DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of: MOONIE H. KONG, Deceased.	No. 1 CA-CV 10-0419 1 CA-CV 10-0899 (Consolidated) DEPARTMENT A
KEVIN STITES and MARCIA KONG, Appellants, v. CURTIS KONG; KELLIE KONG; and DAVIS KONG, in his individual capacity, and in his capacity as Personal Representative of the State of Moonie H. Kong, Deceased, Appellees.	**MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2009-050184

The Honorable Gerald Porter, Commissioner

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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H A L L, Judge

¶1 Appellants Kevin Stites (Stites) and Marcia Kong (Marcia) appeal the probate court's order finding an undated holographic will as the valid last will and testament of Moonie H. Kong (Moonie) and the only testamentary instrument admissible to probate. They separately appeal from the court's award of attorneys' fees to the individual appellees. For the following reasons, we affirm the court's order probating the undated will but vacate the court's award of attorneys' fees and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In January 2009, Davis Kong (Davis) filed an application for informal appointment of personal representative of Moonie's intestate estate, which the court granted. Davis stated in the application that Moonie died in November 2008 at the age of eighty-four years old and was survived by three children, Davis, Curtis Kong (Curtis) and Kellie Kong (Kellie) (collectively, the individual appellees). Davis subsequently filed a petition for formal probate of will (petition), explaining that after his appointment as personal

representative, he came into possession of two testamentary documents, a holographic will dated October 20, 1995 (1995 will), and a preprinted form will completed in Moonie's handwriting and signed by Moonie, but not dated (undated will). The petition further stated that as to the undated will "it is unknown whether it was done before or after the 1995 [will]." Kellie, however, submitted an affidavit with the petition stating that Moonie told Kellie "multiple times that he was leaving his entire estate to . . . Davis . . . In particular, in August of 2007, [Moonie] again stated that he was leaving his entire estate to Davis." The petition also included Marcia, as "[c]hild of [Moonie]," and Stites as "[s]tatus undetermined[,] [c]laims to be a child of [Moonie]" as two additional individuals that should be notified of the probate proceedings.[1]

¶3 The 1995 will, which was entirely handwritten and notarized, stated:

> Last Will and Testament
> I Moonie H. Kong, of sound mind and body, upon my death, bequeath my home at 2321 E. Aldine St., Phoenix, AZ, 85022, on Parcel 166-53-1508, Cactus Garden 2, to my son Curtis K. Kong, SS # . . . There is no lien on the property and the house thereon.
> Respectfully, Moonie H. Kong

¶4 The undated will was a single page preprinted form will that contained blanks for the person's name, residence,

[1] The parties later stipulated that Stites was the biological son of Moonie based on genetic testing.

personal representative appointee, bequests, and signature. The name Moonie H. Kong was written in the undated will and declared it was his "Last Will and Testament [and] expressly revok[ed] all [his] prior Wills and Codicils at any time made." Davis was named as Moonie's personal representative and the statement, "[e]verything I legally own prested [sic] to my son, Davis L. Kong," was written in the bequest section of the document. Moonie's signature was signed below that sentence. It also contained "Page __ of ___," which was left blank.

¶5 Appellants objected to the petition, raising several objections to the validity of both wills, including that Moonie did not sign either will, the 1995 will was not witnessed as required by Arizona Revised Statutes (A.R.S.) section 14-2502 (2005), and that the lack of a date on the undated will made it impossible to ascertain the order in which the wills were executed. Therefore, according to appellants, neither will was admissible to probate and Moonie's estate should pass by intestacy.

