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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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:

RICHARD J. FELL TRUST, An Irrevocable Trust.

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BOKF NA, *Petitioner/Appellee*,

*v.*

LYNN MAGNANDONOVAN, et al., *Respondents/Appellants*.

No. 1 CA-CV 17-0675  
FILED 10-23-18  
AMENDED PER ORDER FILED 11-27-18

Appeal from the Superior Court in Maricopa County  
No. PB2016-001269  
The Honorable Terri L. Clarke, Judge *Pro Tempore*

**APPEAL DISMISSED IN PART; VACATED IN PART, REMANDED**

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COUNSEL

Curley & Allison LLP, Phoenix  
By Roger D. Curley, Kiernan S. Curley  
*Counsel for Petitioner/Appellee*

Alexander R. Arpad, Phoenix  
*Counsel for Respondents/Appellants*

**MEMORANDUM DECISION**

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Lawrence F. Winthrop joined.

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**T H U M M A**, Chief Judge:

¶1 Appellants Lynn Magnandonovan (Lynn), Ryan Magnan (Ryan) and Sharon Magnan (Sharon) appeal the denial of a motion to reopen and subsequent motion for reconsideration/new trial in this probate matter. Lacking appellate jurisdiction over the appeals by Ryan and Sharon, that portion of the appeal is dismissed. The denial of Lynn’s motion to reopen, however, is vacated and remanded for further proceedings.

**FACTS AND PROCEDURAL HISTORY**

¶2 Appellants are current or former beneficiaries of the Richard J. Fell Trust. Appellee BOKF N.A. dba Bank of Arizona (BOKF) became the successor trustee, apparently after resolution of litigation concerning the Trust terms in Illinois culminating in an appellate court decision. In June 2016, BOKF filed a petition to decant the Trust, seeking to distribute the assets to Ryan and seeking a corresponding release from liability. *See* Ariz. Rev. Stat. (A.R.S.) § 14-10819 (2018).<sup>1</sup> In response, Lynn properly paid her appearance fee and filed a timely objection to the petition.

¶3 Lynn and Ryan attended a September 2016 hearing on the petition. The resulting minute entry states the superior court (1) removed BOKF as trustee and (2) appointed Ryan as successor trustee. That minute entry, which was not in appealable form, is silent as to whether the court granted other relief requested in the petition.

¶4 In June 2017, Appellants purported to file a motion to reopen alleging BOKF “had improperly used approximately \$7,000 of [T]rust assets to pay for legal work.” The motion was signed by, and on behalf of, Ryan, Sharon and Lynn as “Co-Trustees” of the Trust “In Pro Per.” As filed,

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<sup>1</sup> Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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however, the names of Ryan and Sharon in the caption were listed but were crossed out. As such, the caption listed Lynn as the only movant.

¶5 After full briefing and based on the documents provided, the court entered a final judgment pursuant to Ariz. R. Civ. P. 54(c) denying the motion to reopen, finding (1) Ryan was “the only and sole trustee” of the Trust; (2) it was “unknown under what authority, if any” Sharon and Lynn claimed to be co-trustees and (3) Lynn, as a self-represented party, could not “file documents on behalf of” Ryan or Sharon.

¶6 Ryan then paid an appearance fee and, as “Trustee” of the Trust “In Pro Per,” filed a motion for reconsideration of the final judgment. This motion states Appellants properly appointed themselves co-trustees and that Ryan crossed out his and Sharon’s names on the motion to reopen in an effort to avoid paying appearance fees. Days later, Ryan filed an amendment, apparently seeking to convert the motion for reconsideration into a motion for new trial. *See* Ariz. R. Civ. P. 59(a). The court denied the motion, noting Ryan “fails to understand the key principle that non-lawyers cannot file documents on behalf of and represent others.”

¶7 Appellants then retained counsel who filed a timely appeal from the final judgment denying the motion to reopen and the denial of Ryan’s motion for reconsideration/new trial.

