FILED BY CLERK
APR 30 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-CV 2012-0095
	)	DEPARTMENT B
	)	
In re the ESTATE OF A.C. MILLER.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. PB20050195

Honorable Charles V. Harrington, Judge

AFFIRMED

Michael D. Hunter — San Diego, California
In Propria Persona

Fleming & Curti, P.L.C.
By Robert B. Fleming — Tucson

and

William E. Druke — Tucson
Attorneys for Appellee
Estate of A.C. Miller

E S P I N O S A, Judge.

¶1 Michael Hunter, appearing pro se, appeals from the probate court's order distributing the estate of his uncle, A.C. Miller. Hunter raises several challenges to the fairness of the probate proceedings and the accuracy of the final accounting and disposition of the estate's assets. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to sustaining the probate court's order. *In re Estate of Pouser*, 193 Ariz. 574, ¶ 2, 975 P.2d 704, 706 (1999). Miller died in January 2005, leaving a will with codicil that devised his entire estate to Peggy Bracamonte and Donna Capanna in equal shares and nominated Capanna to serve as personal representative. Capanna petitioned the court to admit the will and codicil to formal probate and to appoint her as personal representative. Hunter contested the validity of the will and challenged the appointment of Capanna. After a bench trial, the probate court determined the will was the product of undue influence by Capanna and Bracamonte and, thus, not valid. No other will was discovered, and the court thereafter treated Miller as having died intestate.

¶3 Capanna was removed from service, and in September 2005 Sandra Paz was appointed special administrator. With court approval, she sold Miller's house, which was apparently the estate's principal asset and only real property, for $90,000. Hunter subsequently moved to terminate Paz's appointment on the grounds she had failed to notify him and other interested parties of the sale and had otherwise mismanaged the estate. The court denied the motion to remove Paz, but ordered her to file an accounting.

¶4 In December 2006, Paz filed an accounting listing $58,249.08 worth of estate assets, followed by a second accounting in August 2008 valuing the remaining assets at $50,671.67. Hunter objected to both accountings, generally asserting that Paz had acted outside the scope of her authority as special administrator and that she and her attorney had charged the estate unreasonable fees and costs. After reviewing the accountings and Hunter's objections and ordering Paz to provide bank statements for all accounts, the court ultimately approved both accountings.[1] Hunter filed a notice of appeal, which we dismissed as untimely. *Hunter v. Paz*, No. 2 CA-CV 2009-0040 (order filed July 29, 2009).

¶5 Hunter thereafter petitioned the probate court to appoint him personal representative of the estate. Relying on Hunter's averment that all heirs consented to his appointment and service without bond, the court approved his petition. However, when the court later learned that several of the heirs had not, in fact, consented to his serving without bond, it initially ordered him to post "an appropriate bond," but later concluded that "the appointment of a capable private attorney, who is also a private fiduciary, would serve the best interests of the Estate and its heirs." The court appointed Robert Fleming successor personal representative in November 2008 and thereafter discharged Paz.

¶6 In May 2010, Hunter submitted a claim for reimbursement of fees and costs he expended during his brief service as personal representative in 2008. Fleming opposed the request, and the probate court ultimately denied it. Hunter appealed, and we

[1]It does not appear that Paz actually submitted any bank statements.

affirmed, observing that "the [probate] court [had] concluded Hunter's entire appointment as personal representative was tainted by [his] misrepresentation, did not benefit the estate, and was not in good faith." *In re Estate of Miller*, No. 2 CA-CV 2010-0146, ¶ 6 (memorandum decision filed Apr. 26, 2011).

¶7 In 2011, the probate proceedings began to wind up. Hunter objected to Fleming's final accounting of the estate, which had been filed shortly before the 2010 appeal, and the matter was set for trial. The court ordered Hunter to submit a list of potential witnesses and their proposed testimony no later than 5:00 p.m. on February 29, 2012, warning him, "In the event your witness list has not been filed by the time ordered, you will not be permitted to present any evidence. And in the event it is not complete, you will not be able to present any evidence that has not been set forth on the witness list." The court also ordered, "No telephonic appearances will be permitted by any witness or by any party."

¶8 The case was tried on March 15, 2012. Hunter did not attend the hearing, and the court did not consider the documents he had submitted because they had not been timely filed. After hearing Fleming's testimony, the court signed an order settling the estate and approving Fleming's proposed distribution and request for fees. We have jurisdiction over Hunter's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(9).