¶6 The court held an evidentiary hearing in March 2010 to determine the admissibility of the two wills. Appellees' expert witness, Kathleen Nicolaides, a forensic document examiner for Affiliated Forensic Laboratory, testified that she received exemplars, which are known documents, that contained "extensive writing" of handwriting and printing and signatures of Moonie

from 1993 to 2007 to compare with the handwriting on the two wills. The exemplars were comprised of three cancelled checks, a notarized quit claim deed, a notarized durable health care power of attorney, three personal income tax forms, and five letters of correspondence. Nicolaides concluded that she had "[t]he highest level of confidence" that the author of the exemplars "executed both the handwriting and the Moonie Kong signatures appearing on the wills." Nicolaides continued that "there was such a sufficient amount of evidence and the quality of the evidence was such that . . . [she] was able to reach a positive identification." The owner of Affiliated Forensic Laboratory reviewed Nicolaides' findings and agreed with her conclusions. Nicolaides also stated that although a lay person may place significance on Moonie's variance of the letter "g" in his signature, as a forensic document examiner, she examined the differences and concluded that it was "within his habit" and not significant.

¶7 The court noted at the hearing that Arizona "law very much favors testacy and presumes the validity of the will if they facially meet the requirements of the [relevant] statute[s]."

¶8 Stites testified that despite not meeting Moonie in person until March 2008, he had received letters from Moonie beginning in 1996 and had several telephone conversations with

him as well. Stites further stated that the signature in the undated will was "dissimilar to what [he] believe[d] [Moonie's] signature normally [was]." He also testified that the "g" in Kong looked different in other documents that contained Moonie's signature. Stites admitted that he never offered any letters as evidence to demonstrate a difference in the signatures from his correspondence with Moonie and the undated will. Stites additionally admitted that he did not argue the letter "g" was "dissimilar with the undated will" until the day of the hearing.

¶9 Marcia testified that her communication with Moonie consisted mainly of letters and telephone calls between 1970 and his death and that he visited her once in New Hampshire. Marcia stated that she did not think the signatures in the 1995 will and the undated will were Moonie's signatures. Marcia also testified that she believed the "g" in Kong did not match in the two wills. She admitted, however, that she had never been present for the execution of any testamentary instruments completed by Moonie. Marcia also conceded that she did not have any formal or informal training in examining documents or in identifying handwriting or signatures.

¶10 Appellants moved for a judgment as a matter of law (JMOL) at the hearing after the appellees rested, requesting that the court determine that Moonie died intestate on either of the following grounds: (1) there was insufficient evidence to

show which will was most recent, and (2) the dispositive provisions in the wills were inconsistent with one another. The court did not rule on the motion at the hearing, thereby implicitly denying it.[2]

¶11 After the evidentiary hearing, the court concluded that the 1995 will and the undated will:

> are in the handwriting of the testator, contain all the necessary material provisions in the handwriting of the testator and were signed by Moonie H. Kong and are therefore valid pursuant to A.R.S. [§] 14-2503.
>
> A decision on which Will to probate shall either be handled by stipulation between devisees Curtis Kong and Davis Kong or a determination will be made at a hearing to determine which Will was executed last.

¶12 Davis and Curtis filed a stipulation with the probate court and agreed that the court should:

> deem the undated [] will as having been executed subsequent to the [1995] will; and [t]hat the Court deem the undated [] will, by its express terms, as revoking . . . the [1995] will, and superseding the [1995] will; rendering the undated [] will as the only testamentary instrument admissible to probate[;] and

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[2] Appellants renewed their motion for JMOL after the court rendered its findings. We note that a motion for judgment as a matter of law at the conclusion of a party's case may only be made in a jury trial. *See* Ariz. R. Civ. P. 50(a). In non-jury trials, Arizona Rule of Civil Procedure (Civil Rule) 52(c) similarly authorizes a "Judgment on Partial Findings" on a claim or defense "after a party has been fully heard on an issue." Unlike Civil Rule 50(b), however, Civil Rule 52(c) does not authorize a party to renew a Civil Rule 52(c) motion that has been denied. Given our determination that appellants were not entitled in any event to JMOL, ¶¶ 24-25 *infra*, any difference in the availability of relief between the two Civil Rules is immaterial.

> [t]hat the Court admit to probate the undated [] will, which devises the entire Estate to Davis[.]

