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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 05-06-2010  
PHILIP G. URRY, CLERK  
BY: GH

In the Matter of the Estate of: ) 1 CA-CV 07-0559  
)  
JERRY M. WEBB, ) DEPARTMENT D  
)  
Deceased. ) **MEMORANDUM DECISION**  
)  
\_\_\_\_\_)  
DEBRA FERGERSON, a single woman, ) (Not for Publication -  
as Personal Representative of the ) Rule 28, Arizona Rules of  
Estate of JERRY M. WEBB, Deceased, ) Civil Appellate Procedure)  
and as Trustee of the JMW Family )  
Trust, dated January 4, 2000, )  
)  
Petitioner/Appellee, )  
)  
v. )  
)  
ANTHONY DEAN EVENSON, a single man )  
and personal representative of the )  
Veva Kinsey Estate, GREGORY BEST, )  
a single man, )  
)  
Respondents/Appellants.)  
\_\_\_\_\_)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2006-000591

The Honorable Benjamin E. Vatz, Judge

**AFFIRMED**

Carson Messinger Elliott Laughlin & Ragan, PLLC  
By Michael P. Anthony

Phoenix

Attorneys for Petitioner/Appellee

Bueler Jones, LLP

By Gordon S. Bueler

Attorneys for Respondent/Appellant

Chandler

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**T H O M P S O N, Judge**

¶1 Anthony Dean Evenson, in his capacity as personal representative of the estate of Veva Kinsey, and Gregory Best (collectively, appellants) appeal from the probate court's decision dismissing Evenson's objection to probate filed in the informal probate proceedings for the estate of Jerry M. Webb. Evenson and Best appeal from the court's award of attorneys' fees as sanctions. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 On August 2, 2003, Jerry M. Webb executed amendments to the JMW Family Trust. Those amendments provided: "The values of my estate to be used for the shelter, maintenance, education, and welfare of VEVA JEAN KINSEY." The remainder of the estate was to be distributed to Debra Fergerson and Webb's brother. Webb died on August 6, 2003. Prior to the amendment, the provisions of the trust conveyed the assets of the trust to Kinsey.

¶3 Debra Fergerson (the personal representative) was appointed personal representative of Webb's estate and filed an application for informal probate. Best filed a claim against

the estate claiming an interest in real property that had belonged to Webb. Best claimed to hold an option contract for the property signed by Veva Kinsey, deceased, and two quit claim deeds from Kinsey's son, Anthony Dean Evenson, conveying any interest he held in the real property to Best. The personal representative disallowed the claim on the grounds that Best had no standing to submit a claim and that Veva Kinsey had no right, title, or interest in the property and so conveyed no interest to Best.

¶4 Evenson, as the personal representative of Kinsey's estate, filed an objection to the probate of Webb's will and trust, asserting that Kinsey was an intended heir and beneficiary of Webb's estate and that Webb had not been competent to execute the amendments to the trust that gave her only a life estate.

¶5 In responding to the objection, the personal representative notified the court that the real property was the primary asset of the probate proceeding. She also informed the court that Best had filed a civil action against Webb's estate in CV2006-005503, claiming an interest in the real property on the basis of the option and quit claim deeds he allegedly obtained from Veva Kinsey and Evenson. The personal representative alleged that Evenson and Best were colluding to tie up title to the property based on Evenson's recording the

two quit claim deeds and Best's recording of two lis pendens. The personal representative also advised the court that a hearing had been set in the civil proceeding to determine Webb's competency when he executed the amendment to the trust.

¶16 The personal representative also filed a motion to strike Evenson's objection. She argued that Evenson lacked standing to object, having admitted that he had signed over any interest in the real property to Best and that he claimed no interest in any other property in the Webb estate.

¶17 Evenson argued that the amendment to Webb's trust was not valid because, when he executed it, Webb was under the influence of narcotic pain medication and was not of sound mind. He further contended that, under the unamended trust, Kinsey should have received the real property, that the personal representative caused Webb to amend the trust, and that as the sole heir of Kinsey's estate, Evenson stood to gain \$100,000 under the option contract with Best when he inherited the real property. Therefore, he argued, he had standing to object to the probate of Webb's will and trust.

¶18 After oral argument, the trial court found that Evenson had transferred any interest he had in the real property in Webb's estate, individually and as Kinsey's heir, to Best by the quit claim deeds and so had no standing to object to the probate with respect to the real property. The court also

found, however, that he did have standing to object with respect to any other assets in the Webb trust to which he or the Kinsey estate might be entitled. The court noted that whether Evenson or Kinsey were entitled to any assets under the Webb trust depended on whether Jerry Webb had the capacity to execute the amendments to the trust changing Kinsey's interest in the trust from a beneficiary of the property outright to a life estate. The court further noted that Judge Timothy Ryan had already taken under advisement in CV2006-005503 the very question of Jerry Webb's capacity to execute the amendment, and that the ruling on that question could be dispositive. The court stayed all further discovery until Judge Ryan's ruling.

