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Ariz. R. Crim. P. 31.24



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

In the Matter of the: ) 1 CA-CV 08-0573  
)  
DOWNEY FAMILY TRUST. ) DEPARTMENT D  
)  
\_\_\_\_\_) )  
ROBYN MCCREA, ) **MEMORANDUM DECISION**  
)  
Petitioner/Appellee, ) (Not for Publication -  
) Rule 28, Arizona Rules of  
v. ) Civil Appellate Procedure)  
)  
KAREN ANN BURGE, )  
)  
Respondent/Appellant. )  
)  
\_\_\_\_\_) )

Appeal from the Superior Court in Maricopa County

Cause No. PB 2003-003340

The Honorable Phemonia L. Miller, Commissioner

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED**

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G E M M I L L, Judge

¶1 This appeal concerns a trustee's duty to render an inventory and accounting of trust assets and the award of attorneys' fees and costs in such matter. Karen Ann Burge ("Karen") appeals from the probate court's judgment 1) determining that Karen breached her fiduciary duties as trustee; 2) ordering the distribution of all tangible personal property to Robyn McCrea ("Robyn"), a trust beneficiary; 3) denying Karen compensation and attorneys' fees; and 4) awarding attorneys' fees and costs to Robyn. For the following reasons, we affirm in part, vacate in part and remand for further proceedings.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 On September 25, 1992, Robert W. Downey and his wife Adelaide N. Downey (collectively, the "Downeys") established the Downey Family Trust (the "Trust"). The Downeys were the trustors and initial co-trustees of the Trust. Karen and Robyn are the Downeys' two adult daughters. Upon the Downeys' deaths, the Trust assets were to be distributed to Karen and Robyn in equal shares.<sup>1</sup> Karen was nominated as first successor trustee

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<sup>1</sup> The Trust provides for Robyn to receive income from her share until her son, Christopher, commenced studies at an

and Robyn was nominated as second successor trustee. Robert Downey died on April 17, 1998, and Adelaide Downey died on February 19, 2002. Karen became trustee of the Trust immediately upon Mrs. Downey's death.

¶13 Karen opened a Trust bank account. Karen sold the Downeys' house and deposited the proceeds of over \$40,000 into the Trust bank account. Prior to selling the house, Karen removed the Downeys' tangible personal property and placed it in her garage. However, Karen stored the Downeys' coin collection in her own safe deposit box. Beginning in December 2002, Robyn, through her attorney, requested information and documentation pertaining to the Trust administration and the Downeys' estate. Karen responded to each of Robyn's requests and in February 2003, distributed \$11,520.85 to Robyn as her one-half share of the Trust assets. In March, Karen submitted a handwritten check register of the Trust bank account to Robyn, followed in June by a revised typed list of checks issued from the Trust bank account.

¶14 On August 19, 2003, Robyn filed a petition for order

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accredited college, university or trade school, at which time said income was to be distributed for Christopher's education costs for a maximum of five years or until Christopher reached age 25. The balance of this share was to be distributed to Robyn. At the time of distribution, the provisions relating to Christopher were not applicable, thus Robyn's share was distributable directly to her.

directing Karen, as trustee, to prepare and file a Trust inventory and accounting. Robyn alleged Karen's previous responses for requested information were insufficient and did not enable Robyn to identify the assets and value of her beneficial interest in the Trust. Karen responded that all information Robyn requested had been provided. In July 2006, the parties reached an agreement whereby Robyn was given access to Karen's garage to conduct a comprehensive inventory of the tangible personal property. Karen later agreed Robyn could have all the tangible personal property and in July 2007, Robyn went back to Karen's garage and picked up some tangible property.

¶15 A three day evidentiary hearing was held, and on September 5, 2007, Karen filed a formal accounting along with a petition for approval. The court accountant recommended an amended accounting be filed due to three areas of concern. In December, the court issued an order containing findings of fact and conclusions of law granting Robyn's petition and concluding Karen breached her fiduciary duties as trustee by failing to prepare an inventory and accounting, concealing Trust assets, falsifying a check register, and placing unreasonable restrictions on Robyn's efforts to confirm and receive tangible personal property. The court also determined Robyn was entitled to attorneys' fees and costs, all personal property should be given to Robyn, and Karen was not entitled to compensation for

her services as trustee and ordered any fees she previously received for compensation to be returned.

¶16 Karen subsequently filed an amended accounting addressing the three areas of concern mentioned in the court accountant's report. The court accountant recommended the accounting be approved, subject to Karen returning \$3,533.65 in trustee fees she had received, based on the court's December order. Thereafter, the court issued a judgment against Karen expressly incorporating the December order and awarding Robyn \$60,369.49 in attorneys' fees and \$4,762.98 in costs. Karen filed an alternate motion for new trial or to alter or amend the judgment, which the court denied. Karen timely appealed. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") sections 12-2101(B), (F)(1), and (J) (2003).<sup>2</sup>

## DISCUSSION

### I. Standard of Review

¶17 We review findings of fact under a clearly erroneous standard. *In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5, 12 P.3d 1203, 1205 (App. 2000). "A finding of fact is not clearly

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<sup>2</sup> Although Karen's notice of appeal was premature, it was followed by a final appealable judgment. See *Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981). A premature notice of appeal takes effect when the court enters the final judgment. *Id.*; *Schwab v. Ames Constr.*, 207 Ariz. 56, 58, ¶ 9, 83 P.3d 56, 58 (App. 2004). Accordingly, the appeal became effective on July 14, 2008, when the court issued a signed order denying Karen's alternate motion for new trial or to alter or amend the judgment.

erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Kocher v. Dep't of Revenue of State of Ariz.*, 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003). Legal conclusions are reviewed de novo. *Imperial Litho/Graphics v. M.J. Enterprises*, 152 Ariz. 68, 72, 730 P.2d 245, 249 (App. 1986).

¶18 We review an award of attorneys' fees for an abuse of discretion; however, the application of a fee statute is reviewed de novo. *Phoenix Newspapers, Inc. v. Dep't of Corr., State of Ariz.*, 188 Ariz. 237, 243, 244, 934 P.2d 801, 807, 808 (App. 1997). Finally, we review the court's denial of a Rule 59 motion for a new trial or to alter or amend judgment for an abuse of discretion. *Mullin v. Brown*, 210 Ariz. 545, 547, ¶ 2, 115 P.3d 139, 141 (App. 2005); see also *Innovative Home Health Care Inc. v. P.T.-O.T. Assoc. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (applying abuse of discretion standard to the federal counterpart of Rule 59(1), a motion to alter or amend judgment).

## **II. Arizona Trust Code**

¶19 The Arizona Trust Code, A.R.S. §§ 14-7201 *et seq.*, was substantially repealed and rewritten effective January 1, 2009. See 2008 Ariz. Sess. Laws, ch. 247, §§ 15, 16 (2d Reg. Sess.) (memorialized in House Bill 2806). The proceedings in this case concluded prior to January 1, 2009. The probate court cited and

relied on the Trust Code as it existed at the time of the proceedings. Accordingly, because the former Trust Code was in effect during these proceedings, and the probate court relied on the former Trust Code in reaching its decision, we consider the Trust Code as it existed prior to January 1, 2009, in this decision.<sup>3</sup>

### III. Breach of Fiduciary Duties

¶10 Karen argues the probate court's findings regarding her breach of fiduciary duties should be reversed. The probate court found, in relevant part:

Karen has engaged in a course of continuous conduct in breach of the fiduciary duties owed by Karen to Robyn. Acts and omissions, in breach of such fiduciary duty by Karen, include, but are not limited to, the following: failure to account for her activity concerning Trust assets prior to the death of Adelaide Downey; failure to prepare an inventory and appraisal of the assets of the Trust notwithstanding reasonable requests therefore; failure to prepare an accounting of the Trust administration notwithstanding reasonable requests therefor; efforts to conceal Trust assets; intentional falsification of a

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<sup>3</sup> We note that Section 18 of House Bill 2806 provides for application of the new Trust Code to judicial proceedings commenced before January 1, 2009, unless such application substantially interferes with the effective conduct of the judicial proceedings or prejudices the rights of the parties. Because the proceedings in the trial court were completed before the new Code became effective, we believe it is best to apply the pre-2009 Code. See *In re Marriage of Yuro*, 192 Ariz. 568, 572, ¶ 8 968 P.2d 1053, 1057 (App. 1998) (noting appellate courts generally apply the law in effect at the time it renders a decision).

purported informal accounting of the Trust delivered to Robyn; engaging in efforts to place unreasonable restrictions and conditions on efforts by Robyn to confirm and receive distribution of personal property of the Estate.

There is substantial evidence supporting these findings. We will, additionally, address each of Karen's arguments.

¶11 First, Karen contends the court erred in determining a breach based on her failure to account for her activity concerning Trust assets prior to Mrs. Downey's death. Evidence was presented that Karen paid her mother's bills and wrote checks from Mrs. Downey's checking account prior to becoming trustee. Robyn requested information regarding the depletion of Mrs. Downey's estate, and specifically a copy of the check register from Mrs. Downey's checking account. Karen did not initially disclose the check register, yet she could have accounted for her activity concerning this checking account. Moreover, Karen testified her mother did not fully understand Karen was assisting her in paying her bills. The court's finding was not clearly erroneous.

¶12 Second, Karen argues she did not breach her fiduciary duty by failing to provide an inventory, appraisement, and an accounting. The standard of care applicable to a trustee's actions is that of a reasonably prudent person. *In re Schuster's Estate*, 35 Ariz. 457, 469, 281 P. 38, 43 (1929);



A.R.S. § 14-7302 (now repealed).<sup>4</sup> A beneficiary is entitled to a statement of the accounts of the trust. A.R.S. § 14-7303(3) (now repealed).<sup>5</sup> "In rendering an account, the burden is on the trustee to make a proper and satisfactory accounting of the funds coming into his hands, and, if he does not, every intendment is against him." *Schuster's Estate*, 35 Ariz. at 469, 281 P. at 43. Karen maintains she promptly responded to all of Robyn's requests for information and provided an inventory and accounting. Karen's inventory and accounting were not sufficient, however, to comply with her duties as a trustee.

¶13 In response to Robyn's requests prior to litigation, Karen sent Robyn a handwritten check register of the Trust bank account which contained numerous errors, followed by a typewritten list of checks with corrections, bank statements, copies of bills and receipts. Karen contends these documents gave Robyn all the information she needed to fully account for the Trust's receipts and disbursements. However, it was Karen's

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<sup>4</sup> The current version of the applicable statute can be found at A.R.S. § 14-10804 (Supp. 2009) (describing prudent trust administration).

<sup>5</sup> The current version of the applicable statutes are A.R.S. § 14-10813(C) (Supp. 2009) ("A trustee shall send to the distributees . . . at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets . . . ."); see also A.R.S. § 14-10810 (Supp. 2009) (describing the trustee's record-keeping requirements).

duty, as trustee, to provide a sufficient accounting. A reasonably prudent person would have prepared a proper accounting rather than submit documentation that would require the beneficiary to do the accounting. Submission of an inaccurate handwritten check register, bank statements, and bills does not relieve a trustee from her duty to render a proper accounting.

¶14 As for an inventory, Karen initially submitted an inventory listing some of her parents' tangible personal property. However, the list of assets changed throughout the course of these proceedings, and not all assets were initially disclosed to Robyn. For instance, Karen did not initially disclose the existence of a coin collection, a tennis bracelet, and a safe deposit box. Thus, Karen's initial inventory was not sufficient.

¶15 Karen also contends her requests for admissions support her position that she provided all necessary information required. Robyn failed to respond to Karen's request for admissions which stated Karen supplied all information in her possession pertaining to the Trust, accounted for all Trust monies, and did not keep any Trust assets for herself. Thus, such statements are deemed admitted. Ariz. R. Civ. P. 36(a). However, these admissions were either irrelevant to certain breaches of fiduciary duties or were refuted at the evidentiary

hearing. For instance, Karen may have supplied all documents in her possession, and accounted for Trust monies, but such documents were not sufficient to comply with her fiduciary duty to provide an accounting and inventory. See *supra* ¶ 13. Additionally, Karen admitted she kept the coin collection in her safe deposit box, effectively keeping a Trust asset for herself. Thus, the requests for admissions do not exonerate Karen from complying with her duties as trustee.

¶16 Karen maintains her formal accounting submitted on September 5, 2007, shows there were no additional assets or income Karen needed to account for, and such accounting renders Karen in compliance with her duties as a trustee. Robyn, however, filed the petition for accounting on August 19, 2003. Karen's formal accounting was not submitted until over four years later.<sup>6</sup>

¶17 Next, Karen argues the probate court erred when it determined she breached her fiduciary duty with her efforts to conceal Trust assets. There is evidence supporting Karen's concealment of Trust assets. The coin collection was not made available to Robyn, nor was it initially disclosed; the tennis bracelet disappeared between July 2006 and July 2007, when Robyn inventoried and picked up personal property items; and the items

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<sup>6</sup> Additionally, the court accountant recommended the accounting not be approved until Karen returned her trustee fees as ordered by the court in December 2007.

in Karen's garage were not well organized, were mixed with Karen's own property and were moved around between July 2006 and July 2007.<sup>7</sup> The finding regarding concealment of Trust assets is sufficiently supported.

¶18 Karen also argues the handwritten check register was not false, misleading, or fraudulent. The court's findings regarding the handwritten check register included the following:

The entries on the handwritten check register were intentionally falsified by Karen, and did not accurately reflect the disbursements in terms of both amounts of disbursements and payees thereof.

Statements for the [Trust bank account] confirm that the entries on the handwritten check register submitted by Karen under [the] March 27, 200[3] transmittal letter were false and inaccurate.

The falsified portions of the handwritten check register for the [Trust bank account] involve only wrongful disbursements of Trust assets disbursed for the benefit of Karen and her daughter . . . .

Substantial evidence supports these findings.

¶19 Many of the notations in the handwritten check register do not match the actual checks issued. For instance, the handwritten check register did not set forth checks made payable directly to Karen's daughter, or made for her daughter's

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<sup>7</sup> This evidence supporting Karen's concealment of Trust assets directly controverts the request for admission stating Robyn had no evidence to support a claim that Karen kept any trust assets separate and apart for herself outside of the Trust administration. See *supra* ¶ 15.

benefit, which consisted of six checks for over \$2,800. In fact, the last check recorded in the handwritten check register was check number 127, and the last check actually issued prior to closing the account was check 137. Two of the last ten checks were issued for payment of Mrs. Downey's bills, one check was issued to Robyn, and the remaining checks were either issued to Karen or for the benefit of Karen's daughter.

¶20 Karen argues the differences between the handwritten check register and the actual bank statements are immaterial. We disagree. There is nothing immaterial about a trustee failing to disclose checks made payable to herself and her daughter. Karen attempts to justify her actions by showing she submitted a nearly accurate typewritten check register over two months later. However, the eventual submission of an accurate check register does not change the fact Karen initially submitted a false and inaccurate check register. The probate court's findings were not erroneous.

¶21 Finally, Karen argues there was no evidence she breached her fiduciary duty by placing unreasonable restrictions and conditions on efforts by Robyn to confirm and receive the Downeys' personal property. We disagree. The failure to have all tangible property available in the garage and the way such property was stored supports the court's finding.

¶22 Because there is substantial evidence supporting the

probate court's findings that Karen breached her fiduciary duties to Robyn, we affirm these findings.

#### **IV. Distribution of Personal Property**

¶23 Karen agreed Robyn could have all the Downeys' tangible personal property stored in her garage.<sup>8</sup> The probate court ordered all personal property, including the coin collection, to be distributed to Robyn. Karen argues she should be allowed to retain the coin collection, the gold coins, and the tennis bracelet. However, Karen cites no legal basis for her argument, other than maintaining she did not breach her fiduciary duties.<sup>9</sup> Because we are upholding the probate court's findings regarding Karen's breach of fiduciary duties, and because Karen agreed Robyn could have the Downeys' tangible personal property, we affirm this distribution.

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<sup>8</sup> Karen, however, requested to keep two tables, two chairs, and the coin collection.

<sup>9</sup> For instance, Karen does not argue that distribution of all personal property to Robyn contradicts the Trust terms, which provides for equal distribution. Thus, we do not address whether this was an appropriate order by the probate court. See, e.g., *Schabel v. Deer Valley Unified School Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (noting issues not raised in appellate briefs are waived). Regardless, the court determined as a result of Karen's breach of fiduciary duties, the full measure of Robyn's beneficiary interest may never be determined. In fact, Karen's "inventories" show she donated many personal property items, however, she has no documentation regarding such donations.

## V. Trustee Compensation

¶24 The probate court determined Karen was not entitled to any compensation for her services as trustee due to her breach of fiduciary duties and therefore ordered her to return such fees to the Trust. Karen argues she should receive compensation because the Trust and applicable law authorize compensation. In this case, we conclude that the probate court made no error in its order.

¶25 The probate court has discretion to determine just and reasonable compensation for a trustee. A.R.S. § 14-7206 (now repealed);<sup>10</sup> see also *In re Dunlap's Estate*, 38 Ariz. 525, 530, 2 P.2d 1045, 1046-47 (1931). Any person who receives excessive compensation can be ordered to make refunds. A.R.S. § 14-7206.<sup>11</sup> A court may deny a trustee all compensation if the trustee commits a breach of trust. Restatement (Second) of Trusts § 243 (1959); see also *Estate of Gump*, 180 Cal. Rptr. 219, 222 (Cal. Ct. App. 1982). Here, the Trust provides the trustee is entitled to reasonable compensation, and that such compensation should be similar to that of other trustees who perform similar services. However, the Trust also requires the trustee to

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<sup>10</sup> Under the revised Trust Code, trustee compensation is discussed in A.R.S. § 14-10708 (Supp. 2009).

<sup>11</sup> Under the revised Trust Code, the court may remedy a breach of trust by reducing or denying compensation to a trustee. A.R.S. § 14-11001(B)(8) (Supp. 2009).

render "an account of income and principal, including a statement of all receipts, disbursements and capital changes, to all beneficiaries then eligible to receive income . . . ." The court found Karen did not comply with her trustee duties and in its discretion, ordered Karen to return her trustee fees. On this record, we cannot say that the court abused its discretion in ordering Karen to return all compensation received as trustee.

#### **VI. Trustee's Attorneys' Fees and Costs**

¶26 The probate court concluded Karen was not entitled to an award of attorneys' fees or costs incurred in defending against Robyn's petition. Karen argues this was error based on the Trust terms and applicable law. We disagree.

¶27 The Trust authorizes the trustee's attorneys' fees to be paid from the Trust for services incurred in the administration or protection of the Trust. In this case, due to Karen's breach of fiduciary duties, she was not properly administering nor protecting the Trust. Thus, she would not be entitled to attorneys' fees from the Trust. Additionally, when a trustee breaches her fiduciary duty, she may be held personally liable for any resulting loss of the trust assets. See *Shriners Hospitals for Crippled Children v. Gardiner*, 152 Ariz. 527, 528, 733 P.2d 1110, 1111 (1987) (citing Restatement (Second) of Trusts §§ 201, 205(a)). Similarly, a trustee is not



entitled to indemnity from the trust estate for expenses improperly incurred. Restatement (Second) Trusts § 245(1). Robyn filed the petition to have Karen submit a formal accounting, a duty Karen had under both the Trust terms and applicable law. A.R.S. § 14-7303(3).<sup>12</sup> Because Karen did not comply with her fiduciary duties, there was no error by the probate court denying Karen's request for attorneys' fees.

### **VII. Beneficiary's Attorneys' Fees**

¶128 Karen argues that the probate court does not have authority to award attorneys' fees incurred by Robyn in these proceedings.<sup>13</sup> In determining Robyn was entitled to fees, the probate court stated:

[I]n the face of Robyn's assertion of her rights as a Trust beneficiary, Karen has

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<sup>12</sup> Under the revised Trust Code, the probate court may order any appropriate relief when a trustee breaches the trust. A.R.S. § 14-11001(10) (Supp. 2009). Additionally, a court may award attorneys' fees to a trustee which arise out of and relate to a good faith defense of trust administration. A.R.S. § 14-11004(A) (Supp. 2009).

<sup>13</sup> Karen argues for the first time in her reply brief that attorneys' fees could not be awarded because Robyn failed to request attorneys' fees in her pleadings pursuant to Rule 54(g) of the Arizona Rules of Civil Procedure. We generally do not consider arguments raised for the first time on appeal. See *McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997) (indicating appellate court will generally not consider legal issues or arguments raised for the first time on appeal). Also, we usually do not consider arguments raised for the first time in a reply brief. See *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 405 n.1, ¶ 5, 111 P.3d 1003, 1005 n.1 (2005). Therefore, we will not consider this particular argument.

repeatedly breached her fiduciary duties proximately causing Robyn to incur attorneys' fees and costs to obtain information, which the Trustee was required by law to provide. Such fees and costs operate to diminish Robyn's beneficiary interest in the Trust, contrary to the express provisions of the Trust and the purposes and objectives expressed in the *Matter of Estate of Wiswall*.

The Court further finds that Robyn is also entitled to an award of all expenses she has incurred in connection with her efforts to enforce her rights as beneficiary under Arizona law, including all attorneys' fees and costs incurred by her in connection with Karen's acts and omissions as Successor Trustee of the Trust, to be determined by the Court upon the filing of a 5.7 Attorney Statement. Such fees and costs [a]warded should be paid from Karen's distributive share of the Trust assets to avoid diminishment of Robyn's distributive share.

Although we do not question the apparent fairness of the probate court's decision to award fees to Robin, we decline to uphold the award of fees because we do not perceive that any applicable statute authorizes an award of fees to Robyn on this record.

¶129 First, we do not read *Wiswall* to support an award of attorneys' fees in this case. The *Wiswall* court indicated that probate courts do not have the power to award attorneys' fees to attorneys not employed by the personal representative of an estate. *In re Wiswall's Estate*, 11 Ariz. App. 314, 326, 464 P.2d 634, 646 (1970). Robyn is neither the personal representative of an estate nor the trustee of the Trust.

¶130 Moreover, there is no statutory basis for the court's award of attorneys' fees in this case. The general rule is that attorneys' fees are awarded only when specifically authorized by statute or agreement of the parties. *In re Balke's Estate*, 68 Ariz. 373, 379, 206 P.2d 732, 736 (1949). Here, it appears the probate court may have awarded Robyn attorneys' fees pursuant to A.R.S. § 14-7306(B) (now repealed). Under A.R.S. § 14-7306(B) (2007), "[a] trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate if he is personally at fault." The probate court determined Karen breached her fiduciary duties, proximately causing Robyn to incur damages in the form of attorneys' fees.

¶131 Section 14-7306(B), however, does not specifically authorize an award of attorneys' fees. In addition, our attention has not been directed to any statute in Title 14 that authorizes a beneficiary to recover attorneys' fees. *See, e.g., Pintek v. Superior Court*, 81 Ariz. 255, 258, 304 P.2d 392, 394 (1956) (holding attorneys' fees could not be awarded to an attorney who provided no contractual services to the personal representative of an estate). While A.R.S. § 14-7306(B) specifically states that a trustee may be held personally liable for torts, such personal liability is generally imposed for loss

to trust assets.<sup>14</sup> See *Shriners Hospital*, 152 Ariz. at 528, 733 P.2d at 1111. See also *supra* ¶ 27. Moreover, Robyn did not specifically request a finding of tort liability for the purpose of awarding damages under this statute, nor did the court cite A.R.S. § 14-7306(B) when initially awarding fees to Robyn. Nor did Robyn cite this statute when initially applying for a specific amount of fees after the court ruled that fees would be awarded.<sup>15</sup>

¶32 For these reasons and on this record, we cannot uphold the attorneys' fees award under A.R.S. § 14-7306(B). Robyn, however, asks us to uphold the attorneys' fees award on several

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<sup>14</sup> Similarly, the revised Trust Code does not authorize an award of attorneys' fees as damages for a trustee's breach of trust. A.R.S. § 14-11002.

<sup>15</sup> Robyn did cite A.R.S. § 14-7603(B) in her reply in support of her application for attorneys' fees and out-of-pocket costs against Karen Burge individually.

alternative bases that we now address.<sup>16</sup>

**A. A.R.S. § 12-349**

¶133 Arizona Revised Statutes section § 12-349(A)(1)-(3) (2005) mandates an attorneys' fees award and double damages not to exceed \$5,000 "if the attorney or party does any of the following: 1. [b]rings or defends a claim without substantial justification, 2. [b]rings or defends a claim solely or primarily for delay or harassment, [or] 3. [u]nreasonably expands or delays the proceeding." See also *Phoenix Newspapers*, 188 Ariz. at 243, 934 P.2d at 807. For purposes of A.R.S. § 12-349(A)(1), substantial justification means the claim or defense constitutes harassment, is groundless and is not made in good faith. A.R.S. § 12-349(F). The court must set forth specific reasons for a fee award under A.R.S. § 12-349. See A.R.S. § 12-350 (Supp. 2009) ("In awarding attorney fees

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<sup>16</sup> In her fee application, Robyn asserted that A.R.S. § 12-341.01 authorized an award of attorneys' fees in this matter. Robyn, however, does not further this argument on appeal. We usually do not consider arguments raised in the trial court, but not argued on appeal. *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 482 724 P.2d 562, 568 (1986). Even putting aside that principle, Robyn is not entitled to fees under A.R.S. § 12-341.01 (2005) because lawsuits arising out of trust relationships do not arise out of contract for purposes of A.R.S. § 12-341.01. See *In re Naarden Trust*, 195 Ariz. 526, 530, 990 P.2d 1085, 1089 (App. 1999). Robyn also cited *Matter of Estate of Brown*, 137 Ariz. 309, 670 P.2d 414 (App. 1983) (regarding the common fund theory and the application of equity rules) in the probate court proceedings as support for a fee award, but does not mention that case on appeal. Thus, we will not consider such basis.

pursuant to § 12-349, the court shall set forth the specific reasons for the award . . . ."). Generally, a court's finding that A.R.S. § 12-349 applies is viewed in the light most favorable to sustaining the award. *Heuisler v. Phoenix Newspapers, Inc.*, 168 Ariz. 278, 284, 812 P.2d 1096, 1102 (App. 1991). However, in this case, the probate court did not state A.R.S. § 12-349 applied, thus we review the application of this statute de novo.

¶134 Here, a fee award cannot be upheld under A.R.S. § 12-349(A)(1) because the probate court made no specific findings that Karen's defense constituted harassment, was groundless and was not made in good faith. All three elements must be shown, and the trial court must make specific findings of fact and conclusions of law. *Fisher ex rel. Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, 370, ¶ 13, 965 P.2d 100, 104 (App. 1998). At most, the probate court's findings of fact could be construed as expressing that Karen's defense was not made in good faith. However, there are no facts indicating the defense was groundless or constituted harassment. As the court noted, "Karen did provide documents to Robyn however, she has never prepared a complete inventory and appraisal of the Trust." Accordingly, Karen did not defend a claim without substantial justification.

¶135 Similarly, there are no findings that Karen defended

the action primarily for delay or harassment or unreasonably expanded or delayed the proceedings. A.R.S. § 12-349(A)(2)-(3). Perhaps a finding of unreasonably expanding or delaying the proceedings could be implied; however, the court never used such language in its decision. See *Phoenix Newspapers*, 188 Ariz. at 243, 934 P.2d at 807 (explaining a court must set forth specific reasons for a fee award under A.R.S. § 12-349).

¶36 There are two additional reasons why we decline to uphold the fee award under A.R.S. § 12-349. First, the probate court did not reference this statute in the order determining Robyn was entitled to fees, nor in the final judgment. Second, the statute was never mentioned or discussed prior to the court finding that a fee award was appropriate.<sup>17</sup> Although Robyn's attorney did request punitive damages during the evidentiary hearing, he did not then argue A.R.S. § 12-349 applied. The first time the statute was mentioned as a possible basis for a fee award was in Robyn's fee application after the court determined Robyn was entitled to fees. On this record, we cannot assume that the court's findings and conclusions explaining the fee award were based on this statute. Therefore, we decline to uphold the fee award based on A.R.S. § 12-349.

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<sup>17</sup> In Robyn's motion for sanctions for Karen's failure to appear at a deposition, Robyn requested sanctions pursuant to A.R.S. § 12-349. However, A.R.S. § 12-349 was not mentioned in connection with the underlying merits of the case.

**B. A.R.S. § 14-1302**

¶137 Robyn next maintains her fee award can be upheld under A.R.S. § 14-1302 (2005). This statute provides the probate court “has general jurisdiction to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it . . . .” A.R.S. § 14-1302(B).

¶138 A.R.S. § 14-1302 defines the court’s jurisdiction in estate matters; it does not authorize an award of attorneys’ fees. *See, e.g., 96 C.J.S. Wills § 786 (2009)* (explaining a probate court’s authority to award costs in will contest proceedings is derived from statute and does not exist by virtue of general probate jurisdiction); *but see May v. Ellis, 208 Ariz. 229, 232 n.2, ¶ 13, 92 P.3d 859, 862 n.2 (2004)* (declining to award attorneys’ fees to creditors of an estate pursuant to A.R.S. § 14-1302(B) because they were not the prevailing party).

¶139 Robyn argues persuasive authorities from Florida and North Dakota make it clear that A.R.S. § 14-1302 includes authority to award attorneys’ fees. We are not persuaded by these cases, however. In the Florida case, the probate court awarded attorneys’ fees to two beneficiaries of an estate pursuant to a Florida statute which specifically allows attorneys’ fees to an attorney who renders services to an estate. *Brake v. Swan, 767 So.2d 500, 501-02 (Fla. Dist. Ct.*



App. 2000) (citing F.S.A. § 733.106(3)). Similarly, the North Dakota case addresses attorneys' fees for an attorney who represented the personal representative in an estate proceeding. *Ohnstad Twichell, P.C. v. Tretline*, 574 N.W.2d 194, 197-98 (N.D. 1998). These authorities are therefore not persuasive.

¶40 Because A.R.S. § 14-1302(B) does not specifically authorize a court to award attorneys' fees, we cannot uphold the award on this ground.

### **C. Revised Arizona Trust Code**

¶41 Robyn further argues that A.R.S. § 14-10105 (2005) and § 14-11004(B) of the new Arizona Trust Code support the award of attorneys' fees. Because both statutes are part of the revised Arizona Trust Code, we do not consider the application of A.R.S. § 14-10105 or § 14-11004(B) on appeal. See *supra* ¶ 9.

### **VIII. Beneficiary's Costs**

¶42 Karen argues the probate court had authority to award Robyn taxable costs only.<sup>18</sup> In her fee application, Robyn requested out-of-pocket costs of \$4,762.98. Karen objected, asserting some of the requested costs were not statutorily permissible, and requested the amount be reduced. The probate

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<sup>18</sup> Because Karen does not challenge the authority of the court to award costs, but only the amount of costs awarded, we do not address whether the probate court had authority to award costs.

court awarded Robyn the entire amount requested.

¶43 Arizona Revised Statutes § 12-332 (2005) limits taxable costs to expenses incurred for fees of officers and witnesses, deposition expenses, compensation of referees, cost of certified copies of papers or records, surety expenses, and other costs incurred pursuant to an order or agreement between the parties. See also *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Bach*, 193 Ariz. 401, 402, ¶ 6, 973 P.2d 106, 107 (1999) (explaining the types of expenses parties can recover under A.R.S. 12-332). Expenses not enumerated in the statute are not recoverable. *Fowler v. Great Am. Ins. Co.*, 124 Ariz. 111, 114, 602 P.2d 492, 495 (App. 1979). Robyn did not file a separate statement of costs, but instead listed costs on her billing statements. Karen apparently went through each billing statement and determined which costs were appropriate under A.R.S. § 12-332. In the proceedings below, Karen notated each cost in the billing statements she thought was appropriate, which totaled \$1,150.40. On appeal, Karen grouped the costs into categories, with totals for each category and now argues the maximum amount of costs that can be awarded total \$1,269.24. Karen does not account for the difference in the two amounts. Moreover, Robyn makes no attempt to justify the court's award of all her costs based on A.R.S. § 12-332.

¶44 It is clear from the billing statements some of the

costs awarded to Robyn were not statutorily permissible. For instance, Robyn requested costs for photocopies, fax charges, filing fees, and messenger charges, which are all precluded. *Ahwatukee*, 193 Ariz. at 402, ¶ 6, 973 P.2d at 107. Therefore, we remand the cost award for further proceedings. On remand the probate court should award Robyn only those costs which are statutorily permissible under A.R.S. § 12-332.

#### **IX. Costs and Attorneys' Fees on Appeal**

¶45 Robyn requests attorneys' fees and costs on appeal pursuant to A.R.S. §§ 12-341 (2005), 12-341.01, 12-349, and 33-420(A) (2005).

¶46 The successful party in a civil action is entitled to a recovery of costs. A.R.S. § 12-341. Although each party has achieved partial success, we determine in our discretion that Robyn is the prevailing party for the purpose of awarding costs. We therefore award Robyn her taxable costs on appeal.

¶47 In a contested action arising out of contract, a court may award the successful party attorneys' fees. A.R.S. § 12-341.01(A). This, however, is not an action arising out of contract. Both A.R.S. § 12-341.01(C) and § 12-349 authorize a court to award attorneys' fees if the claim or defense constitutes harassment, is groundless, and/or is not made in good faith. We do not find this appeal to constitute harassment, nor is it groundless or made in bad faith. Finally,

A.R.S. § 33-420(A), which requires an award of attorneys' fees against a party who knowingly records a groundless document regarding a claim against real property, is inapplicable.

¶48 Robyn also requests sanctions pursuant to Rule 25 of the Arizona Rules of Civil Appellate Procedure. Rule 25 authorizes an award of fees as a sanction if an appeal "is frivolous or taken solely for the purpose of delay." ARCAP 25. We do not find Karen's appeal frivolous or taken solely for the purpose of delay. Accordingly, we decline to award Robyn sanctions pursuant to Rule 25.

#### **Conclusion**

¶49 For the foregoing reasons we affirm the findings by the probate court, but vacate the award of attorneys' fees. We award Robyn her taxable costs on appeal and we remand the probate court's award of costs to Robyn for a determination of those costs allowed under A.R.S. § 12-332 at the probate court.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
JON W. THOMPSON, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICK IRVINE, Judge