¶13 Based, in part, on Davis's and Curtis's stipulation, the probate court found:

> The validity of the [1995] and the undated Will render the Estate fully testate and that no assets of [Moonie] are subject to intestate administration. That, as a result of the Estate being fully testate, [Stites, Marcia, and Kellie] have no further standing . . . and that only [Davis and Curtis] have standing, as only [Davis and Curtis] are devisees under the [1995] will and the undated will. That [Davis and Curtis] are authorized and entitled to stipulate regarding whether the [1995] will or the undated will was executed last in time. That [Davis and Curtis] have reached a written agreement and have memorialized their written agreement . . . [and] it is, therefore, ordered, adjudged and decreed . . . That the undated holographic will was executed subsequent to the [1995] will, and therefore is the valid Last Will and Testament of . . . [Moonie]. That the undated [] will, by its express terms, revoked by inconsistency the [1995] will, and wholly superseding the [1995] will; rendering the undated [] will as the only testamentary instrument admissible to probate . . .; and . . . That the undated [] will, which devises the entire Estate to [Davis] and which nominates [Davis] for appointment as Personal Representative of the . . . Estate, is hereby admitted to probate[.]

¶14 After the court's ruling, appellees filed a petition requesting attorneys' fees. The court granted the petition in part and directed appellees to file a request for fees pursuant to Arizona Rules of Probate Procedure (Rule) 33. The court stated that it would determine the specific award of fees after the Rule 33 application and response were filed. Appellees filed the Rule 33 application, requesting $53,275.26 in

attorneys' fees and costs. Appellants objected to the application, arguing that Rule 33 was inapplicable because appellees were acting as private litigants and not personal representatives, trustees, guardians, or conservators. Appellants additionally contended that appellees were not seeking fees from the estate, but from appellants, which made their claim under Rule 33 ineligible. Appellants also asserted that there was no basis for an award of fees, A.R.S. §§ 12-349 and -350 (2003) were inapplicable, appellees failed to comply with Civil Rule 58(a) and *Schweiger v. China Doll Restaurant, Inc*., 138 Ariz. 183, 188-89, 673 P.2d 927, 932-33 (App. 1983), and the application and affidavit for fees and costs were untimely. Appellants also moved to strike an exhibit to the affidavit for attorneys' fees, arguing it failed to comply with several rules in the Arizona Rules of Evidence (Evidence Rule) and were based on inadmissible hearsay.

¶15 Appellees replied that the court's prior minute entry ruling resolved the matters argued by appellants in their objection to the fee application because they already presented these issues to the court in their initial response to appellees' petition for fees. Thus, appellees maintained that appellants were only entitled to assert specific objections to the fees and costs in the Rule 33 application. Appellees also stated that they fully complied with court's order directing

them to file an application for fees and costs pursuant to Rule 33 and the application complied with Rule 33.

¶16 Appellants filed another motion with the court asserting that the court should summarily grant their motion to strike, to which appellees objected. Appellants then submitted a reply with the court and argued for summary disposition pursuant to Rule 7.1(a) and stated that appellees ignored their arguments pertaining both to Evidence Rule 103(a)(1) and their evidentiary objections filed in prior motions.

¶17 The court found that appellees' initial petition for attorneys' fees was timely under A.R.S. § 12-349 and that "[Appellants] unreasonably expanded the proceeding in accordance with the required finding [under] A.R.S. § 12-349(A)(3)." The court found appellees' fee application reasonable and awarded them $53,275.26 in attorneys' fees and costs pursuant to A.R.S. § 12-349(A)(3) and Civil Rule 11(a). The court subsequently denied appellants' motion for reconsideration.

¶18 Appellants timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B), (J) (2003).

DISCUSSION

¶19 Appellants make the following claims on appeal: (1) neither the 1995 will or the undated will were valid holographic wills under A.R.S. § 14-2503 (2005); (2) the undated will and the 1995 will were void; (3) the stipulation entered between

Davis and Curtis that the undated will was executed last was improper; and (4) appellees were not entitled to attorneys' fees.