¶19 Judge Ryan ruled in CV2006-005503 that Jerry Webb had testamentary capacity when he amended his trust to change the transfer of property to Kinsey from a complete conveyance of all property to conveyance of only a life estate. Judge Ryan concluded that Veva Kinsey had no legal ability to convey any interest in the property of Webb's estate.

¶10 The personal representative advised the court of Judge Ryan's ruling and submitted a proposed form of order declaring that Evenson had no standing to object to the probate of the estate of Jerry Webb. The personal representative pointed out that Judge Ryan's ruling was against Best, that Best had filed a claim against the estate in the probate action which had been

disallowed, and that Best had paid for Evenson to file an objection in the probate proceeding. The personal representative contended that Evenson acted at the behest of Best, raising the same issue regarding Webb's competence that Best had raised and was litigating in the civil proceeding. The personal representative argued that Best was in fact the real party in interest in Evenson's objection and that Best and Evenson prosecuted their claims in the probate action in bad faith given the proceedings before Judge Ryan and their failure to advise the probate court of those proceedings. The personal representative sought an award of attorneys' fees and sanctions against Evenson and Best pursuant to Arizona Revised Statutes (A.R.S.) sections 12-349(A)(1), (2), and (3), and -350, and Arizona Rules of Civil Procedure Rule 11 (Rule 11).

¶11 Evenson responded that Best was not subject to the court's jurisdiction and whether Best assisted the Kinsey estate in paying fees was not relevant and should not be part of the court's order. He further argued that Judge Ryan's decision was not a valid basis for entry of the order, contending that the personal representative had not demonstrated that the Kinsey estate was collaterally estopped from asserting its claims. With respect to the personal representative's request for fees and sanctions, Evenson argued that the court could not award fees against Best and Evenson individually because they were

non-parties, asserting that the Kinsey estate made the objection. He also argued that no statutory basis existed for an award of fees or sanctions.

¶12 The court entered an order granting the personal representative's motion to strike Evenson's objection and awarding attorneys' fees in the amount of \$10,928.50 and costs in the amount of \$207.50 pursuant to A.R.S. §§ 12-341, 12-349, and 12-350 and Rule 11, against Evenson and Best, jointly and severally. The court found that Best submitted himself to the jurisdiction of the court by filing a notice of claim against Webb's estate, which was disallowed and not challenged; that Evenson's objection to probate was financed entirely by Best, who was the plaintiff in CV2006-005503; that Evenson's objection raised the same factual and legal issue that was being litigated by Best in the civil action and sought the same result as Best's disallowed notice of claim; that Evenson had no standing individually or as personal representative of the Kinsey estate to assert any interest in the real property of Webb's estate based on Evenson's having assigned any interest in the real property to Best and had no standing with respect to any other property given the valid amendment to Webb's trust; and that the actions of Best and Evenson warranted sanctions pursuant to A.R.S. §§ 12-349(A)(1), (2), and (3) and Rule 11. The court further noted:

Under the factors listed in A.R.S. § 12-350, fees, damages, costs and sanctions are appropriate in view of the obvious collaboration between Gregory Best and Anthony Evenson to simultaneously raise the same issues in two courts and asserting repeated claims in this probate proceeding concerning the same subject matter, thereby needlessly and inappropriately adding to the expenses inflicted on the Estate of Jerry M. Webb. The Court notes for the record that Gregory Best was present in the court room on both occasions when Anthony Evenson's Objection was addressed, and that Anthony Evenson testified in his deposition that his attorney's fees and other legal expenses were being paid by Gregory Best. Anthony Evenson's counsel did not dispute these facts or the related arguments when they were presented to the Court.

The court made the following specific findings under A.R.S. § 12-350:

1. Evenson and Best continued to pursue their claim that Jerry Webb lacked capacity without regard to the pendency and adverse determination on the same issue in the case brought by Best before Judge Ryan in CV 2006-005503.

2. Evenson and Best made no effort to advise this Court about the pendency of the same issue before Judge Ryan. Instead, they prosecuted the Objection to Probate as though the issue of Jerry Webb's capacity was solely before this Court, and they never took steps to dismiss, consolidate or otherwise lessen the expenses they were inflicting on the Estate of Jerry Webb and the courts.

3. Facts were adduced in the case before Judge Ryan from which Evenson and Best could have and should have advised this



Court of the invalidity of their Objection to Probate.

4. Evenson and especially Best are clearly motivated by financial considerations surrounding their real estate transactions.

5. In view of the simultaneous prosecution of the same issue in two courts by Best, the failure of Best or Evenson to advise this Court that Jerry Webb's capacity was being litigated in two courts; the failure of Best or Evenson to advise this Court that Judge Ryan had ruled that Jerry Webb had capacity; the failure by Best or Evenson to take any step to consolidate or otherwise lessen the burdens, expenses and costs they created by simultaneously prosecuting the same issue in two courts, the prosecution of the Objection to Probate in this Court was and is a bad faith prosecution.