Discussion

¶9 Hunter's principal argument is that the final distribution of estate assets was not supported by the evidence. In reviewing the probate court's order, "we do not reweigh conflicting evidence or redetermine the preponderance of the evidence, but examine the record only to determine whether substantial evidence exists to support the trial court's action." *Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d at 709. "Substantial evidence is evidence which would permit a reasonable person to reach the trial court's result." *Id.* We review the court's legal conclusions *de novo*. *In re Estate of Newman*, 219 Ariz. 260, ¶ 13, 196 P.3d 863, 868 (App. 2008).

¶10 As an initial matter, we must determine whether we may review Hunter's challenges to Paz's 2006 and 2008 accountings as part of our review of the final order. Fleming correctly points out that "the trial court's approval of an accounting bars an attempt to reopen consideration of items presented in the accounting," citing *In re Sullivan's Estate*, 51 Ariz. 483, 494, 78 P.2d 132, 136-37 (1938) (as a general rule, "the approval of an account of an executor . . . bars an attempt to reopen the approval of items presented in the account"), and *Estrada v. Ariz. Bank*, 152 Ariz. 386, 389, 732 P.2d 1124, 1127 (App. 1987) ("[A] judicial settlement of a trustee's interim accounts as to persons who receive notice and are subject to the court's jurisdiction bars subsequent litigation seeking to raise defaults or defects with respect to the matters shown or disclosed."). Thus, a party generally may not reopen litigation on an interim accounting once it has been approved. *See* A.R.S. § 14-3505(B) ("Subject to appeal or vacation within the time

permitted, an order made on notice and hearing allowing an intermediate account of a personal representative adjudicates his liabilities concerning matters considered in connection therewith."). Moreover, an order approving an accounting is appealable under § 12-2101(A)(9), and any such appeal must be made within the time allowed by Rule 9, Ariz. R. Civ. App. P. Failure to file a timely appeal renders the order *res judicata* and forecloses review. *See In re Estate of Terman*, 135 Ariz. 453, 455, 661 P.2d 1154, 1156 (App. 1983) ("Approval of the annual accountings after notice and without appeal, is binding in the absence of a fraudulent concealment or misrepresentation."). Because Hunter failed to timely appeal from the court's orders approving Paz's accountings, the orders are final and are not subject to review here.[2] We discuss them below only insofar as they bear on Fleming's final settlement of the estate, which is properly before us.

Accuracy of Final Accounting

¶11 Hunter contends Fleming's final accounting is inaccurate because of various alleged errors in Paz's earlier accountings. Hunter's arguments on this point are inconsistent. In his opening brief, he argues the final distribution of the estate fails to account for $16,232.67, which he suggests was never properly distributed. In his reply brief, however, he claims the opposite, namely that Fleming approved $135,844 in total distributions, including $97,640 in attorney fees, and because this far exceeded the

[2]Hunter argues in his reply brief that Fleming committed extrinsic fraud, which is another exception to the general rule, as recognized in *Sullivan's Estate*, 51 Ariz. at 494, 78 P.2d at 137; however, we do not address arguments made for the first time in a reply brief. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005).

approximately $95,000 value of the estate, a remand is necessary to correct the inaccurate accounting. While Hunter does not clearly explain the calculation process by which he arrived at these contradictory conclusions, it appears he has double-counted certain sums and omitted others in arriving at the conflicting totals he presents to us. In any event, Hunter's arguments are belied by the accountings, which properly track the estate's expenses and distributions and end with a zero balance.

¶12 Paz's 2006 accounting reflected that the estate assets included the house, valued at $87,000, and cash in the amount of $2,434.95. During Paz's administration, the house was sold for $90,000, the estate received interest and other income in the amount of $2,791.10, and made disbursements of $36,359.54 for estate expenses (including $11,701 in closing costs and taxes offset against the sale of the house). After a reconciling deduction of $617.43, there remained a $58,249.08 estate balance as of November 27, 2006. Paz's subsequent 2008 accounting reflects a beginning balance of $58,249.08, interest income receipts of $2,925.34, expense disbursements of $10,502.75, and an ending balance of $50,671.67.