¶20 We will not set aside a probate court's findings of fact unless clearly erroneous and we give due regard to the probate court to determine the credibility of witnesses. *In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5, 12 P.3d 1203, 1205 (App. 2000). We review the probate court's legal conclusions de novo. *Id*. We view the facts as to whether there is proper evidence to permit a writing into probate court as a holographic will in the light most favorable to upholding the probate court's decision. *Blake's Estate v. Benza*, 120 Ariz. 552, 553, 587 P.2d 271, 272 (App. 1978).

¶21 Arizona law favors the testamentary disposition of property. *In re Estate of Shumway*, 198 Ariz. 323, 326, ¶ 7, 9 P.3d 1062, 1065 (2000). "[D]oubts should be resolved on the side of carrying out the testator's [known] intent." *Id*.; *see also Waterloo v. Zimmerman*, 226 Ariz. 492, 493, ¶ 1, 250 P.3d 558, 559 (App. 2001) (testator's failure to create "list of final instructions" that was to be attached to her will did not invalidate testamentary intent with which she created the will).

The Wills Are Valid Holographic Wills Under A.R.S. § 14-2503

¶22 Appellants argue that the court erred in determining the 1995 will and the undated will were valid under A.R.S. § 14-

2503. "A will that does not comply with § 14-2502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator." A.R.S. § 14-2503. In a holographic will, the handwritten language of the will must demonstrate the testator's intent. *In re Mulkins' Estate*, 17 Ariz.App. 179, 181, 496 P.2d 605, 607 (1972). "[A] testator who uses a preprinted form, and in *his own handwriting* fills in the blanks by designating his beneficiaries and apportioning his estate among them and signs it, has created a valid holographic will." *In re Estate of Muder*, 159 Ariz. 173, 176, 765 P.2d 997, 1000 (1988) (emphasis in original).

¶23 The probate court found that the 1995 will and the undated will "are in the handwriting of the testator, contain all necessary material provisions in the handwriting of the testator and were signed by Moonie H. Kong and were therefore valid pursuant to A.R.S. § 14-2503." Appellants specifically assert that the undated will was not complete because it was not dated, it contained the word "prested," which "has no meaning," appellees failed to meet their burden of linking the exemplars to Moonie, and appellants testified that Moonie did not sign the 1995 will or the undated will, which Davis admitted.

¶24 Appellants fail to cite to any Arizona case law, rule or statute mandating either that a holographic will be dated or

requiring a date as a material provision of a will. To the contrary, a date is not a material provision of a holographic will and it may therefore be admitted to probate without containing a date. *See In re Morrison's Estate*, 55 Ariz. 504, 510, 103 P.2d 669, 672 (1940) (A holographic will "need not be dated as required by the laws of some of the other states. The important thing is that the testamentary part of the will be wholly written by the testator and of course signed by him.") Further, *In re Estate of Muder* held that a testator had to designate his beneficiaries and apportion the estate in his handwriting as well as sign it in order to create a valid holographic will, but did not require the testator to also write the date on the will. 159 Ariz. at 176, 765 P.2d at 1000. In this case the testamentary part of the undated will was written by Moonie and it was signed by him. We therefore hold that the lack of a date on Moonie's will does not result in an incomplete or invalid will.

¶25 Appellants also argue that the word "prested" in the undated will creates an ambiguous provision of the will and renders the will invalid. However, the handwritten bequest, "[e]verything I legally own . . . to my son, Davis," is clear without including the unknown word. Nicolaides, the sole expert that testified at the evidentiary hearing, stated that she "interpreted that word as presented," which is consistent with

the rest of the sentence. We therefore conclude that Moonie's testamentary intent is unambiguous regardless of the unknown word. *See In re Mulkins' Estate*, 17 Ariz.App. at 181, 496 P.2d at 607.

¶26 Next, appellants claim the probate court erred in permitting Nicolaides' testimony pertaining to authorship of the wills and erred in admitting the exemplars into evidence. We will not disturb a court's ruling on the admissibility of evidence absent a clear abuse of discretion. *State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991).

