "may be supplied by the court," even if they are "essential." *AROK*, 174 Ariz. at 298.

¶12 Here, the probate court, by the parties' express agreement, "retain[ed] jurisdiction to resolve any disputes that may arise out of the settlement," and it had authority under § 204 of the Restatement and *AROK* to supply the term missing from the agreement governing disposition of the \$247,000. After considering the overall context of the agreement among the parties, the court ordered that \$247,000 be transferred from Charles's estate to Dorothy, and clarified that the agreement precluded Tom from inheriting any portion of the \$247,000 at the time of Dorothy's death.

¶13 Having reviewed de novo the settlement conference transcript as well as the agreement as reflected in the resulting minute entry, we conclude that the probate court supplied terms that were "reasonable in the circumstances." See Restatement § 204. The agreement expressly stated that Tom would "assume" the loans to his sons. Because Tom was assuming loans owed to Dorothy, it logically follows that Dorothy would be repaid the loan amount.

¶14 The court also reasonably clarified that Tom would not receive a share of the \$247,000 as it passed through Dorothy's estate. The overall agreement contemplated that, upon Dorothy's death, Tom would receive more than his proportionate share of the value of Dorothy's other significant asset (the house). The court's determination that Tom would not inherit any portion of the \$247,000 ensured that the overall distribution of Charles's and Dorothy's combined estates would be equalized among the four brothers. In this context, the court reasonably clarified that Tom could not inherit any of the \$247,000 through Dorothy's estate. See *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 291, ¶ 18 (App. 2010) ("[E]ach part of a contract must be read together, to bring harmony, if possible, between all parts of the writing.") (quotation omitted).

KISTLER, et al. v. KISTLER  
Decision of the Court

¶15 Because the probate court supplied terms that were reasonable under the circumstances, we affirm the court’s construction of the agreement.

**II. Settlement Positions.**

¶16 Tom next argues that the probate court erred by considering the parties’ statements at the settlement conference when later construing the terms of the agreement. At the conference addressing Tom’s motion for clarification, the court asked the parties to explain their positions regarding how Dorothy was to be compensated for the loans assumed by Tom, and the parties (including Tom) referenced positions they had taken during the settlement conference. The court thereafter considered these “comments made on the record” in reaching its decision.

¶17 Tom argues that, under A.R.S. § 12-2238(B), statements made during the settlement conference were confidential and inadmissible, so the probate court erred by considering such statements to construe the agreement. But Tom never objected to the parties recounting their settlement positions during the conference on his motion for clarification, and even expressly invited the probate court to elicit from Lawrence “what he recall[ed]” about the settlement conference. Accordingly, Tom has waived this argument by failing to raise this objection before the probate court. *See Cedic Dev. Corp. v. Sibole*, 25 Ariz. App. 185, 187 (App. 1975).

**III. Findings of Fact.**

¶18 Tom argues that the probate court abused its discretion by finding facts as part of its ruling even though he did not request—and the court did not hold—an evidentiary hearing, and by relying on the special conservator’s allegedly inadmissible report. We need not determine whether the probate court’s reliance on certain “factors” that it deemed “instructive” was proper, however, because in conducting our de novo review, we have focused on the parties’ agreement as memorialized in the settlement conference transcript and the resulting minute entry. Based on that review, we conclude that the court’s addition of missing terms was consistent with the express terms of the agreement and reasonable under the circumstances. *See* Restatement § 204; *Gesina v. Gen. Elec. Co.*, 162 Ariz. 39, 45 (App. 1988).

KISTLER, et al. v. KISTLER  
Decision of the Court

**CONCLUSION**

¶19 For the foregoing reasons, we affirm the probate court's construction of the agreement. Richard and Gerald request attorneys' fees on appeal pursuant to A.R.S. § 12-341.01. In an exercise of our discretion, we decline to award fees on appeal. We award Richard and Gerald their costs upon compliance with ARCAP 21.



AMY M. WOOD • Clerk of the Court  
FILED: AA