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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: 07-20-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE MATTER OF THE ESTATE) 1 CA-CV 09-0414
OF:) 1 CA-CV 09-0515
) (Consolidated)
KATHRYN L. KING,)
) DEPARTMENT C
Deceased.)
) **MEMORANDUM DECISION**
NICHOLAS DIFILIPPO, a minor, by) (Not for Publication -
and through his next friend and) Rule 28, Arizona Rules of
natural father, JOHN R.) Civil Appellate Procedure)
DIFILIPPO,)
)
Plaintiff/Petitioner,)
Appellant,)
)
v.)
)
MILES ELLIOT REED, a married man,)
)
Defendant/Respondent/)
Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. PB2008-051037 and CV2008-054709
(Consolidated)

The Honorable Gerald Porter, Judge *Pro Tempore*

AFFIRMED

The Armstrong Firm
By James P. Armstrong
Attorney for Appellants

Phoenix

Fennemore Craig P.C.
By Julio M. Zapata
And Theresa Dwyer-Federhar
and

Phoenix

Dana Law Firm
By Matthew S. Dana
And Mark E. Andersen
Co-counsel Attorneys for Defendant/Appellee

Scottsdale

K E S S L E R, Judge

¶1 Plaintiff/Petitioner/Appellant Nicholas DiFilippo ("Nicholas"), the minor son of decedent Kathryn L. King ("King" or "decedent"), through his father John R. DiFilippo ("DiFilippo"), appeals the probate court's decision granting summary judgment in favor of Defendant/Respondent/Appellee Miles Elliot Reed ("Reed"), the personal representative of King's estate and trustee of her trust. Nicholas contends the court erred in entering summary judgment on his claim that Reed should be removed as personal representative and trustee because: (1) King lacked capacity to make the appointment; (2) Reed had a conflict as a creditor; and (3) Reed failed to keep Nicholas informed about the estate and trust, allowed items to go missing, allowed property to enter into foreclosure, and behaved unprofessionally. Nicholas also challenges certain discovery and evidentiary rulings. We hold that the court properly entered summary judgment and affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 King executed a will and trust, under which Nicholas is the sole beneficiary. The will provides that the residue of the estate is to be deposited into the trust. The will and the

trust name Daniel G. King and the Dana Law Firm as personal representative and trustee, respectively. On November 19, 2008, King executed a codicil to her will and an amendment to her trust naming Reed as personal representative and trustee. King underwent elective surgery on November 20, 2008; she unexpectedly died on November 24.

¶13 Two days after King's death, on November 26, 2008, Nicholas, through DiFilippo, filed a complaint against Reed. Nicholas filed an amended complaint two days later alleging King's substantial estate¹ was indebted and lacked cash, making it unable to pay numerous real estate mortgages. The amended complaint also alleged King "may have lacked competence" when she changed the trustee of her trust from her father to Reed, that she made the change without consulting a lawyer, and that Reed was present when the documents were signed. Further, it stated Reed had a conflict in overseeing both the trust and Seton Capital, where he was the accounting manager. The amended complaint also alleged that Reed had two liens placed on his residence after failing to pay homeowner association fees, received a citation for failing to provide proof of insurance during a traffic stop, was inconsistent with the obligations of

¹ King's substantial estate consisted of six parcels of real estate, ownership of Seton Capital Group, Inc., \$300,000 in chattel property and jewelry, and a \$2,000,000 life insurance policy.

the trustee, and "delayed in providing Ms. King's estate planning documents for two days despite multiple requests." The complaint also alleged that on November 26, Reed went to King's home with King's parents and removed some of her personal effects from the house and charged that if Reed "continue[d] on his current course of action, the assets designated for Nicholas' benefit may be dissipated[,]" and that "the assets that Mr. Reed plans to dissipate could be more properly liquated [sic] to meet ongoing mortgage [sic]."