¶27 Appellants assert that Nicolaides "[a]t most . . . should have been allowed to testify . . . that in her opinion the author of the exemplars was the author of the [wills]." That is precisely what Nicolaides testified. She stated that she had "[t]he highest level of confidence" that the author of the exemplars "executed both the handwriting and the Moonie Kong signatures appearing on the wills." It should also be noted that appellants did not object to Nicolaides' expert testimony at the time of the hearing regarding her evaluation of both the exemplars and the wills.

¶28 We disagree with appellants' assertion that appellees failed to lay an adequate foundation identifying the exemplars as containing Moonie's handwriting. The exemplars consisted of three cancelled checks, a notarized quit claim deed, a notarized

durable health care power of attorney, three personal income tax forms, and five letters of correspondence. Appellants cite to Evidence Rules 901(a) and (b)(3) for support. Evidence Rule 901(a) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Evidence Rule 901(b)(3) provides the following example of authentication, "[c]omparison by the trier of fact or by expert witnesses with specimens which have been authenticated." A trial court need not determine whether the evidence is actually authentic, only whether there is sufficient evidence to support a finding that the proffered evidence is what the proponent claims it to be. *See Lavers*, 168 Ariz. at 386, 814 P.2d at 343. The evidence submitted was more than sufficient to support a finding that the exemplars were actually authored by Moonie. Therefore, the court did not abuse its discretion in admitting Nicolaides' testimony and the supporting exhibits.

¶29 Appellants next assert that both appellants provided "credible testimony" that Moonie did not sign the 1995 will or the undated will because the "g" in Moonie's signature "did not appear consistent with the genuine signature of" Moonie. Even assuming that Stites and Marcia were sufficiently acquainted with Moonie's handwriting to testify regarding their opinion

whether he signed either of the wills, their testimony did not necessarily discredit the testimony of Nicolaides. In any event, the probate court found Nicolaides more credible than appellants. We defer to the trial court's determination of the credibility of witnesses and we will not reweigh conflicting evidence. *See Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 511, ¶ 41, 114 P.3d 835, 843 (App. 2005); *see also In re Estate of Zaritsky*, 198 Ariz. at 601, ¶ 5, 12 P.3d at 1205.

¶30 Appellants also argue that Davis "was conclusively deemed to have admitted that [Moonie] did not sign either the 1995 [will] or the [undated will]." However, this argument lacks merit because Davis explicitly stated that he believed both wills contained Moonie's signature.

The Wills Are Not Both Void

¶31 Appellants first argue that both wills are void because the wills could not be admitted under A.R.S. § 14-3410 (2005) because the wills are inconsistent with one another, and there is no evidence showing which will is the most recent. Section 14-3410 states, in relevant part, that:

> If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in

> respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument.

Appellants maintain that the wills could not be admitted to probate under this statute because the undated will expressly revoked all prior wills and the 1995 will impliedly revoked prior wills, and there is no evidence which will is last in time. We disagree with appellants' argument.

¶32 Initially, we note that the premise to appellants' argument, namely, that the court admitted both wills to probate, is mistaken. The court did not admit both wills to formal probate; instead, based on the stipulation entered by appellees, it only admitted the undated will.

¶33 More importantly, as appellees point out in their answering brief, the order in which the wills were executed is a "red herring" because, Moonie's estate is fully testate regardless of the wills' order. If the undated will was the last one executed, it expressly revoked the 1995 will, and completely disposed of Moonie's estate. *See* A.R.S. § 14-2507(A)(1) (2005). If on the other hand, the 1995 will was the last one executed, it impliedly modified the undated will by redirecting that Moonie's home go to Curtis Kong. *See* A.R.S. § 14-2507(D). In either event Moonie's estate would be fully testate. If the court had concluded that both wills were void,

then Moonie's estate would have passed by intestacy. Given Arizona's law favoring the testamentary disposition of property, *see Shumway*, 198 Ariz. at 326, ¶ 7, 9 P.3d at 1065, we conclude that the court did not err by rejecting appellants' claim that both wills were void.[3] Finally, our disposition of this claim necessarily leads us to conclude that the probate court did not err by denying appellants' motions for JMOL.

