IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of the Conservatorship of: WILLIAM JOHN CHALMERS, An Adult.	No. CV-23-0263-PR Court of Appeals, Division One No. 1 CA-CV 22-0429 Maricopa County Superior Court No. PB2017-001373

APPELLANTS' SUPPLEMENTAL BRIEF

Eileen Dennis GilBride, Bar #009220
JONES, SKELTON & HOCHULI P.L.C.
40 N. Central Avenue, Suite 2700
Phoenix, Arizona 85004
(602) 263-1700
egilbride@jshfirm.com

Attorneys for Appellants
Bogle, Stone, East Valley Fiduciary
Services, Inc., McKindles, Scharber,
and Theut

The lower courts erred as a matter of law in reading a waiver/forfeiture provision into A.R.S. § 14-5109 where the legislature chose *not* to include one.

A.R.S. § 14-5109 requires those who intend to seek compensation from the estate of a protected person to give, when they first appear, a "written notice of the basis of the compensation by filing a statement with the court. . . ." The statement need only provide a "general explanation of the compensation arrangement and how the compensation will be computed." And when, as here, the proceeding involves the appointment of a *temporary* conservator or guardian, such individuals need only file the compensation statement with the court. No separate notice need be given directly to the ward or his relatives. *See* A.R.S. §§ 14-5309(A) and 14-5405(A).

Notably, § 14-5109 provides no penalty for failing to file the statement. By contrast, the very next statute, § 14-5110—titled, "Claim deadline for compensation"—expressly states that a "claim for compensation" by attorneys or guardians ad litem "is waived if not submitted to the fiduciary in writing within four months" of certain milestones.

Mr. Chalmers' court-appointed counsel filed a § 14-5109 Notice of Compensation shortly after being appointed, but the other fiduciaries—

Appellants East Valley Fiduciary Services ("EVFS"), McKindles, Scharber, and Theut—did not. Those Appellants did, however, file "Rule 33" claims for compensation that were timely under § 14-5110. While Chalmers' counsel noted his "concern" with the total amounts requested [R. 110, 120, 170], he did not object to Appellants' fee claims based on lack of notice; and Judge Passamonte awarded Appellants the full amounts sought. [R. 124-128, 178, 182.] In doing so, Judge Passamonte found "no doubt" that the fiduciaries had "earned the fees set forth" in their respective Rule 33 applications. [R. 124, 182.]

Not until more than three years later—after Appellants had provided many more services on Chalmers' behalf—did Judge Marquoit hold (after an insinuation from the court of appeals) that because Appellants had failed to file initial Notices of Compensation, they were not entitled to be paid *anything*. Judge Marquoit thus not only denied Appellants' additional claims for compensation but also ordered them to disgorge all the monies they had already received. This appeal followed.

Appellants' Petition for Review discussed why this ruling and the subsequent court of appeals' decision were wrong, and Appellants will not repeat those arguments and analysis here. Instead, this Brief will give a

bullet-point summary of those arguments, then discuss Mr. Chalmers' response to the Petition for Review, and then comment on the remedy.

I. SUMMARY OF REASONS THE LOWER COURTS' DECISIONS WERE WRONG

Appellants' Petition for Review provided the reasons the lower courts' decisions were wrong:

- A.R.S. § 14-5109 contains no waiver/forfeiture provision.

- The legislature knows how to include such a provision when it wants to. *See* A.R.S. § 14-5110.

- Reading a new waiver/forfeiture provision into A.R.S. § 14-5109 defies settled precepts of statutory interpretation, constitutes improper judicial legislation, and fails to recognize that this is a directory—not a mandatory—statute.

- Reading a new waiver/forfeiture provision into A.R.S. § 14-5109 violates Appellants' due process rights and creates a trap for the unwary.

- Reading a new waiver/forfeiture provision into A.R.S. § 14-5109 creates a conflict with the Rules of Probate Procedure.

- Reading a new waiver/forfeiture provision into A.R.S. § 14-5109 thwarts the laudable goal of encouraging people to serve as guardians, conservators, and guardians at litem.

- The court of appeals' decision is internally inconsistent. It says that the mandatory nature of the preliminary Notice requires forfeiture of initial fees but not subsequent fees earned. If Rule 33 petitions provide adequate notice, they should provide adequate notice for all fees.

- Allowing the probate court to determine whether a failure to file the preliminary Notice should result in a sanction, and if so, what that sanction should be, fully protects the ward while avoiding all of the foregoing problems.

II. MR. CHALMERS' RESPONSE LACKS MERIT

Mr. Chalmers does not credibly address any of the foregoing fundamental reasons to reinstate Appellants' fee awards. Instead, he tries to justify the court of appeals' decision by citing 13-year-old newspaper articles [Resp., pp. 8-10] and casting aspersions on the entire probate bar based on those 13-year-old articles. [*See* Resp., p. 5; pp. 6-7.] In so doing, Mr. Chalmers completely ignores Judge Passamonte's actual findings in this case: that "This Court has no doubt that the Rule 33 applicants listed herein have earned the fees set forth in their separate Rule 33 statements. . . ." [R. 124, pp. 1-2; R. 146, p. 1.] He also disregards the fact that he did not object to Appellants' fee requests on lack of notice grounds.

Indeed, Mr. Chalmers refuses to acknowledge most of the important points of this case:

1. He turns a blind eye to the most basic problem here: that the court of appeals judicially read a forfeiture provision into a statute where the legislature chose not to include one. Glossing over that root problem, he

insists that the statute is "mandatory" because it requires a Notice; yet he bypasses the fact that the statute does not even mention forfeiture, let alone mandate it. [Resp., pp. 11-12.]

2. Consequently, Mr. Chalmers pays no heed to the precept that statutes that omit sanctions are directory, not mandatory. [*See* Pet., pp. 12-13 (citing cases refusing to impose a sanction where a statute does not include one).][1] Instead, he simply recites the definition of directory statutes (noting that they *omit* sanctions) and then states—inconsistently—that we will not "nullify unambiguous language our legislature *chose to adopt*." [Resp., pp. 14-15 (quoting the court of appeals' decision) (emphasis added).] The legislature, of course, did *not* choose to adopt a forfeiture provision.

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[1] *See also Mohave Cnty. v. Messner*, 2024 WL 3874176, at *2 (Ariz. Ct. App. Aug. 20, 2024) (statute that specifies no consequence for noncompliance is directory); *Allegra G. v. Dep't of Child Safety*, 2022 WL 1043741, at *2 (Ariz. Ct. App. Apr. 7, 2022) (statute specifying thirty-day deadline with no consequence for failure to comply is directory); *Forino v. Ariz. Dep't of Transportation*, 191 Ariz. 77, 81 (Ct. App. 1997) (if a statute states the time for performance of an official duty, without any language denying performance after a specified time, it is directory rather than mandatory); *Lake Havasu City v. Arizona Dep't of Health Servs.*, 202 Ariz. 549, 551 (Ct. App. 2002) (same); *Arizona Dep't of Economic Security v. Lee ex rel. Cnty. of Maricopa*, 228 Ariz. 150, 154 (Ct. App. 2011) (statute that does not specify consequences for failure to strictly comply is directory).

Mr. Chalmers then cites three cases for the notion that the failure to follow a mandatory statute renders the proceedings void. [Resp., pp. 13-14.] He again bypasses the fact that A.R.S. § 14-5109 lacks a sanction provision and thus is best viewed as a directory statute.

3. Mr. Chalmers submits—erroneously—that without a forfeiture provision, the statute requiring a Notice is nothing more than a "mere suggestion." [Resp. p. 14 (citing the court of appeals' decision).] Not so. The statute still must be followed. The difference with a directory statute is in the consequence of failing to do so:

> To hold that a provision is directory rather than mandatory, does not mean it is optional to be ignored at will. Both mandatory and directory provisions of the legislature are meant to be followed. It is only the Effect of non-compliance that a distinction arises. A provision is mandatory when failure to follow it renders the proceeding to which it relates illegal and void; it is directory when the failure to follow it does not invalidate the proceedings.

Dep't of Revenue v. Southern Union Gas Co., 119 Ariz. 512, 514 (1978) (directory statute "permits the judicial resolution of the questions at issue"), *citing* *Commonwealth v. Kowell*, 228 A.2d 50, 52 (Pa. Super. 1967). In short, the consequence for failing to follow a directory statute like this one is not automatic forfeiture. It is, as the court of appeals dissent suggested, a discretionary matter for the probate judge to determine.

4. Along those same lines, Mr. Chalmers argues that automatic forfeiture is required or else the statute is "nullified." [Resp., p. 15.] He is incorrect. Having the probate court decide whether a sanction should be imposed for a failure to file the Notice does not nullify the statute. It allows the probate court to consider all the relevant circumstances of the case, including, for example, the protected person's lack of objection, the constant discussion of fees during the course of the proceedings, the lack of prejudice to the ward, and the finding by the judge involved in the proceedings that the fees were well-earned under difficult emergency circumstances.

In fact, that is exactly what Judge Marquoit did in his January 22, 2021, minute entry. [R. 302.] He declined to countermand Judge Passamonte's prior years' fee awards, noting that Judge Passamonte was the assigned judicial officer for the vast majority of the case; was present with the parties and able to observe the quality of work; had considered objections from Mr. Chalmers' counsel; and had provided specific reasons for making the awards. [*Id.*, p. 3.] Judge Marquoit also recognized that the previous fee awards contained Rule 54(c) language and thus the time to appeal those

awards had long passed. [*Id.*, p. 4.][2] But Judge Marquoit then denied Appellants' pending fee requests precisely because Appellants had not filed the Notices of Compensation and had (in his view) already been adequately compensated. [*Id.*, pp. 4-5.] This denial reduced Appellants' total compensation by almost 25%. [*Id.*, p. 4.] Clearly Judge Marquoit appropriately exercised his discretion and accounted for Appellants' failure to file the Notices by affirming Judge Passamonte's fee awards but denying Appellants 25% of their total compensation. This was certainly not a nullification of the Notice statute.

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[2] Actually, the awards contained Rule 54(b) "there is no just reason for delay" language, but then mistakenly cited Rule 54(c). [R. 126, 127, 128, 178.] Despite the typographical error, the Rule 54(b) language did make the fee judgments final and no longer appealable three years later, as Judge Marquoit stated. *See Lattin v. Shamrock Materials, LLC*, 2023 WL 4630544, at *2 (Ariz. Ct. App. July 20, 2023) ("[T]he judgment stated there was 'no just reason for delay' but cited Arizona Rule of Civil Procedure 54(c) rather than 54(b). Because Rule 54(b) is the appropriate vehicle to appeal, and the correct language was present, we overlook the typographical error between (b) and (c) and exercise appellate jurisdiction."). While not determinative here, the court of appeals erred in subsequently asserting that the typographical error made the three-year-old fee judgments not final or appealable. *See Chalmers v. E. Valley Fiduciary Servs., Inc.*, 2021 WL 5895612, at *2, ¶ 11 (Ariz. App. Dec. 14, 2021).

5. Mr. Chalmers says that implying a forfeiture remedy where the statute contains none is "fair and logical" [Resp., p. 7] and provides "powerful protection for wards." [Resp., p. 6.] He does not explain how it is fair and logical to Appellants to impose a forfeiture sanction on them—with no prior warning in the statute—after they have already worked hard to earn their awarded fees, and when the ward was not prejudiced by the lack of Notices. And he does not explain why the probate court cannot sufficiently protect wards by deciding the sanction, if any, for a Notice violation—especially when giving the probate court such discretion comports with the statute's language and avoids all the other problems that result from judicially legislating an automatic forfeiture provision where none exists.

6. Mr. Chalmers notes that the Rules of Probate Procedure require the written Notice required by A.R.S. § 14-5109. [Resp., p. 13.] That is true. But he disregards entirely the fact that Rule 33 does not contain a forfeiture provision, and thus the court of appeals majority, by implying a forfeiture provision in the statute, created a conflict with the Rule.

7. Mr. Chalmers says "we are not dealing with amateurs." [Resp., p. 7.] But as Appellants noted in their petition, § 14-5109 is not limited to

professionals. It applies to any guardian or conservator who might step up and later seek compensation from the estate of a ward. Mr. Chalmers does not respond to the argument that the court of appeals' decision, applied to these non-professional individuals especially, creates a trap for the unwary.

8. Finally, Mr. Chalmers accuses Appellants of failing to provide his wife (whom he was divorcing) and adult children with copies of Notice of Compensation statements pursuant to A.R.S. §§ 14-5309 and 14-5405. [Resp., pp. 11-12.] Wrong again. Those statutes by their language do not apply to the appointments of temporary guardians and conservators, which was the situation here. [*See* R. 11, 18, 23, 28, 62, 130.]

In short, Appellants provided plenty of reasons why reading a forfeiture provision into A.R.S. § 14-5109(B) was and is misguided. Mr. Chalmers has provided no viable support for doing so. The court of appeals opinion should be vacated.

III. THE REMEDY IS TO REINSTATE THE FEE AWARDS PURSUANT TO JUDGE MARQUOIT'S JANUARY 22, 2021, MINUTE ENTRY [R. 302.]

Judge Marquoit's January 22, 2021, minute entry [R. 302] should be reinstated. In that order, the court declined to revisit Judge Passamonte's previous years' fee awards for several reasons, and then denied Appellants'

final fee petitions based on the absence of the Notices and the finding that Appellants were adequately compensated. This ruling follows Appellants' analysis—and that of the dissenting judge below—and considers all of the case's circumstances in determining the appropriate sanction for failing to file the Notices. As noted above, this resulted in a 25% decrease in Appellants' requested fees. Mr. Chalmers has not argued that this ruling was an abuse of discretion. He has only argued—erroneously—that the statute requires complete forfeiture and disgorgement of all fees (which it does not).

It is Judge Marquoit's May 17, 2022, order [R. 371] that should be vacated. He issued that order after the court of appeals first suggested—erroneously—that the failure to file the Notices constituted a waiver (forfeiture) of the fees that Judge Passamonte had awarded years earlier. *See Chalmers v. E. Valley Fiduciary Servs., Inc.*, 1 CA-CV 21-0163, 2021 WL 5895612, at *3, ¶ 15 (Ariz. App. Dec. 14, 2021). On remand, Judge Marquoit took up the court of appeals' unfounded forfeiture suggestion and ruled as a matter of law that "the failure of the professionals to comply with the applicable statute regarding a Notice of Compensation waived their right to seek such compensation." [R. 371, p. 1.] He reasoned, again erroneously, that since

A.R.S. § 14-5110 includes a waiver provision, and A.R.S. § 14-5109 does not, the legislature must have intended to "penalize parties who fail to file the required Notice of Compensation." [*Id.*, pp. 2-4.] Of course, the correct analysis leads to exactly the opposite conclusion, as explained thoroughly in the Petition and above.[3] In short, Judge Marquoit's May, 2022, ruling that Appellants' failure to comply with the Notice statute constituted a waiver (forfeiture) of all previously-awarded fees was legally erroneous and thus an abuse of discretion. *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, 518, ¶ 41 (App. 2006) ("A court abuses its discretion if it commits legal error in reaching a discretionary conclusion, or if the record lacks substantial evidence to support its ruling."). It should be vacated.

CONCLUSION

For the foregoing reasons, and those stated in the Petition for Review, Appellants Bogle, Stone, East Valley Fiduciary Services, Inc., McKindles, Scharber, and Theut respectfully request the Court to vacate the court of

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[3] Indeed, where statutes (like the Notice statute) are unambiguous, we do not even resort to statutory construction principles to glean legislative intent. *Mail Boxes v. Indus. Commission of Arizona*, 181 Ariz. 119, 121 (1995) ("Where language is unambiguous, it is normally conclusive, absent a clearly expressed legislative intent to the contrary.").

appeals' decision and to reinstate Judge Passamonte's awards of fees to them as reflected in Judge Marquoit's January 22, 2021, minute entry. [R. 302.]

RESPECTFULLY SUBMITTED this 12th day of September, 2024.

JONES, SKELTON & HOCHULI P.L.C.

By /s/ Eileen Dennis GilBride
Eileen Dennis GilBride
40 N. Central Avenue, Suite 2700
Phoenix, Arizona 85004

Attorneys for Appellants
Bogle, Stone, East Valley Fiduciary Services, Inc., McKindles, Scharber, and Theut