¶4 In addition to its allegations, the amended complaint contained seven claims for relief. The first claim sought injunctive relief under Arizona Revised Statutes ("A.R.S.") sections 14-3607 (A) and (B) (2005) to restrain Reed from performing specified acts of administration, disbursement or distribution. Nicholas also alleged a disclosure claim, asserting Reed failed to keep the trust beneficiaries reasonably informed of the trust and its administration as required by A.R.S. § 14-7303 (2005). The third claim for relief alleged conversion because there was reason to believe Reed intended to dissipate \$100,000 in assets to non-entitled individuals. Nicholas also alleged claims to remove Reed as trustee and personal representative, and to remove Reed's probate counsel, the Dana Law Firm. Finally, Nicholas' seventh claim for relief

requested the court enter an order requiring Reed to post an \$8,000,000 bond.

¶15 On December 1, 2008, Reed filed an application for informal probate and was appointed personal representative. Nicholas' civil complaint was consolidated with the probate matter.

¶16 Nicholas issued notices of deposition for Reed, Matthew Dana, and Zachary Dana of the Dana Law Firm, while Reed's counsel was on vacation. This necessitated Reed filing a motion for protective order, which the court granted.

¶17 Reed then filed a motion for summary judgment. Reed argued that injunctive relief was inappropriate because no evidence existed that he had taken any action to jeopardize the interests of the beneficiary. He asserted that he had given Nicholas a complete copy of the will and the trust within two days of King's death and information concerning the assets of the trust within two weeks of her death which satisfied his statutory obligation to keep the beneficiary informed. Reed also argued that no evidence existed showing he converted any property belonging to the estate or trust, that he breached his fiduciary duty, or that he mismanaged or was incapable of managing the trust. Consequently, Reed argued he was entitled to summary judgment on Nicholas' claims for conversion and for removal of the personal representative and trustee. He

similarly argued that the claim was an attempt to harass and intimidate him and that no evidence supported the removal of his counsel. Finally, Reed argued that Nicholas had no evidence to support the imposition of a bond requirement when the will had expressly waived that requirement.

¶18 Reed supported his motion with his own declaration and the declaration of Janet Green. Reed's declaration explained that he worked for Seton Capital Group, a company owned by King, for approximately five years and continued working there as the accounting manager. He stated that DiFilippo was also employed at Seton Capital prior to his divorce from King in 2006, and that DiFilippo exhibited harassing and intimidating behavior toward King, various employees, and Reed for almost any reason.

¶19 Reed avowed that King died shortly after midnight on November 24. Reed also stated that on that same morning DiFilippo called him eight to ten times repeating, "You're going to work with the family on this, right?" At 5:23 p.m. that same day, Nicholas' lawyer e-mailed Matthew Dana demanding the production of the estate and trust documents even though Reed had not yet retained Dana as counsel. At 9:45 a.m. on November 25, Nicholas' lawyer sent an e-mail to Reed again requesting estate planning documents, and indicating he wanted to participate in the inventory of the estate. Reed declared that he retained Dana as counsel on November 25, and Dana e-mailed

the estate documents to Nicholas' counsel the following day. The documents were attached to the amended complaint filed on November 28, 2008.

¶10 Reed also avowed that the only items removed from King's residence were clothing and a piece of jewelry that were viewed and photographed for the obituary and memorial. In response to claims that his failure to pay certain personal debts made him unqualified as personal representative and trustee, Reed also stated that he had been managing King's property "at various levels of responsibility" for nearly five years.

¶11 Janet Green avowed that she had a telephone conversation with King on November 19, 2008, during which King discussed her surgery scheduled for the following day. She recalled King telling her that she had decided to make Reed the fiduciary for her estate plan instead of King's father because Reed was much more familiar with her property and business dealings. She stated that King did not appear to be under any undue influence or suffering any incapacity.

