IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE ESTATE OF
JERRIS SUE KELLER, DECEASED.

ANNE MADALINSKI,
Petitioner/Claimant/Appellant,

v.

LAURA KELLER, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF JERRIS SUE KELLER,
Respondent/Appellee.

No. 2 CA-CV 2018-0083
Filed April 10, 2019

Appeal from the Superior Court in Cochise County
No. PB201500220
The Honorable John F. Kelliher Jr., Judge

AFFIRMED

COUNSEL

Udall Law Firm LLP, Tucson
By Jeanna Chandler Nash and Abigail Reinard Wolberg
Counsel for Petitioner/Claimant/Appellant

Law Office of Derek J. Wilson, Phoenix
By Derek J. Wilson
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Appellant Anne Madalinski appeals an order of the probate court finding her claim against the Jerris Sue Keller estate untimely presented and "forever barred." For the reasons that follow, we affirm.

Factual and Procedural History

¶2 Jerris Sue Keller died in April 2014. In October 2015, her daughter, Laura Denise Keller ("Keller"), was appointed personal representative of the estate and filed an Application for Informal Probate of Will showing the estate was approximately $75,000 in debt.

¶3 In November 2015, Madalinski filed a Demand for Notice pursuant to A.R.S. § 14-3204, which was served on Keller's attorney.[1] On the same day, Madalinski filed a Claim Against the Estate (the "Claim") with the probate court, claiming the estate owed her $13,755.48.[2] Unlike the

[1] The record does not reflect that Keller provided notice of her appointment as personal representative either through publication in a newspaper of general circulation or via written notice to known creditors, as required by A.R.S. § 14-3801(A), (B). However, Madalinski's filing of the Demand for Notice in November 2015, with service to Keller's attorney of record, demonstrates that Madalinski had actual notice of the appointment by the time of that filing.

[2] In particular, Madalinski claimed that, in March 2013, she had loaned Keller's mother $15,680.48 at zero percent interest to refinance an automobile, and that she had received $100 monthly payments through

Demand for Notice, the Claim included no certificate of service to either Keller or her attorney. In August 2016, Keller changed counsel, and her new attorney obtained a copy of the court file, which included the Claim. According to Keller, this was the first time she received a copy of the Claim that had been filed in November 2015.

¶4 In July 2016, Madalinski's attorney had sent a letter to Keller's first attorney contesting an Inventory and Appraisement Keller had executed in December 2015, requesting a "formal disallowance of claim," acknowledging Madalinski's "understanding that the sole reason for denying the claim is due to insufficient funds," and indicating Madalinski would "file a petition for allowance of claim with the court" if the claim was disallowed. Keller's then-counsel responded in writing in August 2016, explaining the details of the estate's insolvency and reiterating "the previous disallowance" under A.R.S. § 14-3806(B) due to lack of sufficient funds to pay the claim.

¶5 In September 2016, Madalinski filed a Petition for Allowance with the probate court, stating the November 2015 Claim (which it attached as an exhibit) had been "properly presented" to Keller and had not been "formally disallowed by the Estate," although "communications ha[d] stated that there [were] not sufficient funds in the Estate to pay the claim." In October 2016, Keller filed a Notice of Disallowance, stating Madalinski's Claim "has been disallowed in full" and providing a "Formal Accounting" showing that the value of the estate was insufficient to pay the Claim.

¶6 In early 2018, the parties filed briefs and exhibits to address whether the Claim and Keller's disallowance of the Claim were timely.[3] Madalinski "ask[ed] [the] court for an Order allowing the Claim." In

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December 2014. The $13,755.48 demanded in Madalinski's November 2015 Claim was the balance of the alleged loan.

[3]Until 2018, the litigation had focused on "the existence and validity of [Madalinski's] claim," with Keller retaining an expert witness who was expected to opine that the decedent's signature on the promissory note was not genuine. However, in early January 2018, shortly before the date set for trial, Madalinski requested an emergency status conference to discuss "a potentially dispositive legal claim that should be examined prior to trial," namely whether Keller had timely disallowed the Claim. After the status conference, the judge vacated the trial schedule and ordered the parties to submit briefing.

response, Keller "request[ed] an order from [the] Court determining that [Madalinski] failed to present the Claim as required by A.R.S. § 14-3804," rendering the Claim "forever barred."[4] In March 2018, the probate court granted Keller's request, ruling Madalinski had "failed to timely present her claim as required by A.R.S. § 14-3804 and her claim is forever barred." This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(9).[5]

Discussion

¶7 Madalinski argues the trial court erred in finding her claim "forever barred" because the November 2015 Claim was both timely and properly presented.[6] In particular, Madalinski contends the Claim was not only filed with the probate court in November 2015,[7] but also simultaneously mailed to Keller's attorney, thus achieving the "presentment of the Claim" as required by statute.

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[4]In the alternative, Keller "request[ed] that the Court conclude that Madalinski [was] estopped from asserting that the Claim ha[d] been allowed as a matter of law."

[5]In September 2018, this court suspended the appeal and revested jurisdiction in the trial court for the limited purpose of permitting counsel to apply for an appropriate final judgment. Madalinski moved the trial court for an amended order containing language pursuant to Rule 54(c), Ariz. R. Civ. P., which the court promptly issued. This court then vacated the stay, revested jurisdiction, and reinstated the appeal.

[6]Madalinski does not argue that either the letter sent to Keller's counsel in July 2016 or the September 2016 Petition for Allowance were timely claims. Regardless, both were dated after the time for presenting claims had expired. *See* A.R.S. §§ 14-3801, 14-3803(A).

[7]There is no dispute that the mere filing of a claim in the probate court, without service on the estate's personal representative or her attorney, is insufficient to satisfy the requirements of A.R.S. § 14-3804(1), which expressly requires written notice to be received by the personal representative. *See In re Estate of Snure*, 234 Ariz. 203, ¶ 9 (App. 2014) (citing *Jones v. Flowers*, 547 U.S. 220, 232-33 (2006)) (rejecting argument that filing document with superior court is sufficient to give notice).

¶8 We agree that, if shown by competent evidence, the mailing[8] of a written claim to Keller's attorney of record[9] in November 2015[10] would be sufficient to demonstrate timely presentation of the Claim under A.R.S. § 14-3804(1), which establishes that a claim "is deemed presented on receipt of the written statement of claim by the personal representative." However, the trial court implicitly found that Madalinski failed to prove the Claim was received by Keller's attorney in November 2015 when it was filed with the court. *See Lee Dev. Co. v. Papp*, 166 Ariz. 471,

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[8] Under the common-law "mail delivery rule," there is "a presumption that a 'letter properly addressed, stamped and deposited in the United States mail will reach the addressee,'" such that "proof of the fact of mailing will, absent any contrary evidence, establish that delivery occurred." *Lee v. State*, 218 Ariz. 235, ¶ 8 (2008) (quoting *State v. Mays*, 96 Ariz. 366, 367-68 (1964)).

[9] We find unpersuasive Keller's argument on appeal that service of a written claim on a personal representative's attorney, as opposed to the personal representative herself, is insufficient under A.R.S. § 14-3804(1). *See In re Estate of Barry*, 184 Ariz. 506, 511 n.3 (App. 1996) (citing *Strong Bros. Enters., Inc. v. Estate of Strong*, 666 P.2d 1109, 1112 (Colo. App. 1983) for proposition that notice to estate's attorney instead of personal representative is sufficient). The Arizona Rules of Civil Procedure provide, "If a party is represented by an attorney, service . . . must be made on the attorney unless the court orders or a specific rule requires service on the party." Ariz. R. Civ. P. 5(c)(1). We do not read § 14-3804(1) as requiring service on the personal representative in lieu of his or her attorney of record. Notably, both parties to this action have proceeded as if other statutory provisions describing the roles of "claimant" and "personal representative" could be effectuated by their respective counsel, despite no mention of that possibility in the statutory text itself. Moreover, as Madalinski notes, Keller's October 2015 filings with the probate court included only her attorney's address, not Keller's personal address, indicating that Keller "clearly anticipated and should have expected that any notices directed to [Keller] would be going to her lawyer."

[10] Under A.R.S. § 14-3803(A)(1), Madalinski had at least two years from the date of the decedent's death in April 2014 to file her claim, i.e., until at least April 2016. *In re Estate of Van Der Zee*, 228 Ariz. 257, ¶ 11 (App. 2011) (known creditor who should have been served written notice has at least two years after decedent's death to present claim).

476 (App. 1990) ("[I]mplied in every judgment, in addition to express findings made by the court, is any additional finding that is necessary to sustain a judgment, if reasonably supported by the evidence, and not in conflict with the express findings."). "We defer to the trial court with respect to any factual findings explicitly or implicitly made, affirming them so long as they are not clearly erroneous." *John C. Lincoln Hosp. and Health Corp. v. Maricopa Cty.*, 208 Ariz. 532, ¶ 10 (App. 2004). We will affirm the trial court's decision in this case absent an abuse of discretion.[11] *See Toy v. Katz*, 192 Ariz. 73, 83 (App. 1997) (appellate court reviews trial court's ruling on motion to dismiss for insufficiency of process for abuse of discretion); *see also Snow v. Steele*, 121 Ariz. 82, 84 (1978) (reviewing trial court dismissal for lack of timely service of process for abuse of discretion, and affirming same when "court below could reasonably conclude" lack of due diligence from facts before it).

¶9 Madalinski contends "the record is clear that the Claim . . . was mailed on November 20, 2015 to [Keller's] lawyer." We disagree. Most importantly, the Claim filed with the probate court in November 2015 bears no certificate of service. This is a telling omission, particularly given that a certificate of service is included on the Demand for Notice that Madalinski filed the same day. She also failed to include a certificate of service on her January 2018 trial brief and failed to serve it on Keller or Keller's attorney, requiring Keller to seek a copy of the brief from the probate registrar and an extension of time to file her response, which Madalinski did not oppose. These facts support the conclusion that the lack of a certificate of service on the November 2015 Claim indicates another failure to serve rather than a mere failure to include the certificate.

¶10 Madalinski contends Keller's attorney "acknowledged the Claim" in the August 2016 letter to Madalinski's attorney. But the August 2016 letter directly responded to the July 2016 letter from Madalinski's

[11]The parties did not present their respective requests for a court order as formal motions, nor did the trial court characterize its order as a dismissal pursuant to a particular statutory provision. The parties have not argued or briefed this issue, and finding no Arizona cases directly on point, we conclude the court's order, which implicitly found the November 2015 Claim not timely received by Keller or her counsel, is best analogized to the granting of a motion to dismiss for insufficient service of process under Rule 12(b)(5), Ariz. R. Civ. P.

counsel, and it made no reference to the written Claim filed with the court—and allegedly mailed to Keller's counsel—in November 2015.

¶11 Moreover, according to Madalinski, Keller and her attorney had learned of Madalinski's desire to collect money from the estate well before the written Claim was filed in November 2015. She maintains Keller had actual notice of the substance of the claim and discussed it with her attorney as early as January 2015.[12] Thus, the references in the August 2016 letter to the claim and the "previous disallowance" could reasonably be interpreted as references to prior oral communications between the parties and do not prove Keller's attorney received the written Claim in November 2015.

¶12 The only document stating the Claim was mailed to Keller's attorney in November 2015 is Exhibit B to Madalinski's reply brief filed with the trial court. That document is an alleged business record from the offices of Madalinski's counsel dated November 2015—but printed from a "Temp" file in March 2018—in which a person identifying herself as Mallory Ress typed into the Madalinski case file: "Mailed Demand and Claim to Client and to the attorney for Personal Representative." No affidavit or declaration accompanied this document when it was submitted to the trial court.[13] Even if authentic, this case note shows only that Ms. Ress entered the note into the system, not that she mailed the Claim as described.[14] Moreover, even if the case note were sufficient to show Ms.

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[12]It is undisputed that actual knowledge of a claim that has not been provided in writing is insufficient to satisfy the requirements of A.R.S. § 14-3804. *See Estate of Barry*, 184 Ariz. at 511 (notice of claim must be in writing).

[13]Counsel's characterization of the document as a "business record," without more, is insufficient to establish the note could be considered an exception to the rule against hearsay. *See* Ariz. R. Evid. 803(6) (identifying conditions that must be met, by testimony or certification, for admission of business record).

[14]We cannot agree with Madalinski that this purported business record constitutes "unrefuted evidence" that Madalinski mailed the Claim to Keller's attorney in November 2015, given that the record was filed with Madalinski's reply, a brief to which Keller had no right of reply. *Cf. Atreus Cmtys. Grp. of Ariz. v. Stardust Dev., Inc.*, 229 Ariz. 503, ¶ 34 (App. 2012)

Ress mailed the Claim, it provides no evidence that the document was "properly addressed" to Keller or her counsel or that it was adequately "stamped" before being mailed, as required to trigger the presumptions of the "mail delivery rule." *Lee v. State*, 218 Ariz. 235, ¶ 8 (2008) (quoting *State v. Mays*, 96 Ariz. 366, 367-68 (1964)). Thus, contrary to Madalinski's assertion, the case note is insufficient to raise a presumption that the Claim was received by Keller's attorney in November 2015.

¶13 Madalinski contends Keller did not argue below that her attorney never received the Claim and therefore waived that ground for disallowing it. However, as Madalinski concedes in her opening brief, she both argued and attempted to prove service of the Claim on Keller's attorney in November 2015. The court thus had the opportunity to consider the issue and implicitly rejected Madalinski's argument. *See Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, ¶ 12 (App. 2011) (purpose of waiver rules is to allow trial court opportunity to address issues on their merits). Moreover, "the doctrine of waiver is discretionary," *Noriega v. Town of Miami*, 243 Ariz. 320, ¶ 27 (App. 2017), and in the exercise of that discretion, we decline to find waiver in these circumstances.

¶14 Relying on A.R.S. § 14-3804(3), Madalinski also contends the trial court erred in finding that actual notice of disallowance, as opposed to mailing of a written notice, was the triggering date for commencing an action against the estate. However, that statutory provision, like § 14-3806(A) regarding the allowance and disallowance of claims, only applies if the claim has been presented as established in § 14-3804(1). The trial court found this had not timely occurred. Because we affirm the trial court's finding that Madalinski failed to timely present her claim, we need not address Madalinski's arguments regarding the manner in which she received notice of the disallowance or the timeliness of her action against the estate.

¶15 Both Madalinski and Keller request an award of attorney fees on appeal pursuant to A.R.S. § 12-341.01. In our discretion, we award reasonable attorney fees and costs to Keller as the successful party on appeal, subject to her compliance with Rule 21, Ariz. R. Civ. App. P. *See*

("The applicable civil procedure rule provides for a motion, a response, and a reply," and "makes no provision for a surreply.").

A.R.S. § 12-341. Madalinski has not succeeded on appeal and we therefore deny her request.

Disposition

¶16 We affirm the judgment of the trial court.