Appellants Were Not Entitled to Challenge the Stipulation

¶34 After finding that both the 1995 will and the undated will were valid, the probate court provided the beneficiaries of the two wills, Davis and Curtis, an opportunity to stipulate which will was executed last. Because Stites, Marcia, and Kellie were not named beneficiaries in either will, they were not included in the probate court's order. Having found that Moonie died testate, the court did not err by determining that appellants were no longer entitled to be heard regarding which will should be admitted to probate.

¶35 Appellants also summarily argue in a footnote that the probate court erred by excluding Davis's testimony about a pre-existing agreement to divide the estate between appellees. However, they fail to develop this argument further by including

[3] For the reasons stated, we are not persuaded by appellants' reliance on out-of-state cases for the proposition that both wills are invalid because they were inconsistent with one another and it was unclear which will came first.

citations to the record and appropriate authority. We therefore decline to address it. *See* Ariz. R. Civ. App. P. 13(a)(6); *see also FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, 524 n.1, ¶ 5, 200 P.3d 1020, 1021 n.1 (App. 2008).

Probate Court Attorneys' Fees

¶36 The probate court awarded the individual appellees the entirety of their requested fees in the amount of $51,910.00, which was the totality of fees incurred by individual appellees dating from October 1, 2009, a month before the attorney for individual appellees filed his notice of appearance. Appellants contend that the court abused its discretion in doing so. We agree.

¶37 Preliminarily, we address appellants' argument that the probate court lacked jurisdiction to enter a fee award after it entered the order admitting the undated document to probate. We disagree. *See Britt v. Steffen*, 220 Ariz. 265, 269, ¶ 15, 205 P.3d 357, 361 (App. 2008) (holding that a trial court retains jurisdiction to enter an attorneys' fees award even after it has entered a final, appealable order).

¶38 As to the fee award itself, appellants maintain that insufficient evidence supports the probate court's finding that they unreasonably expanded or delayed the proceedings, as required to impose attorneys' fees pursuant to A.R.S. § 12-349(A)(3), or that they filed any pleading or motion "for any

improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[,]" as required by the provision of Civil Rule 11(a) referred to in the court's order awarding fees.

¶39 We review an award of attorneys' fees pursuant to A.R.S. § 12-349(A)(3) for an abuse of discretion. *Larkin v. State ex rel. Rottas*, 175 Ariz. 417, 426, 857 P.2d 1271, 1280 (App. 1992). We likewise review a court's imposition of Civil Rule 11 sanctions for an abuse of discretion. *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing and Fire Prot.*, 177 Ariz. 316, 319, 868 P.2d 329, 332 (App. 1993). A court abuses its discretion if it bases "its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id*. at 319 n.4, 868 P.2d at 332 n.4. We consider the evidence in the light most favorable to sustaining a few award. *See Moreno v. Jones*, 213 Ariz. 94, 98, ¶ 20, 139 P.3d 612, 616 (2006); *Heuisler v. Phoenix Newspapers, Inc.*, 168 Ariz. 278, 284, 812 P.2d 1096, 1102 (App. 1991).

¶40 We conclude that there is no basis to support an award to individual appellees of *all* the fees they incurred as a sanction against appellants. The award by the court amounts to a determination that appellants unreasonably expanded the proceedings merely by objecting to the petition for formal probate. Given the substantial issues that were presented in

this unusual probate matter, appellants were certainly justified in initially opposing the petition and were entitled to some amount of leeway in formulating their strategy and pursuing their contest. Moreover, as we explain below, several of the findings made by the probate court do not support an award of fees.

¶41 One of the issues in the case was whether Stites had standing as an heir-at-law to even pursue a will contest. Although the individual appellees urged the court to bifurcate the proceedings during a status conference held November 12, 2009, and determine first the validity of the wills and then determine Stites's status only if the court found that Moonie died totally or partially intestate, the court agreed with appellants' argument that his standing was a preliminary matter that should be determined upfront. The test result confirming that Stites was Moonie's son was filed with the court approximately one month later. Even assuming that appellants should have consented to bifurcate the proceedings, Stites's desire to proceed with genetic testing can hardly be characterized as obstructive, and, in any event, the resulting delay was minimal. Therefore, to the extent that the court based its award of sanctions on delay caused by the genetic testing, it erred.