¶12 Nicholas filed a motion for relief under Arizona Rule of Civil Procedure ("Ariz. R. Civ. P.") 56(f) ("56(f)") and a motion to compel the depositions of Reed, Matthew Dana, and Zachary Dana. He argued he was seeking evidence showing that King lacked the capacity to alter her estate planning documents

and that her state of mind may have been compromised. Nicholas also stated that he was seeking evidence of Reed's fitness as trustee and personal representative, asserting that Reed had no prior experience serving in that capacity, that his personal conduct was inconsistent with the role, and that having him serve as trustee and personal representative was not in the best interest of the estate or beneficiary. Nicholas also asserted that he was seeking evidence that Reed had a conflict of interest because he was managing the finances of Seton Capital and because he claimed to be a creditor of the estate. Nicholas sought to depose anyone who assisted with or reviewed King's amendment of her estate planning documents, including Matthew Dana and Zachary Dana, as well as Reed, and to review the financial records of Seton Capital and another of King's companies.

¶13 Reed objected to the motions, arguing that Nicholas had no factual basis for his claims, that he was relying on speculation and supposition, and that he should not be permitted to bring baseless claims and then use the lawsuit to engage in discovery to try to find something on which to base a claim. Reed moved for dismissal of the complaint pursuant to Rule 12(b)(6) and Rule 11. Reed noted that the claims, as alleged, were based "on information and belief," and on what "may" have happened in the past or what "may" happen in the future, making

them speculative. After oral argument, the court denied Nicholas' motion for 56(f) relief and motion to compel.²

¶14 Nicholas filed a motion to strike the declarations of Reed and Green, arguing the declarations were inadmissible because the declarants lacked personal knowledge, or that the testimony was irrelevant or hearsay. In his response to the motion for summary judgment, Nicholas argued that Reed allowed multiple properties owned by King to go into foreclosure, such as a condominium in Deer Valley, Utah which was owned by King and DiFilippo. Nicholas also argued that Reed allowed King's residence to fall into disrepair and to go into foreclosure and that he had not obtained insurance on King's vehicle. Nicholas alleged that items were missing from King's home, specifically, certain items of jewelry, as well as liquor, season tickets for local sports teams, telephones, cameras, food, purses, clothing, and her makeup and toiletries. To support his claim that items were missing, Nicholas offered the affidavit of Celia Munoz who was at the house in October 2008 and who stated items were missing when she returned on April 3, 2009. Nicholas claimed that on April 3, 2009, when DiFilippo went to King's house to remove some of Nicholas' things, Reed attacked DiFilippo by grabbing his throat, which caused DiFilippo to call the police.

² After the court denied Nicholas' 56(f) motion, DiFilippo filed a claim against the estate seeking reimbursement of \$700,373.26 in alleged debts owed to him.

Munoz's affidavit recounted the attack. Nicholas also asserted that King was not competent to make changes to her estate documents. He noted that in the last few months of her life, King lived a "disheveled life," was stressed, less clear in her thinking, and suffered personal and financial problems, including mounting debt, tax problems, investigations, and "brushes with suicide." Munoz's affidavit recounted a trip to Mexico in September during which King was drunk much of the time, which frightened Nicholas. King's father and step-mother recounted that through October 2008, King appeared to be energetic and positive during telephone calls even when she asked her father to loan her money to supplement the reserves for Seton Capital in preparation for an audit by the State. King's parents, however, avowed that she left a hysterical voicemail on November 19 where her voice was unrecognizable due to her crying uncontrollably. When her step-mother returned the call later that day, King was still crying, distraught, and seemed convinced she would not survive the surgery.

¶15 Reed replied that the properties he allowed to go into foreclosure were worth less than the estate owed on them and that the only cash available to pay those mortgages and maintain the property was from a life insurance policy payable to the trust. Reed maintained that by statute, the insurance proceeds were protected from creditors so that it would not be in

