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SUPREME COURT
STATE OF ARIZONA

In the Matter of the Conservatorship of: WILLIAM JOHN CHALMERS, an Adult.	**Case No. CV-23-0263-PR** **Arizona Court of Appeals** **Case No. 1 CA-CV 22-0429** Maricopa County Superior Court Case No. PB 2017-001373 Thomas L. Marquoit

RESPONSE TO PETITION FOR REVIEW

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Introduction

William Chalmers agrees with Petitioners that the Court of Appeals filed an Opinion that has decided novel issues of statewide importance about a remedial statute the Legislature enacted to protect the rights of vulnerable conservatorship and guardianship wards. But there is no need to grant the petition for review. The Court of Appeals correctly decided that A.R.S. § 14-5109(A) is mandatory and that forfeiture of fees is a proper remedy to impose against probate professionals that violate the statute.

Still, at the Opinion's end, the Court of Appeals diluted the fair, logical forfeiture remedy it had just recognized. The rule should be as clear as the statute. The rule should be this: If a probate professional violates A.R.S. § 14-5109(A) and collects fees for work supposedly done to benefit the conservatorship/guardianship ward, that probate professional must disgorge those fees in full.

Anything else would weaken the protection of a statute the Legislature enacted to protect conservatorship/guardianship wards from predatory probate professionals purporting to represent those wards' best interests while shamelessly looting their assets, churning their client files, performing work that no one really needs, and providing their wards with little to nothing of real value.

In its novelty, importance, and likelihood of repetition in probate cases across Arizona, this is a petition with serious merit. Still, because the Court of

Appeals got things right on the mandatory nature of the statute and on the need to impose a strong forfeiture remedy for its violation, this Court should decline to grant the petition. If this Court does grant the petition, however, it should correct the Court of Appeals' ultimate unclear prevarication on the scope of the remedy and how to apply it.

Forfeiture of compensation is a proper, forcible remedy that Arizona courts should impose whenever a guardian, conservator, attorney, or guardian ad litem that intends to seek compensation from the estate of a ward or protected person first appears in the proceeding—but:

> (1) fails to give written notice of the basis of the compensation by filing a statement with the probate court,
>
> (2) fails to provide a copy of the statement to all persons entitled to notice,
>
> (3) fails to provide a general explanation of the compensation arrangement, and
>
> (4) fails to provide a general explanation of how the compensation will be computed.

A.R.S. § 14-5109(A).

Recognizing and imposing a forfeiture remedy for violation of this clear, mandatory statute provides a powerful protection for conservatorship/guardianship wards. The Legislature created A.R.S. § 14-5109(A) to combat the rampant abuse of wards by a small clique of probate professionals crassly feathering their nests at

the expense of wards unable to protect themselves from their foul malfeasance. The forfeiture penalty is fair and logical.

One point merits emphasis. We are not dealing with amateurs. Petitioners touted themselves as professionals and charged magnificently for their services. But they did not comply with A.R.S. § 14-5109(A). They cannot blame Bill Chalmers or the probate court for that. They can only blame themselves. They alone must bear the consequences of their lack of professional competence.

Legal Argument

1. A.R.S. § 14-5109(A)'s mandatory terms.

This petition concerns what happens when probate professionals seeking payment for their services from a probate ward's estate fail to comply with a statute that governs what they must do to be paid. The statute at issue is A.R.S. § 14-5109(A), which provides that:

> When a guardian, a conservator, an attorney or a guardian ad litem who intends to seek compensation from the estate of a ward or protected person first appears in the proceeding, that person *must give written notice* of the basis of the compensation by filing a statement with the court and providing a copy of the statement to all persons entitled to notice pursuant to §§ 14-5309 and 14-5405. The statement *must provide* a general explanation of the compensation arrangement and how the compensation will be computed.

A.R.S. § 14-5109(A) (emphasis added).

This mandatory statute requires that the probate professionals seeking money from the ward's estate first:

(1) *must* give a written notice of the basis of the compensation by filing a statement with the probate court;

(2) *must* provide a copy of the statement to all persons entitled to the written notice;

(3) *must* provide a general explanation of the compensation arrangement; and

(4) *must* provide a general explanation of how the compensation will be computed.

Courts interpret each word in a statute in its "ordinary sense unless it appears from context that a different meaning should control." *Castregon v. Huerta*, 119 Ariz. 343, 345 (1978). A "mandatory statute," which is what A.R.S. § 14-5109(A) is, "should as a general rule be literally construed and strictly applied." *Biaett v. Phoenix Title & Trust Co.*, 70 Ariz. 164, 168 (1950). That is "especially" true "in regard to provisions which are designated to safeguard substantial rights." *Id*.

In 2011, the Legislature passed A.R.S. § 14-5109(A) as part of Senate Bill 1499. Its enactment was a vigorous legislative response to exemplary investigative journalism that disclosed widespread financial abuse by probate-court-appointed fiduciaries and attorneys of wards such as William Chalmers. Many exemplary newspaper articles revealed comprehensive abuse of probate wards (particularly in Maricopa County Superior Court).

Summaries of many of those excellent newspaper articles by *Arizona Republic* reporters Robert Anglen, Pat Kossan, and Laurie Roberts appear at Pages

27 to 42 of the Answering Brief. They are examples of the highest tradition of American investigatory newspaper reporting and of the impact that such quality reporting can have in spurring significant legislative reform.

A March 3, 2011 article in the *Arizona Republic* explained that "Senate Bill 1499, supported by judges, fiduciaries and their lawyers, would impose new rules that would require fiduciaries to submit budgets, create fee guidelines, and require that [their] services and costs benefit vulnerable adults." Robert Anglen, *Competing Bills Target Probate*, Arizona Republic A-1 (March 3, 2011).

Arizona State Senator Adam Driggs (R-Phoenix), SB 1499's sponsor, explained the legislation "demands that a proposed guardian must submit a good-faith estimate of all costs up front to avoid any sticker shock for families." Adam Driggs, *SB 1499 Will Bring Order to Probate Court Chaos*, Arizona Republic B-5 (March 23, 2011). "Shortly after being appointed," Senator Driggs explained that "the conservator/guardian is required to have a detailed budget in place. If the conservator goes over budget, it won't see the money unless there is a clear, defensible explanation." *Id*.

A front-page April 20, 2011 article explained that the SB 1499 "legislation follows an ongoing investigation" by the *Arizona Republic* "that found Maricopa County Probate Court for years allowed the assets of some vulnerable adults to become cash machines for attorneys and fiduciaries. Judges charged with

overseeing these cases rarely stepped in to limit or reduce fees, even when incapacitated adults ended up on state assistance programs." Robert Anglen, *Legislative Work Wraps Up—Bills That Would Reform Probate Court Get OK*, Arizona Republic A-1, A-15 (April 20, 2011).

The Arizona Legislature *unanimously* adopted SB 1499 with the goals "of better protecting vulnerable people and giving them a voice in what happens to their money" and of ensuring "fiduciaries and lawyers can't run up charges that do nothing to benefit the vulnerable person footing the bill." Laurie Roberts, *1 Signature Away from Her Wish: Woman, 89, Wants Justice After Protectors Drained Her Estate*, Arizona Republic B-1, B-5 (April 27, 2011).

A May 7, 2011 editorial observed that SB 1499 "will make it harder for lawyers and fiduciaries to drain the assets of their vulnerable and incapacitated clients." *Probate Law Leaves a Loophole*, Arizona Republic B-4 (May 7, 2011).

It was from that reform environment that A.R.S. § 14-5109(A) orders that, when a guardian, conservator, attorney, or guardian ad litem "first appears in the proceedings" and intends to seek money from a ward's estate, that guardian, conservator, attorney, or guardian ad litem:

> (1) must give a written notice of the basis of the compensation by filing a statement with the probate court;
>
> (2) must provide a copy of the statement to all persons entitled to the written notice;

(3) must provide a general explanation of the compensation arrangement; and

(4) must provide a general explanation of how the compensation will be computed.

2. A mandatory statute means nothing when violating it has no real consequences.

Fiduciaries and attorneys must comply with A.R.S. § 14-5109(A). If they do not, there must be consequences, one of which would be loss of any entitlement to payment. A mandatory statute with no remedy for its violation is a meaningless, empty gesture. A mandatory statute, after all, is by definition a "law that requires a course of action as opposed to merely permitting it." *Black's Law Dictionary* 1704 (11th ed. 2019).

Requiring a remedy for violating a mandatory statute is consistent with the public and legislative concern about probate professionals looting their wards' assets that led to enacting A.R.S. § 14-5109(A).

The Petitioner probate professionals (EVFS, Scharber, McKindles, and Theut) never filed any A.R.S. § 14-5109(A) notice of compensation. In addition, there is no evidence in the record that the Petitioner probate professionals ever provided copies of any notice-of-compensation statements to those persons entitled to notice under A.R.S. §§ 14-5309 and 14-5405, including to Chalmers's spouse and adult children. In addition, not one of the Rule 33 statements submitted in this case was ever sent to Chalmer's spouse and adult children. The Petitioner probate

professionals thus failed to provide *any* of the important protections for probate wards that the Arizona Legislature had created in A.R.S. § 14-5109(A).

The trial court held that the fact that the attorneys in this matter failed to comply with A.R.S. § 14-5109(A) is a "factual issue [that] is not in dispute." (IR-359 at 1). Ultimately, the trial court justifiably and reasonably concluded that the "'attorneys in this matter did not comply with A.R.S § 14-5109(A)'" and "ruled that the [probate professionals] therefore waived their right to seek compensation." *Opinion* ¶ 12. The Court of Appeals held that A.R.S. § 14-5109(A)'s "plain text requires a professional to provide notice at the time of a first appearance, before seeking compensation. The language is unequivocally mandatory." *Opinion* ¶ 14.

The Court of Appeals noted that the compensated probate professionals sought to excuse their failure to comply with A.R.S. § 14-5109(A)'s mandatory notice provision "because the statute does not contain language setting forth a consequence for failure to comply," and therefore, according to them, "there must be no consequence." *Opinion* ¶ 15. That is the same argument Petitioners are making now.

But the Court of Appeals correctly noted that "the legislature adopted Senate Bill 1499 in response to widespread reports of financial abuse by court-appointed fiduciaries and attorneys over wards and protected persons." *Opinion* ¶ 16. The Court of Appeals also acknowledged that the "Arizona Supreme Court Committee

on Improving Judicial Oversight and Processing of Probate Court Matters convened in the wake of such reports and recommended the statutory changes contained in Senate Bill 1499." *Opinion* ¶ 16.

"In its June 2011 final report to the Arizona Judicial Council, the committee explained that Section 14-5109(A) serves 'to promote transparency and disclosure of fees paid from the estate of a ward or protected person.'" Ariz. Sup. Ct. Comm. on Improving Jud. Oversight and Processing of Prob. Ct. Matters, *Final Report to the Arizona Judicial Council* 102 (2011). *Opinion* ¶ 16.

Further, the procedural rules this Court itself later adopted "emphasize the transparency requirement for such compensation requests." *Opinion* ¶ 17. Just so, "the version of Rule 33 in effect in 2017 mirrored the requirements of Section 14-5109: 'A guardian, conservator, attorney or guardian ad litem who intends to be compensated by the estate of a ward or protected person shall give written notice of the basis of any compensation as required by Arizona Revised Statutes Section 14-5109.' Ariz. R. Prob. P. 33(A) (2017) (amended 2020). And Rules 30.1, 30.2, and 30.3 required an appointed conservator to submit and abide by a budget and disclose the conservatorship's financial sustainability. *See* Ariz. R. Prob. P. 30.1–30.3 (2017) (abrogated 2020)." *Opinion* ¶ 17.

If a person does not follow a discretionary statute, there is "no invalidating consequence." *State v. Lewis*, 224 Ariz. 512, 515 ¶ 17 (App. 2010). But failing to

comply with a mandatory statute invalidates noncomplying actions. *HCZ Const., Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 364 ¶ 9 n. 1 (App. 2001). "If a statute is mandatory, failure to comply renders the proceedings void and invalid, and dismissal is mandated without any further inquiry." *Fuller v. Olson*, 233 Ariz. 468, 471 ¶ 7 (App. 2013). That is, "if a statutory provision is deemed mandatory, failure to follow it renders all subsequent proceedings relating to that provision illegal and void." *Way v. State*, 205 Ariz. 149, 152 ¶ 9 (App. 2003).

"The consequential distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while a failure to comply with the requirements of the other is productive of serious results." Jabez Gridley Sutherland, *Statutes and Statutory Construction* 573 (1891). "A crucial difference between statutes considered directory and those deemed mandatory arises from the consequences of noncompliance. A failure to follow the former is unattended by serious legal consequences; a neglect of the latter may invalidate a transaction or subject the transgressor to legal liabilities." *Perry v. Planning Commission of the County of Hawaii*, 619 P.2d 95, 103 (Haw. 1980).

In our case, the parties *and* the Court of Appeals all acknowledged that A.R.S § 14-5109(A) "specifies no consequence or remedy for failure to file notice." *Opinion* ¶ 21. But that "omission," the Court of Appeals explained, did not make the law "a mere suggestion" since the "statute explicitly and unambiguously

requires notice upon" a probate professional's "first appearance." *Opinion* ¶ 21. "Our duty to read statutory language in context," the Court of Appeals noted, "should not lead us to nullify unambiguous language our legislature chose to adopt." *Opinion* ¶ 21.

Failing to enforce the unambiguous command for probate professionals to file the compensation notice that the statute requires A.R.S § 14-5109(A) nullifies the statute. If the statute is to have any reforming effect, courts must be willing to find that its violation results in no compensation for violators.

Because the probate professionals admittedly "failed to meet the prerequisite that would allow them to collect the first round of fees," the Court of Appeals decided to "affirm the court's order requiring the [probate professionals] to return the fees requested in their initial Rule 33 applications." *Opinion* ¶ 22.

3. Full forfeiture is the logical consequence. Half measures will not work. On that final point, the Court of Appeals incorrectly prevaricated.

After that, however, the Court of Appeals drifted from the literal, strict, logical consequence of a probate professional's violation of A.R.S § 14-5109(A).

The literal, strict, logical consequence of that violation is consistent with what the probate court decided in its May 17, 2022 Ruling, where the trial court stated that:

> **The Court concludes that the previous fee approvals were manifestly unjust because the [probate] professionals did not comply with Ariz. Rev. Stat. Ann. § 14-5109(A).** All fees from the

> 2018 fee orders shall be returned to Mr. Chalmers within 60 days of today.

(IR-371 at 4) (underlining deleted; bolding added).

If this Court grants review, it should implement the trial court's May 17, 2022 Ruling (IR-371) and direct that the remedy on remand will be the full refund of the $312,939.23 in fees for the probate professionals' supposed services while William Chalmers was their guardianship/conservatorship ward. *OB* at 1-2, 4.

But instead of the trial court's easy-to-determine, easy-to-impose, reasonable remedy, the Court of Appeals concluded that nothing in A.R.S. § 14-5109(A) "prevents a factual finding that an initial Rule 33 application suffices to provide the content of the required notice necessary for requires for later fees requests." *Opinion* ¶ 23.

Thus, according to the Court of Appeals, a trial court "may evaluate whether an initial application provides the information required by [A.R.S.] § 14-5109(A), "thereby providing the required notice *in substance*, if not in the form required by the statute." *Opinion* ¶ 23 (emphasis added).

The problem with that approach is that A.R.S. § 14-5109(A) requires a clear, specific, mandatory notice—not a notice that only "in substance" complies with the statute. There must be a notice "literally construed and strictly applied" because that fulfills the general rule that "a mandatory statute should be literally construed and strictly applied." *Walter v. Northern Arizona Title Co*., 6 Ariz.App. 506, 509

(1967). There is no reason to evade or water down that protective general rule.

This is not a situation for prevarication. The Court of Appeals, however, did that when it vacated the trial court's order as to the probate professionals' later fee applications and remanded for the trial "court to consider in the first instance whether the contents of the initial Rule 33 applications satisfy the statute's notice requirement." *Opinion* ¶ 24. The Court of Appeals also directed that if the trial court decided that the Rule 33 applications satisfied A.R.S. § 14-5109(A)'s notice requirements, the trial court then "should evaluate the subsequent applications for timeliness." *Opinion* ¶ 24.

The Court of Appeals then ended the Opinion by affirming the trial court's ruling requiring the probate professionals to return the fees that they requested in their Rule 33 applications. *Opinion* ¶ 25. That is consistent with A.R.S. § 14-5109(A)'s plain words.

A problem this Court should resolve if it grants review is whether the Court of Appeals' vacating of the trial court's ruling "as to the later applications" and its remanding "for proceedings consistent" with that directive correctly implemented A.R.S. § 14-5109(A). *Opinion* ¶ 25.

Conclusion

William Chalmers asks the Court to deny the petition for review. But if this Court grants the petition, it should recognize a rule that is as clear and direct as the

statute.

The rule is straightforward: If a probate professional fails to provide the notice that A.R.S. § 14-5109(A) requires, the probate professional must disgorge all fees the probate professional collected from the ward's assets.

In addition, to protect the ward fully, this Court should confirm that the ward is not only entitled to a refund of all fees but is entitled to full legal interest on those incorrectly assessed fees until they are all refunded in full. *See* A.R.S. § 44-1201; *Employers Mutual Casualty Co. v. McKeon*, 170 Ariz. 75, 78 (App. 1991) (Interest under A.R.S. § 44-1201 is a matter of right, not discretion.).

Full reimbursement of all incorrectly assessed fees (plus interest) is the rule best protecting those whom the Legislature wanted to protect—the vulnerable, defenseless probate wards whose assets are in danger of being looted by probate professionals who care more for money that for their clients.

William Chalmers also asks the Court to award to him the reasonable costs he has incurred in responding to this petition, in accordance with A.R.S. §§ 12-331, 12-341, and 12-342, and Ariz. R. Civ. App. Proc. 21.

DATED this 20th day of November, 2023.

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