¶42 Further, appellants' refusal to concede that Moonie's purported signature on the holographic documents was authentic, therefore putting appellees to the burden of proving the authenticity of Moonie's signatures at an evidentiary hearing, did not justify an award of fees as a sanction. Likewise, although we have rejected, as did the probate court, appellants' various legal arguments regarding the invalidity of the wills, their arguments were not so specious as to be sanctionable. To the extent that the court found that these tactics/arguments by appellants justified an award of fees, it erred in doing so.

¶43 Finally, as pointed out by appellees in their reply brief, the first mention of Rule 11 as a basis for an award of sanctions appears in the order awarding fees and costs. To the extent that the order's citation to Rule 11 provided a more expansive basis for the award than did A.R.S. § 12-349(A)(3), the court's reliance on Rule 11 was inappropriate. We further note that the seven-page order awarding fees was prepared by counsel for appellees and the probate court appears to have adopted verbatim all of appellees' proposed findings of fact and conclusions of law. On remand, the court should carefully review for accuracy any order prepared for its signature by either party. *See Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990).

¶44 Although we have concluded that some of the bases relied on by the probate court do not support an award of sanctions under either § 12-349(A)(3) or Rule 11, some of the other findings contained in the court's order awarding fees may support a partial fee award. Therefore, we vacate the fee award and remand for further proceedings on this issue.

Attorneys' Fees on Appeal

¶45 Appellees request attorneys' fees on appeal pursuant to A.R.S. §§ 14-3720 (2005), -1302(B) (2005), and 12-349. Section 14-3720 states that "[i]f any personal representative . . . defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred." "[T]he personal representative of an estate has a duty to defend the validity of the decedent's will if the will is challenged." *In re Estate of Killen*, 188 Ariz. 569, 574, 937 P.2d 1375, 1380 (App. 1996). Pursuant to A.R.S. § 14-3720, we grant an award of personal representative Davis's reasonable attorneys' fees incurred on appeal. Because Curtis and Kellie employed the same attorneys as Davis to defend in the litigation pertaining to the validity of the wills and their arguments on appeal are co-extensive, their reasonable fees will also be paid for by Moonie's estate. *See In re Estate of Brown*, 137 Ariz. 309, 312, 670 P.2d 414, 417

(App. 1983) (attorneys' fees are payable from the assets of an estate from lawyers hired by the personal representative). The amount of the award must be established by complying with Arizona Rules of Civil Appellate Procedure 21(c).

¶46 We do not find § 14-1302(B) relevant to the issue of attorneys' fees because it pertains to subject matter jurisdiction and appellees fail to explain the relevancy of this statute.

¶47 We further decline to award fees under § 12-349 for either of these consolidated appeals. First, as to the attorneys' fees award, appellants did not proceed without substantial justification as evidenced by their partial success in having at least a portion of the fee award irrevocably set aside. As to the merits of the substantive issues on appeal, we conclude that the claims raised by appellants, although unsuccessful, were, for the most part, fairly debatable. *See Johnson v. Mohave County*, 206 Ariz. 330, 334-35, ¶ 19, 78 P.3d 1051, 1055-56 (App. 2003) ("Section 12-349 does not provide a basis for an award of attorneys' fees against a party whose unsuccessful claim was . . . fairly debatable.").

CONCLUSION

¶48 For the reasons set forth above, we affirm the probate court's order probating the undated will but vacate the attorneys' fees award, and remand for further proceedings on that issue. Upon application, appellants are entitled to their costs on appeal pursuant to A.R.S. § 12-342(A) (2003).

__/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

__/s/_____
JON W. THOMPSON, Judge

__/s/_____
LAWRENCE F. WINTHROP, Judge