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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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In the Matter of the Estate of:

DARLENE MAY, Deceased.

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SUSAN KAY YARBOROUGH, as personal representative of the ESTATE  
OF DARLENE M. MAY, Deceased, *Petitioner/Appellee*,

*v.*

KIMBERLY GRAZIANO, *Respondent/Appellant*.

No. 1 CA-CV 15-0563  
FILED 11-1-2016

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Appeal from the Superior Court in Maricopa County  
No. PB2014-070623  
The Honorable Colleen L. French, Judge *Pro Tempore*  
The Honorable Frank W. Moskowitz, Judge

**REVERSED AND REMANDED**

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COUNSEL

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**MEMORANDUM DECISION**

Presiding Judge Patricia K. Norris delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Margaret H. Downie joined.

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**N O R R I S**, Judge:

¶1 Respondent/Appellant Kimberly Graziano appeals the superior court's order dismissing her Objection and Request for Formal Proceeding. For the following reasons, we reverse and remand.

**FACTS AND PROCEDURAL HISTORY**

¶2 Decedent Darlene M. May died on April 5, 2014. On April 28, 2014, Petitioner/ Appellee Susan Kay Yarborough, May's niece, applied for informal probate of May's will and asked the court to appoint her as personal representative of May's estate. With her application, Yarborough filed a Last Will and Testament executed by May on October 10, 2009 (the "2009 Will"), and averred that she had priority for appointment as personal representative of May's estate under the terms of the 2009 Will. The probate registrar declared the 2009 Will valid, admitted it to informal probate, and appointed Yarborough as personal representative to administer the estate. Yarborough subsequently filed proof that she mailed notice of the informal probate and appointment of personal representative to May's heirs and devisees, including May's daughter, Graziano, on May 7, 2014.

¶3 On July 22, 2014, a paralegal employed by Graziano's counsel attempted to file a civil complaint to contest the 2009 Will and to object to the appointment of Yarborough as personal representative. The complaint also asked the court to admit May's 1995 Last Will and Testament (the "1995 Will") to probate, and to appoint Graziano as personal representative of May's estate. A deputy clerk of the superior court, however, refused to file the complaint and rejected the complaint with instructions that it had to be filed at the probate filing counter, with a probate coversheet, in probate format, and "not as a civil complaint." The paralegal then contacted a "probate court clerk" who informed her that "the only document needing

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to be filed was an Objection and Request for Formal Proceeding and the Court would set a hearing date.”

¶4 On July 29, 2014, Graziano filed a form document entitled “Objection and Request for Formal Proceeding” (the “Objection”). In the Objection, Graziano identified herself as May’s daughter, stated that she objected to the “Will submitted to Probate and the Order Appointing Personal Representative,” and asked the court to “Remove the Personal Representative and deem rejected the [2009] Will . . . , appoint myself as the Personal Representative and admit the” 1995 Will. Graziano did not file the 1995 Will, or any other documents, with the Objection.

¶5 The court did not set a hearing on Graziano’s Objection and the record contains no evidence that Graziano contacted the court to obtain a hearing date. On September 19, 2014, Yarborough moved to dismiss the Objection, asserting that it failed to set forth grounds under Arizona Revised Statutes (“A.R.S.”) section 14-3611(B) (2016)<sup>1</sup> for removal of Yarborough as personal representative. Yarborough also asserted Graziano’s Objection failed to satisfy the requirements for a petition for formal testacy proceedings under Arizona law, a defect that Graziano could no longer cure because A.R.S. § 14-3306(B) (2016) prohibited her from filing such a petition more than four months after she received notice of the informal probate proceeding.

¶6 Graziano responded by explaining that the deputy clerk had refused to file her civil complaint to contest the 2009 Will and that the probate court clerk had informed her that the Objection was the document she needed to file in the probate court case. Graziano alleged she did not specifically request a hearing because the probate court clerk told the paralegal that the court would set a hearing. Graziano stated that she was “concerned with the actions of the Personal Representative since appointment,” and, while not asking for leave to amend her earlier filing, suggested that she had no objection to providing a more definite statement. She also directed the court to the exhibits attached to her response – a copy of the rejected complaint and the paralegal’s affidavit describing her communications with the court clerks – and stated that those documents should aid Yarborough in responding to Graziano’s allegations. Finally, Graziano maintained that she had complied with the requirements of

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<sup>1</sup>The statutes cited in this memorandum decision have not been materially amended since the paralegal attempted to file the civil complaint. Thus, we cite to the current versions of the applicable statutes.

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A.R.S. § 14-3306(B) to commence a formal testacy proceeding by following the directions of the probate court clerk.

¶7 The superior court granted Yarborough’s motion to dismiss the Objection, ruling that it failed to state a reason to remove the personal representative, failed to state facts sufficient to contest the probate of the 2009 Will, and failed to attach the alleged 1995 Will.

**DISCUSSION**

¶8 This court reviews de novo an order granting a motion to dismiss, assuming the truth of all facts stated in the pleading. *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 194, ¶ 6, 377 P.3d 988, 989 (2016); *In re Estate of Snure*, 234 Ariz. 203, 204, ¶ 2, 320 P.3d 316, 317 (App. 2014).

¶9 Yarborough filed the 2009 Will in April 2014, which was “conclusive as to all persons until superseded by an order in a formal testacy proceeding.” A.R.S. § 14-3302 (2016). Graziano contends she properly “commenced” a formal testacy proceeding by filing the Objection. See A.R.S. § 14-3401(A) (2016) (stating, in part, that a formal testacy proceeding may be commenced by filing “a petition to set aside an informal probate of a will”). Yet, as the superior court noted in its ruling, Graziano’s Objection did not state any grounds for opposing informal probate of the 2009 Will and did not assert any facts to support her request or attach any documents. The only substantive statement contained in the Objection was Graziano’s request for relief: “Remove the Personal Representative and deem rejected the [2009] Will . . . , appoint myself as the Personal Representative and admit the” 1995 Will. Accordingly, the Objection, standing alone, did not constitute a satisfactory petition to set aside the informal probate of the 2009 Will because it did not state any facts in support of Graziano’s request.

¶10 Before she filed the Objection, however, Graziano had attempted to file a verified civil complaint, which stated that she was objecting to Yarborough’s appointment as personal representative of the estate and alleged the 2009 Will was invalid because May had lacked testamentary capacity when she executed it and Yarborough had procured the will by undue influence and fraudulent misrepresentations. Graziano attached to the complaint a copy of the 1995 Will and alleged it should be admitted to probate as May’s last true will and testament.

¶11 If the deputy court clerk had filed Graziano’s complaint, it would have satisfied the requirement that Graziano state facts in support

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of her request that the court set aside the informal probate of the 2009 Will. See Ariz. R. Prob. P. 4(B) (allowing a civil action to be consolidated with, or filed within, a related probate action); *Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 102, 907 P.2d 67, 71 (1995) (noting superior court may consolidate a probate action and a related civil action). The deputy court clerk refused to file the complaint, however, and instructed Graziano that the complaint should be filed at the probate filing counter, with a probate coversheet, and in probate format, “not as a civil complaint.” Neither party has cited, and we have not found, any authority that permits a clerk of the superior court to reject an improperly formatted or deficient pleading. Indeed, this court has previously held that a complaint was “constructively filed” for purposes of the statute of limitations when a party presented it to the clerk of the court, even though the clerk returned it because it was not in the required format. See *Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, 534, ¶ 16, 115 P.3d 124, 128 (App. 2005); see also *Whittaker Corp. v. Estate of King*, 25 Ariz. App. 356, 357, 543 P.2d 477, 478 (1975) (reversing trial court’s order granting motion to dismiss complaint as untimely and holding complaint was constructively filed when first presented to the superior court clerk, even though clerk returned the complaint for failure to comply with a local rule).

¶12 Under these circumstances, when but for the deputy clerk’s refusal to accept Graziano’s civil complaint because of purported technical deficiencies, she would have satisfied the minimal requirements for stating an objection to the informal probate proceedings, the superior court should not have dismissed Graziano’s Objection.

CONCLUSION

¶13 For the foregoing reasons, we reverse and remand for further proceedings. We deny Yarborough’s request for an award of attorneys’ fees and costs incurred on appeal. We award Graziano her costs on appeal contingent upon her compliance with Arizona Rule of Civil Appellate Procedure 21 but deny her request for attorneys’ fees.



AMY M. WOOD • Clerk of the Court  
FILED: AA