Nicholas' best interest to use those funds to try to bring the real property current and maintained. As for Nicholas' allegation that items had been removed from the home, Reed noted that the basis of the claim was Munoz's declaration, which was based on her observations a month earlier. Reed asserted that King could have disposed of the items herself to help pay bills and that the items were removed if at all prior to his appointment. Reed supported his reply with a supplementary declaration in which he disputed Nicholas' claim that he had assaulted DiFilippo. Reed claimed that DiFilippo started the altercation, assaulted him, and caused him to call the police. Reed further noted that he was not carrying insurance on the vehicle at that time because it was in storage and he was working with the insurance company to have the policy issued in the name of the trust. Reed also provided an affidavit from Lillian Dombrowski, who avowed that she sold various items of King's personal property, including various concert tickets, Arizona Cardinals season tickets, and Phoenix Suns season tickets. She stated that King told her she wanted to sell anything she could because of financial problems. Dombrowski also avowed that she spoke to King the day before her surgery and King seemed upbeat and stated she was going to her lawyer's office to update her will. Dombrowski stated that King did not

appear to be suffering from any incapacity and that she appeared to be of clear mind.

¶16 In an unsigned minute entry, the court granted Reed's motion for summary judgment and denied Nicholas' motion to strike the declarations of Reed and Green. Nicholas appealed. Nicholas then filed a separate petition to require a \$2,000,000 bond, reiterating some of the same claims made in his response to the motion for summary judgment.

¶17 On June 26, 2009, the court issued a signed judgment granting Reed's motion for summary judgment and denying Nicholas' motion to strike the declarations of Reed and Green. The judgment also awarded Reed attorneys' fees in the amount of \$97,933.25 against DiFilippo. In an unsigned minute entry filed July 13, 2009, the court denied Nicholas' separate petition to post bond. Nicholas filed a notice of appeal purporting to appeal from the grant of Reed's motion for summary judgment, the denial of his motion to strike, the denial of his separate petition to require the posting of a bond and all prior rulings. Thereafter, Nicholas filed an amended notice of appeal. We have jurisdiction over the court's decision granting summary judgment and its rulings related to that judgment. A.R.S. § 12-2101(J)

(2003). We lack jurisdiction with respect to the denial of Nicholas' separate petition to post bond.³

³ This court has jurisdiction over appeals from a judgment, decree, or order entered in any formal probate proceeding. A.R.S. § 12-2101(J). An "order" is an order similar to a final judgment or decree entered in any formal probate proceeding. *Ivancovich v. Meier*, 122 Ariz. 346, 353, 595 P.2d 24, 31 (1979). To be appealable, the order "should at least be of the same general importance as those orders specified in the previous [version of A.R.S. § 12-2101(J)]," which listed the types of orders appealable in a probate case. Arizona Appellate Handbook § 3.3.1.7 (4th ed. Supp. 2006). "[T]he order should finally adjudicate some particular aspect of the probate proceeding or affect some substantial right of a party of the same nature as those involved in the other appealable orders specified in A.R.S. § 12-2101." *Id.* The summary judgment granted here disposed of Nicholas' entire complaint; although it lacked language pursuant to Ariz. R. Civ. P. 54(b), it is appealable. See *Kinnear v. Finegan*, 138 Ariz. 34, 35-36, 672 P.2d 986, 987-88 (App. 1983) (judgment that did not dispose of all issues raised in motion for summary judgment for removal of personal representative and that did not include Rule 54(b) language was not appealable; subsequent judgment disposing of all issues was appealable).

The trial court's ruling on Nicholas' separate petition to post bond is not appealable. First, no signed order has been filed. See Ariz. R. Civ. P. 58(a); *Thomas v. W. Sav. & Loan Ass'n*, 6 Ariz. App. 511, 513, 433 P.2d 1003, 1005 (1967) ("a judgment or order from which an appeal is allowed must be in writing, signed by a judge and filed to be effective for purposes of appeal."). Even if the order had been signed, the denial of a petition to post bond is not an order of the same general importance as those enumerated in the prior version of the statute. Those types of orders included orders granting, refusing to grant, revoking, or refusing to revoke letters testamentary, of administration or of guardianship; orders admitting or refusing to admit a will to probate or determining the validity of a will; orders concerning the partition, sale or conveyance of real property; and orders determining heirship. A.R.S. § 12-2101, Historical Notes (2003). The denial of the petition to post bond also is not a final adjudication of any matter in the probate proceeding and is not similar to the other types of appealable orders in A.R.S. § 12-2101. Therefore, it

DISCUSSION

¶18 Summary judgment should be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). Summary judgment is appropriate "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In reviewing a court's decision granting summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We review the decision on the record made in the trial court. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994). We view the facts and the inferences to be drawn from those facts in the

is not therefore in itself appealable, and does not contain certification under Ariz. R. Civ. P. 54(b).

Although the court's denial of Nicholas' separate petition to post bond was not appealable, Nicholas asserted in his amended complaint that Reed should have to post bond. We have jurisdiction to consider Nicholas' argument with respect to the posting of a bond to the extent that it relates to the claim adjudicated in the motion for summary judgment rather than the separate petition.

light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

I. King's Competency

¶19 Nicholas argues that the probate court erred in granting summary judgment against him on his claim that King was not competent to execute the codicil to her will and amendment to her trust that changed her designation of personal representative and successor trustee to Reed. We find no error.

¶20 The law presumes that a person has the requisite mental capacity to execute a will. *Estate of Thorpe*, 152 Ariz. 341, 343, 732 P.2d 571, 573 (App. 1986). The party contesting testamentary capacity bears the burden of showing by a preponderance of evidence that the testator lacked capacity at the time he or she executed the testamentary document. *Estate of Killen*, 188 Ariz. 562, 565, 937 P.2d 1368, 1371 (App. 1996). To demonstrate lack of capacity, the contestant must establish that the decedent lacked the ability to know the nature and extent of his or her property, lacked the ability to know the natural objects of his or her bounty, or lacked the ability to understand the nature of the testamentary act. *Thorpe*, 152 Ariz. at 343, 732 P.2d at 573. The contestant must affirmatively establish that at least one of the three factors existed at the time the documents were executed. *Id.* Mental

capacity before or after the execution of the documents may be considered only to the extent that it tends to show the decedent's state of mind. *Id.* at 344, 732 P.2d at 574.

¶21 Nicholas has produced evidence that, in the last months of her life, King was experiencing financial difficulties, was under stress, was drinking heavily, and was acting erratically. He also produced evidence that on the day she executed the codicil and trust amendment, she was emotionally distraught. Accepting all of Nicholas' evidence as true, however, none of it is sufficient to satisfy one of the elements Nicholas must prove to establish lack of capacity. Significantly, Nicholas has not recognized the elements he must prove to establish incapacity and so has offered no argument that the evidence he has presented establishes a factual basis and an issue of material fact with respect to the test for capacity. Because Nicholas lacked evidence of incapacity, failed to establish the existence of a disputed issue of material fact or a factual basis for his complaint, the court properly entered summary judgment on this claim.

II. Reed's Conduct

¶22 Nicholas also contends that the trial court erred in granting summary judgment to Reed on Nicholas' claim to have Reed removed as personal representative and trustee for improper conduct. A decedent's choice for a personal representative is

given great deference. *Estate of Newman*, 219 Ariz. 260, 270-71, ¶ 39, 196 P.3d 863, 873-74 (App. 2008). Nicholas argues that Reed failed to: take account of the estate, keep Nicholas informed, and maintain certain properties. He also argues Reed allowed some properties to go into foreclosure, acted unprofessionally, and allowed items to go missing from King's residence.

¶23 The duties and powers of a personal representative commence on appointment. A.R.S. § 14-3701 (2005). A personal representative is required to give notice of his or her appointment not later than thirty days after that appointment. A.R.S. § 14-3705 (2005). Thereafter, within ninety days of the appointment, the personal representative must prepare an inventory of property owned by the decedent at the time of death, including its value and any existing encumbrance. A.R.S. § 14-3706(A) (2005). The personal representative can file the inventory with the court and send copies only to those interested parties that request it or can choose not to file it with the court and can instead send copies to all heirs and devisees. A.R.S. § 14-3706(B). A trustee must keep beneficiaries reasonably informed about the trust and its administration and, upon request of a beneficiary, must promptly furnish to that beneficiary a copy of the portions of the trust that describe that beneficiary's interest. Within thirty days

after accepting trusteeship, the trustee must notify the beneficiaries, in writing, of the acceptance, of the trustee's name, address, and telephone number. A.R.S. § 14-7303 (2005).⁴

¶24 Copies of e-mails in the record show that Nicholas began requesting information about the estate and trust the day of King's death, filed this action two days after King's death, and filed the amended complaint and petition for removal of the personal representative two days later. Obviously, at that extremely early stage, Nicholas had no factual basis for removing the personal representative and trustee for failure to inform or failure to take account of the estate. Reed had not even been appointed personal representative, and he still had more than twenty days remaining by statute to even advise Nicholas of accepting the trusteeship. Moreover, the record shows that Nicholas had a copy of the will, the codicil, the

⁴ In 2008, Arizona passed the Arizona Trust Code, A.R.S. §§ 14-10101 to 14-11102, which repealed portions of Title 14, including this section. 2008 Ariz. Sess. Laws, ch. 247, § 15 (2nd Reg. Sess.). Under the new code, similar duties are now imposed by A.R.S. § 14-10813 (Supp. 2009). The new Trust Code became effective January 1, 2009. The new act is applicable to all trusts regardless of when executed and applies to judicial proceedings commenced before January 1, 2009, "unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties" 2008 Ariz. Sess. Laws, ch. 247, § 18(A)(3). The new code also does not affect "[a]n act done before January 1, 2009." *Id.* at § 18(A)(5). Because with respect to this issue we are concerned with Reed's actions in November 2008, we apply the prior statute.

trust⁵, and the trust amendment at the latest by November 28, when Nicholas attached those documents to his amended complaint, demonstrating that Reed, in fact, had responded to Nicholas' requests for information at the time the complaint was filed.

¶125 Nor do we find any error in granting summary judgment for failure to pay various real estate loans. It appears clear from the record that at least most of the properties were worth less than the debts owed on them. In some cases, Reed was attempting to work with the lenders. The only real dispute appears to be about the Utah property owned jointly by King and DiFilippo. In that case, the property was up for sale and Reed had asked DiFilippo to cooperate on the sale. Moreover, the trial court refused to require the trustee to apply estate funds to avoid a trustee's sale of the Utah property, an order DiFilippo has not challenged on appeal. In addition, while DiFilippo complained Reed should not have been continuing to pay debts on the Mexican property, the court later ordered Reed to continue paying those debts, another issue not raised on appeal. Those orders further support Reed's argument that summary judgment was proper on Reed's decisions on what loans to pay.

¶126 Similarly, Nicholas asserts that DiFilippo went to the house the week King died, on January 26, 2009, and on April 3,

⁵ Within two weeks of King's death, Reed provided Nicholas with information concerning the assets of the trust.

2009, and that jewelry of significant value was missing from the house. He also asserts that other items such as purses, cameras, and clothing were missing. He did not establish, however, that these items were missing as of the time he filed the amended complaint on November 28, 2008, such that they could be the basis of the complaint. More importantly, Nicholas failed to establish that the items were in the house at the time of King's death. The record does not indicate when DiFilippo had last been in King's house and seen those items there, and Munoz had last seen them in the house a month before King's death. Even accepting Nicholas' argument that the items existed and are now missing, trying to determine what happened to them is speculation.

III. Conflict of Interest

¶127 Nicholas also argues that Reed's claim alleging King owed him \$80,000 presents a conflict warranting his removal. Reed denies having presented such a claim to the estate. The early inventories of the estate prepared by Reed, however, list an \$80,000 liability based on a personal loan from Reed to King.

¶128 Nicholas has offered no authority to support the position that being a creditor of an estate disqualifies a person from being a personal representative or trustee. Authority does exist, however, that being a creditor does not necessarily present a conflict for a personal representative.

See 31 Am. Jur. 2d Executors and Administrators § 284 (2010) (“no conflict of interest is created by the mere fact that the personal representative is also a creditor of the estate.”). We note, in fact, that A.R.S. § 14-3203 (2005) lists “any creditor” as seventh in priority for appointment as personal representative of an estate. Arizona clearly does not require that a personal representative be disqualified because he or she is also a creditor. Therefore, even if Reed made such a claim against the estate, that claim would not require his removal.

IV. Removal of Reed’s Counsel

¶129 Nicholas also argues that summary judgment should not have been granted against him on his claim for the removal of Matthew Dana as Reed’s counsel. Nicholas contends that Dana is a witness regarding the circumstances under which King modified her estate plan and therefore must be disqualified for violation of Ethical Rule (“E.R.”) 3.7, which provides:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) [T]he testimony relates to an uncontested issue;
 - (2) [T]he testimony relates to the nature and value of legal services rendered in the case; or
 - (3) [D]isqualification of the lawyer would work substantial hardship on the client.

Ariz. R. Sup. Ct. 42, E.R. 3.7.

¶30 The ethical rules are intended to provide guidance to lawyers and structure for regulating conduct through disciplinary agencies. Ariz. R. Sup. Ct. 42, Preamble ¶ 20. They are not in themselves grounds for disqualifying opposing counsel. *Id.* "Violation of a Rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation . . . [T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." *Id.* The ethical rules may be used as guidance, however, on disqualification issues. *Amparano v. ASARCO, Inc.*, 208 Ariz. 370, 376, ¶ 22, 93 P.3d 1086, 1092 (App. 2004).

¶31 We have already concluded that Nicholas has presented no evidence to support the existence of a material fact with respect to King's competence to execute the codicil and trust amendment. Consequently, Dana is not likely to be a necessary witness on a contested matter.

¶32 Nicholas also argues that Dana erroneously advised Reed on several matters. That Nicholas disagrees with the advice given by Dana does not render that erroneous nor does it present grounds for removing Dana as counsel. Nicholas provides no authority to support such a position. We find the court appropriately granted summary judgment on this claim.

V. Bond

¶133 Nicholas also argues that the court should require Reed to post a \$5,000,000 bond. Nicholas is unclear as to whether he is appealing from the probate court's grant of summary judgment against him on his request for an \$8,000,000 bond in his complaint, appealing from the probate court's denial of his separate petition to post bond in the amount of \$2,000,000, or asking this Court in the first instance to require the posting of a bond. We have jurisdiction only with respect to the request for bond included in the complaint that was denied by summary judgment. *Supra*, n. 3.

¶134 A personal representative is required to post a bond unless the decedent expressly waives the requirement in the will, which King did. A.R.S. § 14-3603(A)(1) (2005). When the requirement is waived, the court "may" require the personal representative to post a bond "upon reasonable proof that the interest of the petitioning person is in danger of being lost because of the administration of the estate." A.R.S. § 14-3603(B). A trustee must post a bond "only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement." A.R.S. § 14-10702(A) (Supp. 2009). "The court may modify or terminate a bond at any time." A.R.S. § 14-10702(B). By the terms of the

statutes, whether to require the posting of a bond is within the trial court's discretion.

¶135 Nicholas presents a litany of claimed errors by Reed to support the imposition of a bond, but he supplies no citation to the record to establish that these claimed errors actually occurred. Among the claimed errors are Reed's payment of a mortgage on certain property before deciding to cease payment, failing to explore rental income streams on another property and allowing that property to be foreclosed upon, failing to use commercially reasonable manners to dispose of King's personal property, and failing to account for certain business assets. First, we disregard Nicholas' list of Reed's claimed errors because Nicholas failed to cite to the record. *See Ariz. Dep't of Econ. Sec. v. Redlon*, 215 Ariz. 13, 15, 156 P.3d 430, 432 (App. 2007) (holding when a litigant fails to include citations to the record in an appellate brief, the court may disregard that party's unsupported factual narrative and draw the facts from the opposing party's properly-documented brief and/or the record on appeal). Second, we only consider facts that were present at the time Reed filed a motion for summary judgment. Third, whether Reed could have taken action or made these decisions is immaterial because Nicholas offered no reasonable proof that his interests were in danger of being lost when he filed the complaint. We therefore find no abuse of discretion

in the probate court's denial of the request for bond as part of the summary judgment.