¶13 After Fleming was appointed personal representative, Paz filed a memorandum reconciling the discrepancy between her August 2008 accounting and the assets she transferred to Fleming in November 2008. This statement showed a beginning balance of $50,671.27, interest receipts of $115.47, expense disbursements of $380, and a

final balance of $50,407.14.[3] And Fleming's final accounting showed a beginning balance of $50,407.14, receipts of $277.12, disbursements of $27,120.58, and an available balance to be distributed of $23,563.68. He proposed that distributions be made to Miller's heirs in the amount of $16,000 and projected remaining estate expenses to be $7,563.68, leaving a zero balance. Hunter has not demonstrated any error in Fleming's final accounting.

Druke's Attorney Fees

¶14 Hunter also argues Fleming paid William Druke, appellate counsel for the estate in the earlier appeal, without notice to the heirs or a court order and concealed the payment in his final accounting. First, we disagree that the payment was concealed. As Fleming points out, Druke filed an affidavit of attorney fees in June 2011, which became part of the court record and was also mailed to Hunter, and Hunter himself referred to the disbursement in his opposition to Fleming's final accounting. We also disagree that the disbursement was not made pursuant to court order. Fleming was entitled to recover Druke's fees pursuant to A.R.S. § 14-3720, which allows a personal representative "to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred" when he "defends or prosecutes any proceeding in good faith."

[3]Fleming acknowledges a forty-cent discrepancy between the closing balance of the 2008 accounting and the opening balance of the reconciliation statement. We agree with him, however, that this is attributable to a scrivener's error because the ending balance of the reconciliation statement is accurate and includes the forty cents missing from the opening balance.

And the disbursement was included in Fleming's final accounting, which the court approved. We accordingly find no error.

Failure to Cite Statutes

¶15 Hunter next contends the probate court erred in approving the final settlement of the estate because Fleming's petition lacked citation to various statutes, including A.R.S. §§ 14-3719 through 14-3722 (providing statutory basis for compensation of estate's personal representative, agents, and appointees, and for award of personal representative's litigation expenses) and 14-3931 through 14-3938 (detailing procedures for final settlement of estate and distribution of assets, and limiting liability of personal representative and distributees). To support his argument, he states simply that he "has never seen in his tenure in this case a PETITION submitted to Probate . . . without a Statute Cited in a[n] accounting proceeding[]." Hunter does not cite, nor do we find, any authority suggesting that a petition must contain statutory references before a court may order an estate settled. Accordingly, we find no error.

Amount of Fees

¶16 Finally, Hunter contends that distributions of attorney fees constituted an unreasonably high portion—over half—of the estate. *See Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 187, 673 P.2d 927, 931 (App. 1983) ("'[A]ttorney's fee must be reasonable and bear a direct relation to the amount involved, and the quality, kind and extent of the service rendered.'"), *quoting Leggett v. Wardenburg*, 53 Ariz. 105, 85 P.2d 989 (1939). He maintains that fees totaled $62,761.33; our calculations, however, place

them at $53,636.18, not including fees distributed to Paz, a nonlawyer, for her work as special administrator. Either amount is considerable and constitutes more than half of the estate, which comprised only approximately $92,000. But it is apparent that the majority of these fees have resulted from substantial litigation over the eight years of the estate's administration—indeed, the record on appeal contains nearly five hundred items. Much of this litigation has been occasioned by Hunter's own actions. In the probate court, he challenged numerous actions taken by both Fleming and Paz; he also unsuccessfully prosecuted two appeals in addition to the one currently before us. Accordingly, although attorney fees have unfortunately depleted the estate to a large extent, we cannot say the fees incurred were unreasonable given the litigation involved.

Other Issues

¶17 We do not address the other issues raised by Hunter, either because he fails to support them with argument in his opening brief or because they were not adequately preserved in the probate court. *See* Ariz. R. Civ. App. P. 13(a)(6) (requiring each issue to be supported by argument); *DeElena v. S. Pac. Co.*, 121 Ariz. 563, 572, 592 P.2d 759, 768 (1979) (declining to address issues not supported by argument); *Englert*, 199 Ariz. 21, ¶ 13, 13 P.3d at 768 (declining to address issues not raised in trial court); *see also Gibson v. Boyle*, 139 Ariz. 512, 521, 679 P.2d 535, 544 (App. 1983) (appellant must include record citation showing appellate issue was presented to and ruled on by trial court). As noted above, we also do not review his challenges to Paz's accountings because they are untimely. *See Sullivan's Estate*, 51 Ariz. at 494, 78 P.2d at 136-37.

Disposition

¶18 For the foregoing reasons, the probate court's order is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge