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

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In the Estate of:

SUSAN RUTH CHALKER, *Decedent*.

LEONARD KARP, et al., *Petitioners/Appellants/Cross-Appellees*,

*v.*

DAVID G. CHALKER, et al., *Respondents/Appellees/Cross-Appellants*.

No. 1 CA-CV 17-0109
FILED 9-20-2018

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Appeal from the Superior Court in Pima County
No. PB 20050931
The Honorable Charles V. Harrington, Judge

**AFFIRMED**

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COUNSEL

Waterfall Economidis Caldwell Hanshaw & Villamana, P.C., Tucson
By Corey B. Larson, Jill D. Wiley
*Counsel for Petitioners/Appellants/Cross-Appellees*

Rusing Lopez & Lizardi, PLLC, Tucson
By Michael J. S. Rusing, Rebecca K. O'Brien
*Counsel for Respondents/Appellees/Cross-Appellants*

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**MEMORANDUM DECISION**

Judge Jennifer B. Campbell delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Paul J. McMurdie joined.

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**C A M P B E L L**, Judge:

**¶1** Attorneys Leonard Karp and Annette Everlove ("Petitioners") appeal from the superior court's ruling awarding them fees in quantum meruit, arguing the court erred by concluding that Respondent timely disallowed their claim against their late client's estate.[1] The Estate of Susan Chalker—with her son David Chalker acting as Personal Representative ("Respondent")—cross-appeals, arguing that the award in quantum meruit must be vacated on multiple grounds. For the following reasons, we affirm the decision of the superior court regarding these issues.

## BACKGROUND

### I. The Initial 1994 Divorce Proceeding and the Subsequent State and Federal Litigation

**¶2** Petitioners represented Susan Chalker in her divorce proceeding from Robert Catz, filed in an Arizona superior court in November 1994. At the time the divorce was filed, Robert Catz held investment accounts at various financial institutions, including Fidelity Investments, TIAA-CREF, and Waterhouse Securities. In December 1994, Robert Catz re-titled the three Fidelity accounts (the "Fidelity Accounts") in the names of his two sons, Shawn and Jason Catz.

**¶3** During the divorce action, Robert Catz refused to participate in discovery. As a sanction, the superior court entered a default decree of dissolution of marriage in March 1995. The decree awarded Chalker all right, title, and interest in a number of investment accounts, including the accounts held by Fidelity, TIAA-CREF, and Waterhouse. Subsequently, Robert, Shawn, and Jason Catz proceeded to file three separate lawsuits in

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[1] In a separate opinion, *Karp, et al. v. Chalker, et al.*, 1 CA-CV 17-0109 (Ariz. App. September 20, 2018), filed simultaneously with this memorandum decision, *see* Ariz. R. Sup. Ct. 111(h), we address Petitioners' remaining arguments.

the federal courts in Ohio and Tennessee against Petitioners, Chalker, Fidelity, Waterhouse, and TIAA-CREF attacking the validity of the Arizona decree. That litigation would linger in federal court until finally reaching resolution in 2013, *see infra* ¶¶ 19-20.

**¶4** In August 1995, Chalker filed a petition for an order to show cause in the divorce action in Arizona, asking that the Fidelity Accounts be transferred to her pursuant to the divorce decree. Fidelity opposed the petition, arguing it had not transferred the accounts because of the Catzes' collateral federal lawsuits and because the accounts were titled in the names of Shawn and Jason Catz, non-parties to the divorce action. In 1997, the superior court ordered Fidelity to transfer the three investment accounts to Chalker, but Fidelity appealed. In 1998, this court held that the joinder of Shawn and Jason Catz to the divorce proceeding was necessary before the ownership of the accounts could be resolved and directed the divorce court to modify the March 1995 divorce decree accordingly.

**¶5** In April 1999, the superior court entered an amended *nunc pro tunc* decree of dissolution, awarding Chalker "as her sole and separate property all . . . right, title and interest in and to" the Fidelity Accounts. The decree provided that, "[a]s between [Chalker] and [Robert Catz], [Chalker] is, and shall be, the owner of all of the interest . . . in the three [Fidelity Accounts]. Upon resolution, whether by consent or [by] adjudication, as against Shawn Catz and Jason Catz that the accounts ostensibly in their names were, in fact, owned by [Robert Catz] or the marital community of [Chalker] and [Robert Catz], the ownership of these Fidelity Investment Trust accounts shall also be changed to reflect [Chalker]'s interest in said accounts."

**¶6** In December 1999, Petitioners filed a motion to join Shawn and Jason Catz to the Arizona divorce action to "resolve the ownership of the [Fidelity Accounts]," requesting an order requiring them to appear and demonstrate what legitimate interest, if any, they had in the Fidelity Accounts.

**¶7** In July 2000, through her counsel in Tennessee, Chalker entered into a stand-still agreement with Fidelity (the "Stand-still Agreement"). Through the Stand-still Agreement, Chalker and Fidelity acknowledged that, because of the "multiple legal actions in which Chalker and the Catzes have asserted various claims to the Accounts," Fidelity was "concerned about the risk of multiple and conflicting court orders" and the risk of "multiple liability and sanctions." Therefore, they agreed that until the various actions were finally resolved, Chalker would not "seek to

compel Fidelity to transfer control, ownership, or registration of any of the Accounts . . . to her" and Fidelity would maintain the accounts and "not allow the Catzes to transfer, exchange, redeem, or dissipate" them.

**¶8** In early 2001, after further litigation, Petitioners were prepared to file a motion for entry of default judgment to terminate Shawn and Jason Catz's interests in the Fidelity Accounts, but Petitioners did not do so because they believed doing so would violate the terms of the Stand-still Agreement.

## II. Petitioners' Representation of Chalker Throughout the Litigation

**¶9** Petitioners began jointly representing Chalker in the divorce action in 1994 pursuant to an Amended Fee Agreement, signed by Chalker and dated November 30, 1994. The Amended Fee Agreement required a retainer, identified standard billing rates, and instituted an interest rate of ten percent per annum on "[a]ccounts not paid in full for more than 30 days."

**¶10** In February 1996, Petitioners obtained an order compelling the distribution of the TIAA-CREF accounts to Chalker in a total amount of approximately $500,000. However, Chalker used those funds to pay only a small fraction of the approximately $150,000 in attorney fees and costs she owed to Petitioners at that time.

**¶11** In early 1999, Chalker still had not paid the entirety of her legal bills and owed Petitioners approximately $273,000. In February 1999, at Chalker's suggestion, Petitioner Karp sent Chalker a new proposed fee arrangement to supersede their prior Amended Fee Agreement, calling for 50 percent of the Fidelity Accounts to be paid to Petitioners once the Accounts were recovered. At the time of Karp's proposal, the Fidelity Accounts were worth only about $230,000 in total, but Chalker assured Petitioners in a May 1999 letter that she was "reasonably confident the funds will rise to their July 1998 value of approximately $400,000 and [she] would be willing to ride out the Asian crisis, if you so desire."

**¶12** In June 1999, Petitioner Karp and Chalker signed the new fee arrangement ("Retainer/Fee Agreement"). The new Retainer/Fee Agreement provided in part:

> [Chalker] wishes to continue to employ and retain the services of [Petitioners] . . . and further wishes to make provision for payment of attorneys' fees and costs incurred by

her and/or expended on her behalf, to date and hereafter incurred . . . .

1. [Petitioners] have represented [Chalker] in various matters . . . including an action on dissolution of marriage between [Chalker] and her former husband, Robert Steven Catz . . . resulting in a Decree of Dissolution of Marriage on or about March 14, 1995.

. . .

3. [Chalker] and [Petitioners] acknowledge and agree that the fees and costs subject to this Agreement were and are incurred for services rendered to [Chalker] for various matters which may be related to issues raised as a result of the action on dissolution of marriage above-referenced, but are not a part of that proceeding and include representing, advising and/or counseling Client in various post-dissolution civil matters as well as representing [Chalker] in various appeals related to those post-dissolution civil matters and/or arising out of the action on dissolution of marriage following entry of judgment.

4. Client agrees to pay to [Petitioners] FIFTY PERCENT (50%) of all sums and/or assets recovered by, or upon [Chalker]'s behalf, arising out of the determination of ownership interest in and to the following accounts: **Fidelity Latin American Fund, Fidelity Southeast Asia Fund, Fidelity U.S. Government Reserves; and/or any other accounts held by Fidelity Trust and/or any of its related entities.**

. . .

10. Client further acknowledges and agrees that in the event no recovery is obtained in this matter, the Attorneys fees incurred on behalf of Client in all matters other than that referenced in ¶4 above shall remain due and owing in full.

11. Client acknowledges and agrees that this Agreement provides for service through hearing or trial only and does not provide for services rendered for appeal from any orders of the court pertaining to the matter referenced in ¶4 above (or any other matter) or for any subsequent proceedings for enforcement of any judgment and/or orders hereafter

> obtained, nor to any advice, consultation or proceedings subsequent to any judgment or order obtained. Client acknowledges that based upon the litigious conduct of her former husband, Robert Steven Catz, as demonstrated to date, in the event she obtains a judgment or order as contemplated herein, an appeal therefrom is anticipated.

## III. Chalker's Death and Petitioners' Claim on her Estate

**¶13** Susan Chalker died in July 2005. In August 2005, an informal probate was opened in an Arizona superior court. A notice to creditors was mailed to Petitioners on August 4, 2005, stating: "All persons having claims against the estate are required to present their claims within four months after the date of the first publication of this Notice or the claims will be forever barred."

**¶14** On September 30, 2005, Petitioners filed their claim against the Estate ("Claim"). They claimed the Estate was indebted to them in "an amount equal to 50% of all sums and/or assets recovered by the Estate of Susan Ruth Chalker, or upon the Estate's behalf arising out of the determination of ownership interest in and to any of the Fidelity accounts," "an amount equal to 50% of any attorney's fees awarded to and recovered by the Estate" in the related actions, costs of $46,406.94, and any additional costs they had incurred on Chalker's behalf since May 1999, as yet undetermined.

**¶15** David Sobel, the attorney for the Estate, informed Petitioners by a letter dated November 15 that the Estate was "prepared to file an objection to the claim, but rather than proceed with litigation regarding your claim, we would like to enter into an agreement with you regarding the tolling of the objection pending the outcome of the pending litigation filed by Robert Catz in which Don Wilson is representing [Everlove], Mr. Karp, and Susan Chalker."

**¶16** Sobel prepared a tolling agreement, which was signed by Petitioners on January 11, 2006 ("Tolling Agreement"). The Tolling Agreement provided:

> 1. Annette Everlove and Leonard Karp have filed a claim in the above-captioned matter.
>
> 2. The notice to creditors was mailed on August 4, 2005.

> 3. The time for original presentation of claims expires on December 4, 2005.
>
> 4. The personal representative has sixty (60) days from December 4, 2005 to file a notice of allowance or disallowance of claims.
>
> 5. The parties agree to extend the personal representative's deadline to file a notice of allowance or disallowance of the Everlove and Karp claim until the following case has been resolved in the United States Federal District Court for the District of Arizona, Case No. CV-03-91-TUC-FRZ.

The superior court approved the Tolling Agreement on January 23, 2006.

## IV. The Estate Takes Up Its Own Defense, Prevails, and Subsequently Disallows Petitioners' Claim

**¶17** As noted above, *supra* ¶ 3, beginning in 1995, the Catzes filed several actions attacking the original Arizona divorce decree in various federal courts, alleging Petitioners had obtained the divorce decree fraudulently or in violation of their due process rights. The lawsuits were eventually consolidated by the Sixth Circuit, but multiple issues were remanded to the Tennessee district court[2] and subsequently transferred to the Arizona district court in 2003. Ultimately, the Ninth Circuit dismissed the Catzes' claims against Petitioners in 2009[3] and against Chalker, Fidelity, Waterhouse, and TIAA-CREF in 2013.[4]

**¶18** Throughout the iterations of federal litigation, Chalker and subsequently her Estate were defended as "ride along" defendants by Petitioners' errors & omissions insurance carrier. Following Petitioners' dismissal from the litigation by the Ninth Circuit in May 2009, the Estate was advised that the insurance carrier would no longer defend the Estate in the federal lawsuit.

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[2] *See Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998), *overruled in part by, Coles v. Granville,* 448 F.3d 853, 859 n.1 (6th Cir. 2006*) as recognized in Chevalier v. Estate of Barnhart*, 803 F.3d 789, 795 (6th Cir. 2015).

[3] *See Catz v. Chalker*, No. 06-17183 (9th Cir. May 13, 2009) (mem. decision).

[4] *See Catz v. Chalker*, No. 11-16285 (9th Cir. Mar. 20, 2013) (mem. decision).

**¶19** In August 2009, Robert and Shawn Catz filed a second amended complaint against Chalker, Fidelity, Waterhouse, and TIAA-CREF in the Arizona district court, challenging the divorce decree on due process grounds and seeking a declaration that the decree and all derivative orders were void. In April 2011, the Arizona district court granted the Estate's motion for summary judgment and dismissed the Catz suit. The Catzes appealed to the Ninth Circuit, but the Ninth Circuit affirmed the district court's dismissal order in March 2013 and remanded the issue of the attorney fees owed by the Catzes to Petitioners back to the Arizona district court. The Ninth Circuit issued its formal mandate on April 12, 2013.

**¶20** The deadline for the Catzes to file a petition for certiorari to the United States Supreme Court was July 12, 2013, but they did not do so. Pursuant to a settlement agreement, the Arizona district court finally dismissed the case with prejudice and ordered the Catzes to pay attorney fees to Petitioners and Respondent on November 14, 2013, bringing the federal litigation to an end after almost two decades.

**¶21** The Estate filed its notice of disallowance of Petitioners' Claim on November 27, 2013. Petitioners filed their petition for allowance of their Claim on January 15, 2014.

**¶22** In March 2014, the Estate filed a petition to finally recover the Fidelity Accounts. In July 2014, the superior court issued an order determining that the Fidelity Accounts "are the sole and separate property of The Chalker Estate and that Shawn Catz and Jason Catz have no ownership interest in the Fidelity Accounts." In August 2014, the Fidelity Accounts were transferred to the Estate and liquidated, yielding a total value of over $1.2 million.

**¶23** Both parties moved for summary judgment on Petitioners' Claim against the Estate in 2014, but the superior court denied both motions. The parties asked the court to reconsider their cross-motions for summary judgment, but the court upheld its denial in 2015, concluding that there existed multiple, genuine issues of fact, including at least: the intent of the parties with regard to the Tolling Agreement, specifically the "resolved" language; the intent of the parties with regard to the 1999 Retainer/Fee Agreement and its scope; the reasonableness of the efforts undertaken by Petitioners pursuant to the Retainer/Fee Agreement, and when those efforts were undertaken; and the reasonableness of the requested attorney fees in light of Petitioners' efforts.

**¶24** The superior court held a bench trial in January 2016. The court entered its ruling on March 14, 2016, which included the following determinations, among others: (1) Respondent's November 27, 2013 disallowance of Petitioners' Claim was timely; (2) the 1999 Retainer/Fee Agreement was not in violation of Ethical Rules 1.5 and 1.8; (3) the Retainer/Fee Agreement had obligated Petitioners themselves to secure a final determination for Chalker on the ownership of the Fidelity Accounts and Petitioners had not done so, disentitling them to payment under its terms; (4) Petitioners were each entitled to an award in quantum meruit for services rendered, but not to receive interest on those awards. The superior court awarded Petitioner Karp approximately $126,000 and Petitioner Everlove approximately $134,000 for their services under the theory of quantum meruit relating to attorney fees. The superior court later modified these amounts to account for payments already made by Chalker and other factors, arriving at a total figure of over $238,000 in attorney fees and costs to be paid to Petitioners.

## DISCUSSION

**¶25** On appeal, Petitioners argue that—pursuant to the parties' Tolling Agreement—the superior court erred in concluding Respondent's November 27, 2013 notice of disallowance was timely. On cross-appeal, Respondent presents multiple arguments regarding why the Petitioners' quantum meruit award must be vacated: (1) Paragraph 10 of the 1999 Retainer/Fee Agreement governed Petitioners' recovery, limiting it to $45,000 with no interest; (2) Petitioners' claim for unjust enrichment was barred by the non-claim statute; (3) Petitioners are precluded from recovering in quantum meruit because they "abandoned" the Estate and "seek an excessive fee"; and (4) the superior court erred by failing to offset the awards for the cost borne by Chalker and then the Estate as a result of Petitioners' failure to address the fraudulent transfer of the Fidelity Accounts and timely join Shawn and Jason Catz to the divorce action.

**¶26** "Whether contract language is reasonably susceptible to more than one interpretation so that extrinsic evidence is admissible is a question of law for the court, but the intent of the parties is a question of fact left to the fact finder." *Chopin v. Chopin*, 224 Ariz. 425, 428, ¶ 7 (App. 2010) (citations omitted). We review the trial court's conclusions of law de novo, *Sholes v. Fernando*, 228 Ariz. 455, 458, ¶ 6 (App. 2011), and review its factual findings for clear error, *State v. Herrera*, 183 Ariz. 642, 648 (App. 1995); *see also In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5 (App. 2000) (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). A

factual finding "is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Kocher v. Dep't of Revenue of State of Ariz.*, 206 Ariz. 480, 482, ¶ 9 (App. 2003). "We defer to the judge with respect to any factual findings explicitly or implicitly made, affirming them so long as they are supported by reasonable evidence." *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254, ¶ 10 (2003) (citation omitted).

## I. Petitioners' Appeal

**¶27** Arizona Revised Statutes ("A.R.S.") section 14-3806(A) provides, in pertinent part: "Failure of the personal representative to mail notice to a claimant of action on his claim for sixty days after the time for original presentation of the claim has expired has the effect of a notice of allowance."

**¶28** Here, the Petitioners submitted their Claim to the Estate on September 30, 2005. *Supra* ¶ 14. The expiration date for the original presentation of claims was December 4, 2005, *supra* ¶ 16, from which point—under A.R.S. § 14-3806(A)—the Estate would have had 60 days to mail Petitioners a notice of disallowance of their Claim. However, because of the continuing litigation over the fate of the Fidelity Accounts, the parties agreed in writing to toll the "deadline" for the personal representative to take action on Petitioners' Claim "until the following case has been **resolved** in the United States Federal District Court for the District of Arizona, **Case No. CV-03-91-TUC-FRZ**" (emphasis added). *Supra* ¶ 16. Respondent filed its notice of disallowance of Petitioners' Claim on November 27, 2013. *Supra* ¶ 21.

**¶29** Petitioners argue the last possible day the tolled 60-day period could have begun was July 12, 2013—the deadline by which the Catzes had to file a petition for certiorari to the U.S. Supreme Court and declined to do so, *supra* ¶ 20, making the November 27 notice of disallowance untimely. Therefore, Petitioners argue, their Claim should be deemed allowed in full. Respondents, however, argue the superior court correctly found their notice of disallowance timely because the tolled 60-day period did not begin until November 14, 2013—the day the Arizona district court dismissed the entire case with prejudice for the final time, *supra* ¶ 20.

**¶30** Before trial, the superior court held that:

> [T]he tolling agreement's language concerning the case being "resolved" in federal court is susceptible to more than one interpretation. A genuine issue of fact exists concerning the

> intent of the parties with regard to the tolling agreement, and specifically the "resolved" language. . . . The accurate resolution of these issues would be served by the development of a more substantial record at trial.

**¶31** In its ruling after trial, the superior court found that:

> Petitioners and David Sobel, then spokesperson for the Estate, had agreed that the disallowance of the claim be no later than 60 days after the resolution of the Federal action. This was shown by the trial testimony of David Sobel and the deposition testimony of Leonard Karp. . . . The Court finds and concludes that the Arizona Federal litigation was resolved on November 14, 2013, the date that the U.S. District Court for the District of Arizona dismissed the entire case with prejudice for the final time.

**¶32** Substantial, reasonable evidence supports the superior court's findings. At trial, David Sobel—the attorney representing the Estate as of the fall of 2005 and the author of the parties' Tolling Agreement—testified to his understanding that the case would be resolved "once there's a final nonappealable order." He also projected, in a 2011 status report to the court, that "the finality would likely be in 2013," although he anticipated this "because we assumed that Mr. Catz would appeal any order to the U.S. Supreme Court." Sobel further testified that "[t]he final nonappealable order would be the triggering event to the 60 days," and that "there was a final nonappealable order in November 2013," referring to the Judgment of Dismissal in a Civil Case issued by the district court on November 14, 2013, which "dismissed [the case CV 03-0091-TUC-FRZ] with prejudice."

**¶33** Because the superior court's findings were supported by substantial, reasonable evidence, they were not clearly erroneous. We therefore uphold the superior court's ruling that Respondent's notice of disallowance of Petitioners' Claim was timely.

**¶34** Furthermore, as "an alternative finding and conclusion," the superior court also found that:

> [E]ven in the absence of an agreed-upon time following the resolution of the case to disallow the claim, the attorney for the Personal Representative filed and served the Notice of Disallowance of Claim in a reasonable time after the U.S. District Court's dismissal with prejudice; and the Court

> would read a "reasonable time" term into the Tolling Agreement.

*See Zancanaro v. Cross*, 85 Ariz 394, 398 (1959) ("Where no time is specified within which a promise must be performed, a reasonable time is implied. Reasonable time is ordinarily a question of fact." (citations omitted)). Due to the drawn-out, complex, and contentious nature of the attendant federal litigation, the superior court had substantial, reasonable evidence to find and conclude that Respondent filed its notice of disallowance within a reasonable time.[5]

## II. Respondent's Cross-Appeal

### A. Paragraph 10 of the 1999 Retainer/Fee Agreement

**¶35** Respondent argues that Petitioners' award in quantum meruit must be vacated, asserting that Paragraph 10 of the Retainer/Fee Agreement governs Petitioners' recovery entirely. According to Respondent, "the evidence at trial was undisputed that Paragraph 10 of the [Retainer/Fee Agreement] governed Petitioners' recovery," requiring the superior court to instead enter judgment in favor of Petitioners for the original outstanding fees incurred in the "basic divorce" action, which Respondent contends were approximately $45,000.

**¶36** Respondent raised its argument concerning Paragraph 10 of the Retainer/Fee Agreement in its trial brief to the superior court. The superior court did not specifically address the issue of Paragraph 10's meaning and applicability in its ruling, but rather noted that "[t]here are several other claims or issues asserted in this matter. All other claims or issues not specifically ruled on in this Under Advisement Ruling are denied." Once extrinsic evidence has been admitted to resolve ambiguity in contract language, "the intent of the parties is a question of fact left to the fact finder," *Chopin*, 224 Ariz. at 428, ¶ 7 (citation omitted), and we review the superior court's factual findings for clear error, *Herrera*, 183 Ariz. at 648.

**¶37** Paragraph 10 of the Retainer/Fee Agreement provided:

> Client further acknowledges and agrees that in the event no recovery is obtained in this matter, the Attorneys fees

[5] We address the remaining issues surrounding the denial of interest on the quantum meruit award in our separately-issued opinion.

> incurred on behalf of Client in all matters other than that referenced in ¶4 above shall remain due and owing in full.

**¶38** At trial, both Petitioners testified to their understanding of the meaning of Paragraph 10 as they had discussed it with Susan Chalker. Karp testified:

> Q. . . . In your understanding of Paragraph 10 there, was that in the event that you did not recover the Fidelity accounts, that she, Chalker, would only owe for the initial divorce work you had done, correct?
>
> . . .
>
> A. That was part of the 1999 fee agreement.
>
> Q. And your recollection that it was around $45,000 between you and [Everlove], correct?
>
> A. That's an approximate amount. It was between 45 and 48, I think.
>
> Q. So under Paragraph 10, you agreed if there was no recovery, your fees were limited to the 45,000 in fees incurred in the basic divorce?
>
> Th[at's] your deposition testimony right here?
>
> A. I think that's how I answered, yes.
>
> Q. So this agreement was how you were going to get paid, but you had to obtain the Fidelity accounts in order for there to be a fund available to pay you, correct?
>
> A. You keep saying "you had to recover." That's not what the agreement says. If anyone recovered for or on behalf of Susan Chalker, we were to get 50 percent of those fees.

**¶39** Similarly, Everlove testified:

> Q. . . . Paragraph 10 is arguably a little confusing, but, in any event, Paragraph 10 was something that Susan Chalker objected to and that you sat down, and maybe with [Karp] too -- I don't know -- and clarified it with her what it meant?

A. She asked for an explanation as to that paragraph; you're correct.

. . .

Q. Okay. So you guys said that you explained to her that this meant the only fees that you were referring to here in 10 is that was unpaid from the basic divorce case, which was right around $45,000, correct?

A. I don't know that we provided her the number, but the explanation was that she would owe us the underlying divorce fees that [Karp] and I incurred.

**¶40** The Petitioners' expert, Mark Harrison, also testified at trial concerning a letter he had written to the State Bar of Arizona on behalf of Petitioners concerning Paragraph 10 of the Retainer/Fee Agreement. The letter stated:

> <u>If the Fidelity Accounts Were Never Recovered Under the 1999 Fee Agreement</u>:
>
> - Ms. Chalker would have owed only $46,406.94 in accrued costs and outside attorneys' fees, any costs (including outside attorneys' fees) incurred after the date of the 1999 Fee Agreement, and that portion of outstanding attorneys' fees associated with the divorce action (approximately $45,000.00-$48,000.00), *without* interest accruing at 10% per annum on any of these amounts.

Mr. Harrison then testified at trial:

Q. …[Y]ou talk about various scenarios that could occur, and the last one of those is, "If the Fidelity accounts were never recovered under the 1999 fee agreement."

Do you see that?

A. Yes.

Q. And this is covered by Paragraphs 9 and 10 of the contingent fee agreement, correct? And that indicates that she

> would have owed only 46,000 and change and accrued costs and 45- to 48,000 in fees, right?
>
> A. Yes.
>
> Q. And it also indicates she would have obtained continued representation by respondents until the recovery ultimately failed, right?
>
> A.Yes.
>
> . . .
>
> Q. Is that your understanding?
>
> . . .
>
> A. It doesn't say they have to be -- the lawyer -- if the issue was resolved in another jurisdiction -- I think it wasn't resolved in another jurisdiction -- they might not be the lawyers literally involved in doing the work that resulted in the recovery of the accounts. I don't think that's required by the agreement.

**¶41** Respondent's characterization of the evidence concerning the parties' intent regarding Paragraph 10 as "undisputed" is inaccurate, as is its contention that Paragraph 10 presents an issue of law to be reviewed de novo. The superior court heard extrinsic evidence regarding the interpretation of the ambiguous Retainer/Fee Agreement, and made findings and conclusions accordingly. While the superior court did not explicitly rule on the issue of Paragraph 10's applicability, it had substantial testimonial evidence to rule as it implicitly did: That Paragraph 10 only governed a scenario in which the Fidelity fees were *never* recovered by the Estate, and that it therefore had no bearing on Petitioners' fee arrangement after the Fidelity Accounts actually were recovered. *See Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 506, ¶ 9 (App. 2005) ("[W]e must presume that the trial court found every fact necessary to support its judgment and we will affirm if any reasonable construction of the evidence justifies it." (citations omitted)). Paragraph 10 would have governed the Petitioners' fees if the Fidelity Accounts had never been recovered by the Estate, but they were. The superior court therefore properly proceeded to the issue of whether Petitioners otherwise deserved to recover 50 percent of the Fidelity Accounts under the remaining terms of the Retainer/Fee Agreement, and we cannot say the court clearly erred by doing so.

### B. The Non-Claim Statute's Applicability to Petitioners' Unjust Enrichment Claim

**¶42** The parties do not dispute that Petitioners timely presented a Claim for attorney fees and costs pursuant to the 1999 Retainer/Fee Agreement to the Estate in writing on September 30, 2005. Respondent points out, however, that Petitioners' initial Claim included nothing about an award of fees in quantum meruit. Respondent contends that such an award is time-barred and must be vacated. In other words, Respondent argues, "Petitioners only made one claim" against the Estate in the form of 50 percent of the Fidelity Accounts under the Retainer/Fee Agreement, and that is therefore the only avenue through which they were permitted to recover any of their attorney fees. As the facts concerning the contents and timing of Petitioners' Claim are undisputed, we review the superior court's legal conclusions de novo. *See SAL Leasing, Inc. v. State ex rel. Napolitano*, 198 Ariz. 434, 438, ¶ 13 (App. 2000).

**¶43** A.R.S. §§ 14-3803(A), (A)(2), and 14-3801(B) provide that, for creditors who are given actual notice, "[a]ll claims against a decedent's estate that arose before the death of the decedent . . . whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort or other legal basis" must be presented "within four months after the published notice . . . or within sixty days after the mailing or other delivery of the notice, whichever is later, or be forever barred."

**¶44** A.R.S. § 14-3804(1) further provides that, to successfully present a claim against a decedent's estate, claimants may:

> [D]eliver or mail to the personal representative a written statement of the claim indicating **its basis**, the name and address of the claimant and the amount claimed. The claim is deemed presented on receipt of the written statement of claim by the personal representative. If a claim is not yet due, the date when it will become due shall be stated. **If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated**. . . . **Failure to describe correctly** . . . **the nature of any uncertainty**, and the due date of a claim not yet due, **does not invalidate the presentation made**.

(Emphases added.). A.R.S § 14-3804 requires a creditor's claim to be submitted in writing for a number of reasons: "[F]acilitating and expediting the speedy and orderly administration of the estate"; creating "certainty as to whether a claim has actually been made"; allowing a court to determine

if a claim was "sufficient to fulfill its purpose" of "giving notice of the debt to the personal representative and showing a plain intention to look to the estate for payment"; giving "the representative a reasonable opportunity to examine into, and determine for himself, the justness and validity of the demand"; and providing "certainty as to the terms and status of the debt." *Matter of Estate of Barry*, 184 Ariz. 506, 509-10 (App. 1996) (citations omitted).

**¶45** While the written statement must identify the basis of the claim and the amount sought, A.R.S. § 14-3804(1), it "need not specify in detail the legal theory underpinning it." *Estate of Page v. Litzenburg*, 177 Ariz. 84, 89 (App. 1993). That is, "a creditor's claim need not be drafted with precision and completeness, but need only state such facts as will inform the personal representative of the amount of the demand." *Id*. at 89 (citation omitted). In *Estate of Page*, this court—adopting the reasoning of the Utah court of appeals in interpreting its almost identical provision under the Utah code—held that it is "inconsequential that the claim did not articulate particular legal theories upon which payment of the claim would be most appropriately premised." *Id*. at 89-90. A claim is adequate if it "acquaints a personal representative with a specific amount allegedly due and the general nature of the obligation," giving the personal representative "all the information . . . needed to investigate and decide whether to pay the claim, dispute it or settle it." *Id*. at 90.

**¶46** Here, Petitioners' Claim was sufficient to fulfill the purpose of informing the personal representative of the general nature of the claim and giving the Estate a chance to dispute that claim. No party contests that the Estate was notified that Petitioners were seeking to collect their attorney fees and costs from the Estate—i.e., the basis of the claim—regardless of the legal theory ultimately underpinning their award (particularly since Petitioners actually recovered much less in quantum meruit than what they were seeking under the terms of the Retainer/Fee Agreement). Adopting Respondent's arguments would essentially require those making claims against estates to list every possible legal avenue through which they might possibly recover, and we decline to do so.

### C. Petitioners' Allegedly Abandoned the Estate and Sought an Excessive Fee

**¶47** Respondent argues the award in quantum meruit "must be vacated because the law prohibits a lawyer from recovering in quantum meruit where they abandoned their client or seek an excessive fee." Respondent claims Petitioners "abandoned" the Estate by "fail[ing] to step up and defend the Estate when it lost its representation in 2009," referring

to the Ninth Circuit dismissing Petitioners from the federal litigation and the subsequent loss of representation from Petitioners' errors & omissions insurer, *supra* ¶ 18. Respondent also contends that Petitioners seeking 50 percent of the Fidelity Accounts is unreasonable and "outrageous." We disagree.

**¶48** The superior court found and concluded that the 1999 Retainer/Fee Agreement did oblige Petitioners to personally secure a final determination as to the ownership of the Fidelity Accounts and recover the accounts themselves, and that Petitioners did not do so. The court further found and concluded that "[i]n addition or in the alternative, the Agreement terminated in 2005 at the death of Susan Chalker. The funds had not been collected by the Attorneys for Ms. Chalker before her death and the Petitioners did not enter into a fee agreement with the Estate. The Petitioners are not entitled to payment under the terms of the Agreement."

**¶49** In other words, the superior court did not find that Petitioners "abandoned" the Estate, nor that they failed to take any meaningful action to resolve the ownership dispute over the Fidelity Accounts. Rather, the court concluded Petitioners did not completely fulfill the obligations necessary to recover attorney fees under the terms of the Retainer/Fee Agreement. Once again, Respondent's contention that "[a]ny implicit finding that Petitioners did not abandon Chalker and her Estate was error" because the facts are "undisputed," is an inaccurate characterization of the available evidence. The superior court had reasonable evidence to conclude as it did: Petitioner Everlove testified at trial that Petitioners had no understanding that they were required, nor were they ever asked by the Estate, to assume representation of the Estate in the federal district court action against Catz after the Petitioners were dismissed. Indeed, such a situation would have required a "waiver of conflict or some other accommodation" because Petitioners had already filed their Claim against the Estate by that point. Accordingly, the superior court did not err in implicitly concluding that the Estate was never the Petitioners' direct client and was not "abandoned" by them.

**¶50** Furthermore, to the extent Respondent contends Petitioners should have taken further action to secure the Fidelity Accounts for Chalker before her death, Chalker had entered the Stand-still Agreement with Fidelity in 2000 in which she agreed "not to seek to compel Fidelity to transfer control, ownership, or registration of any of the Accounts . . . to her." Petitioner Everlove testified it was her understanding that the Stand-still Agreement limited the action Petitioners could take on Chalker's behalf: Obtaining a determination of the Catzes' lack of interest in the

Fidelity Accounts "would have triggered" the *nunc pro tunc* decree's provision requiring Fidelity to transfer title of the funds and therefore "put [Chalker] in violation of" the Stand-still Agreement. Everlove testified that Chalker was "part of [the] determination" to therefore refrain from proceeding with the entry of a default judgment in the divorce proceeding.

**¶51** Respondent also contends that Petitioners are seeking an excessive, unreasonable fee for their representation of Chalker. *See Matter of Swartz*, 141 Ariz. 266, 273 (1984) ("Excessive fees should not be charged . . . and clearly excessive fees will constitute grounds for disciplinary action . . . ."). Respondent argues that, because the superior court ultimately determined Petitioners deserved a total of approximately $196,000 in attorney fees, Petitioners' request to recover under the terms of the Retainer/Fee Agreement—a current value of over $600,000—is "outrageous."

**¶52** The "[p]ropriety of [an] initial fee arrangement" does not give a lawyer "carte blanche to charge the agreed percentage regardless of the circumstances which eventually develop," as a "contingent fee, proper when contracted for, may later turn out to be excessive." *Id*. at 273. However:

> [A] lawyer working on a contingent fee basis may receive a large fee without that fee being excessive. The fee may be much larger than that which the attorney would have received if he had made no agreement and sued for the reasonable value of his services. . . . Such disparity is inherent in the nature of a contingent fee and is, therefore, one of the circumstances to be considered. . . . [T]he share of the recovery to be paid the lawyer as a contingent fee is properly the product of a number of factors, including: 1) the degree of uncertainty or contingency with respect to liability, amount of damages which may be recovered, or the funds available from which to collect any judgment; 2) the difficulty of the case and the skill required to handle it; 3) the time expended in pursuing it; and, 4) the results obtained.

*Id*. at 273. The superior court made an implicit finding that Petitioners' request for 50 percent of the Fidelity Accounts was not unreasonable, and given the protracted and complicated nature of the case, as well as the risk that Petitioners would never receive payment for fees Chalker had already incurred or else not receive payment through many litigious years to come, we cannot say the superior court clearly erred in doing so.

### D. Offset to Petitioners' Quantum Meruit Award

**¶53** Respondent contends the superior court's quantum meruit analysis was flawed because it "failed to offset for the cost borne by the Estate to defend the federal litigation and obtain the Fidelity Accounts." It claims the superior court "clearly failed to consider the result obtained by ***Petitioner's efforts***, [emphasis in original] which were actually quite dismal," and the award must be offset by the "at least $205,000" the Estate incurred to defend the federal litigation and finally recover the Fidelity Accounts in August 2014. We disagree.

**¶54** "Quantum meruit is the measure of damages imposed when a party prevails on the equitable claim of unjust enrichment." *W. Corrections Grp., Inc. v. Tierney*, 208 Ariz. 583, 590, ¶ 27 (App. 2004) (citation omitted). A party seeking to recover such damages must prove that "(1) the other party was unjustly enriched at the expense of the claimant, (2) the claimant rendered services that benefitted the other party, and (3) the claimant conferred this benefit under circumstances that would render inequitable the other party's retention of the benefit without payment." *Id*. (citation omitted).

**¶55** The "well-known basic elements to be considered in determining the reasonable value of an attorney's services" when calculating an award in quantum meruit "may be classified under four general headings":

> (1) *the qualities of the advocate:* his ability, his training, education, experience, professional standing and skill; (2) *the character of the work to be done:* its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; [(3)] *the work actually performed by the lawyer:* the skill, time and attention given to the work; (4) *the result:* whether the attorney was successful and what benefits were derived.

*Schwartz v. Schwerin*, 85 Ariz. 242, 245-46 (1959) (citations omitted). "Furthermore, good judgment would dictate that each of these factors be given consideration by the trier of fact and that no one element should predominate or be given undue weight." *Id.*

**¶56** Respondent provides virtually no support for its contention that a court must provide an equitable offset of the attorney fees it later incurred to Petitioners' award in quantum meruit to comply with these

standards. The superior court awarded Petitioners their requested fees in quantum meruit based on services already and actually rendered between 1994 and 1999 on behalf of Chalker. The fact that Petitioners did not personally obtain the Fidelity Accounts for the Estate precluded them from recovering under the terms of the 1999 Retainer/Fee Agreement, but not from recovering any fees at all. As the superior court noted, it weighed the *Schwartz* factors. There was ample evidence to support the superior court's findings that the "attorneys spent a considerable amount of time representing Ms. Chalker in the divorce case between 1994 and 1999 when the agreement is signed," and that they "faced opposition on virtually every issue by Mr. Catz during that four-year time frame." Therefore, we cannot say the superior court clearly erred by not offsetting Petitioners' awards in quantum meruit.

## CONCLUSION

**¶57** For the foregoing reasons, we affirm the decision of the superior court regarding the aforementioned issues. Both parties request an award of attorney fees on appeal and cross-appeal under A.R.S. § 12-341.01; as the prevailing party, we award Petitioners their costs on appeal and cross-appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21, but, in our discretion, decline to award either party attorney fees.


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