6. The factual issues determinative of the validity of the Best Claim and the Evenson/Estate of Veva Kinsey Objection were not reasonably in conflict, but neither Best nor Evenson notified this Court of those facts or their resolution in Judge Ryan's court.

7. The Estate of Jerry Webb clearly prevailed before Judge Ryan against the lack of capacity claim asserted in this Court through Best's Claim and Evenson's/Estate of Viva Kinsey's Objection to Probate.

¶13 "Anthony Dean Evenson, the personal representative of the Estate of Veva Jean Kinsey, and Greg Best" filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(J)(2003).

## DISCUSSION

¶14 The personal representative argues that Evenson only appealed as the personal representative of the Kinsey estate and not the judgment against him individually. A notice of appeal must specify the party or parties taking the appeal. Ariz. R. Civ. App. P. 8(c). The test of sufficiency of a notice of appeal, however, is whether the notice provides sufficient notice to the appellees without misleading or prejudicing them. *Hanen V. Willis*, 102 Ariz. 6, 10, 423 P.2d 95, 99 (1967). The notice of appeal here does not indicate that Evenson appeals from the judgment in his individual capacity. As Evenson conceded this fact at oral argument, we need not address it. The trial court judgment striking the objection to the probate of the Webb Estate is final and the issues related to the propriety of the amendment is not properly before us. See *Century Med. Plaza v. Goldstein*, 122 Ariz. 583, 584, 596 P.2d 721, 722 (App. 1979).

¶15 Appellants argue that the trial court's award of attorneys' fees as sanctions under A.R.S. § 12-349 against Evenson, individually, and Best was improper because it was not supported by evidence and because Anthony Evenson and Gregory Best were not parties to the action.

¶16 The personal representative correctly asserts that appellants did not challenge the court's award of attorneys'

fees pursuant to Rule 11 and contends that any objection on that ground is waived. In their reply brief, appellants argue for the first time that an award of fees pursuant to Rule 11 was improper because they were not parties in the trial court action. Having not raised that argument with respect to Rule 11 until the reply brief, the appellants have waived it. See *In re the Marriage of Pownall*, 197 Ariz. 577, 583 n.5, 5 P.3d 911, 917 n.5 (App. 2000) (arguments made first in the reply brief are deemed waived). Because appellants did not challenge one of the grounds on which the court awarded fees and that basis for the award remains, we affirm the award of attorneys' fees below.

¶17 The personal representative seeks an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2003) as a matter arising out of contract. The personal representative contends that this matter arose as a dispute related to the option contract between Best and Veva Kinsey. We disagree. Although the option contract may have been a motivating factor for Best's involvement and may have precipitated Evenson's objection, it was at most a "factual predicate" to the proceeding. Fees are not awardable pursuant to A.R.S. § 12-341.01(A) where a contract is merely in the factual background of the litigation. *Kennedy v. Linda Brock Auto. Plaza, Inc.*, 175 Ariz. 323, 325, 856 P.2d 1201, 1203 (App. 1993). This probate case concerned whether Veva Kinsey, and

therefore Evenson, was entitled to an outright conveyance of the assets of Webb's estate or entitled to only a life estate, depending on the validity of the trust amendments. A dispute concerning a trust is not a matter arising out of contract for purposes of A.R.S. § 12-341.01. *In re Naarden Trust*, 195 Ariz. 526, 529-30, 900 P.2d 1085, 1088-89 (App. 1999).

¶18 The personal representative also requests an award of attorneys fees on appeal pursuant to Rule 11 and A.R.S. § 12-341.01(C). Section 12-341.01(C) requires the court to award reasonable attorneys' fees "in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and is not made in good faith." All three elements--harassment, groundlessness, and the absence of good faith--must be present for fees to be awarded under this section. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 33, 20 P.3d 1158, 1168 (App. 2001).

¶19 We find an award of fees on appeal warranted under A.R.S. § 12-341.01(C). Appellants' first argument was that the probate court's decision striking Evenson's objection was premature in part because Judge Ryan's ruling was not final. Judge Ryan's ruling was subsequently affirmed on appeal rendering it final. After that, the personal representative offered to release appellants from the probate court's attorneys' fees judgment, which constituted the subject of the

remaining appellate arguments, in exchange for a stipulation to dismiss the appeal. Appellants refused. The personal representative's offer to release the judgment in exchange for dismissal of the appeal rendered the appeal to vacate that same judgment groundless, harassive, and lacking in good faith. We therefore award the personal representative her attorneys' fees on appeal upon her compliance with Rule 21(a), Arizona Rules of Civil Appellate Procedure, as well as her costs pursuant to A.R.S. § 12-341 (2003).

**CONCLUSION**

¶120 The trial court's judgment is affirmed. The personal representative is awarded attorneys fees and costs on appeal.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

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JOHN C. GEMMILL, Presiding Judge

/s/

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PATRICK IRVINE, Judge