¶136 Nicholas can request a bond in the course of the administration of the estate if facts arise suggesting his interests are at risk. We note that Nicholas did just that by raising many of the allegations asserted on appeal as grounds in his separate petition to post bond. As previously stated, however, we have no jurisdiction to consider that decision.⁶

VI. Motions to Compel and for Rule 56(f) Relief

¶137 Nicholas also contends that the probate court erred in denying his motions to compel and for 56(f) relief. We review a court's decision regarding a motion to compel and a motion for 56(f) relief for an abuse of discretion. *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, 519, ¶ 45, 144 P.3d 519, 533 (App. 2006); *Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 287, 947 P.2d 859, 861 (App. 1997).

¶138 Nicholas filed a motion to compel the depositions of Reed, Matthew Dana, and Zachary Dana, seeking information regarding King's competence to execute the amendments to her estate documents and Reed's fitness to be personal

⁶ We note that during the pendency of this appeal, Reed filed a petition to appoint a conservator for Nicholas in PB 2009-001423. Reed argued an independent conservator should be appointed because DiFilippo has a personal financial crisis, conflicts of interest with the conservatorship estate, and is incapable of making rational decisions for Nicholas' benefit.

representative and trustee. He sought similar information pursuant to Rule 56(f).

¶139 The probate court did not abuse its discretion in denying Nicholas' motions. When he filed his amended complaint, Nicholas had no factual basis to challenge King's capacity to execute the amendments. Similarly, he had no factual basis to challenge Reed's "fitness." Reed was selected by King to be the personal representative of her estate and the trustee of her trust. That selection is entitled to great deference. *Newman*, 219 Ariz. at 270-71, ¶ 39, 196 P.3d at 873-74. Although Nicholas is entitled to challenge the personal representative and trustee if and when Reed engages in improper conduct, Nicholas is not entitled to attack King's selection of Reed by filing a preemptive amended complaint without a factual basis and then using the litigation process to try to find evidence to support the claim.

VII. Motion to Strike

¶140 Nicholas also contends that the trial court erred in not striking the affidavits of Reed and Green, which were offered in support of Reed's motion for summary judgment. We have not relied on either of the contested declarations in concluding that the court properly granted summary judgment. We therefore need not consider whether the declarations offered in support of the motion should have been stricken.

¶41 We note that our decision does not prevent Nicholas from raising issues with respect to the administration of the estate as such issues arise in the course of the probate proceeding.

VIII. Attorneys' Fees

¶42 Reed requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 12-341.01(C) (2003) and A.R.S. § 14-11004(A) and (B) (Supp. 2009). A.R.S. § 14-11004 provides:

- A. A trustee . . . is entitled to reimbursement from the trust for that person's reasonable fees, expenses and disbursement, including attorney fees and costs, that arise out of and that relate to the good faith defense or prosecution of a judicial . . . proceeding involving the administration of the trust, regardless of whether the defense or prosecution is successful.
- B. A court . . . may order that a party's reasonable fees, expenses and disbursements pursuant to subsection A be paid by any other party or the trust that is the subject of the judicial proceeding.

A.R.S. § 14-11004. We grant Reed's request for an award of reasonable attorneys' fees and costs against DiFilippo, upon Reed's compliance with Rule 21(a) of the Arizona Rules of Civil Appellate Procedure.

CONCLUSION

¶143 We find that the probate court properly granted summary judgment and affirm the probate court's ruling.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

MARGARET H. DOWNIE, Presiding Judge

/S/

PETER B. SWANN, Judge