**DISCUSSION**

**I. This Court Lacks Appellate Jurisdiction Over The Purported Appeals By Ryan And Sharon.**

¶8 As applicable here, “[a]n appeal may only be taken by a *party* aggrieved by the judgment.” *In re Estate of Friedman*, 217 Ariz. 548, 551, ¶ 9 (App. 2008) (emphasis added); *accord* Ariz. R. Civ. App. P. 1(d). In probate court, a “party” is one “who has filed a notice of appearance, an application, a petition, or an objection.” Ariz. R. Prob. P. 2(M). This court is required to dismiss an appeal, or any portion of an appeal, where appellate jurisdiction is lacking. *Baker v. Bradley*, 231 Ariz. 475, 478-79 ¶ 8 (App. 2013).

**A. This Court Lacks Appellate Jurisdiction Over Sharon’s And Ryan’s Purported Appeal From The Final Judgment Denying The Motion To Reopen.**

¶9 Having previously appeared when opposing the petition to decant, Lynn was a party aggrieved by the denial of the motion to reopen. Accordingly, this court has appellate jurisdiction over Lynn’s appeal from

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that final judgment. *See* A.R.S. § 12-2101(A)(9). Sharon and Ryan, however, did not file a notice of appearance, application, petition or objection to the petition to decant. *See* Ariz. R. Prob. P. 2(M). Although Ryan attended the hearing, the applicable rules distinguish between an “interested person” who opposes a petition and a “party” who has appeared. *See* Ariz. R. Prob. P. 2(M); 17(D), (E). Thus, this court lacks appellate jurisdiction over the appeal by Sharon and Ryan from the final judgment denying the motion to reopen. As a result, that portion of the appeal is dismissed.

**B. This Court Lacks Jurisdiction Over The Appeal From The Order Denying Ryan’s Motion For Reconsideration/New Trial.**

¶10 Ryan first appeared when he filed the motion for reconsideration/new trial. Although the denial of a motion for new trial generally is appealable, this court “must look to the ‘character of the proceedings which resulted in the order appealed from’ to ascertain [appellate] jurisdiction in any particular case.” *Maria v. Najera*, 222 Ariz. 306, 308 ¶ 9 (App. 2009) (citations omitted). Because Ryan cannot appeal from the final judgment denying the motion to reopen, this court lacks appellate jurisdiction to consider his challenge to the order denying his motion for reconsideration/new trial, which sought to challenge the validity of that final judgment. *Cf. Maria*, 222 Ariz. at 308 ¶ 11 (“A party may not create access to appellate review merely by filing a new trial motion” challenging a prior ruling that cannot be appealed) (citation omitted). Thus, this court lacks appellate jurisdiction over the appeal by Ryan from the order denying his motion for reconsideration/new trial. Accordingly, that portion of the appeal is dismissed.

**II. As To Lynn, The Final Judgment Denying Her Motion To Reopen Was In Error.**

¶11 This court has appellate jurisdiction over Lynn’s appeal from the final judgment denying her motion to reopen. *See* A.R.S. § 12-2101(A)(9). Lynn argues on appeal that the record fails to support the finding in the final judgment that she was not a co-trustee. Although Ryan had been appointed trustee nearly a year before Lynn filed her motion to reopen, a vacant trusteeship may be filled by “a person [or persons] appointed by unanimous agreement of the qualified beneficiaries.” A.R.S. § 14-10704(C)(2). Similarly, “a person designated as a trustee accepts the trusteeship” by, among other things, “performing duties as trustee or otherwise indicating acceptance of the trusteeship.” A.R.S. § 14-10701(A)(2). Lynn’s declaration under penalty of perjury, attached to her motion to

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reopen, states she is a co-trustee, indicating she had accepted that position. Ryan's declaration under penalty of perjury, also attached to Lynn's motion to reopen, confirms Lynn's declaration. Although BOKF opposed Lynn's motion to reopen, it did not controvert this factual showing. In addition, the final judgment denied the motion based on the filings and without any evidentiary hearing. At this stage of the proceeding, where the denial was based on the filings and not any credibility assessment, there was no basis to reject, as a matter of law, Lynn's claim to be co-trustee of the Trust.

¶12 On appeal, BOKF offers various arguments for affirming the final judgment, none of which compel such a result here. Although correctly asserting that Lynn is not a trustee named in the Trust, BOKF does not explain how that would displace the authority to fill a vacant trusteeship under A.R.S. § 14-10704(C)(1) or prohibit her from accepting the trusteeship under A.R.S. § 14-10701(A)(2). Similarly, although speculating that the trustor "never intended for Lynn" to serve as a trustee, BOKF offers no supporting record evidence. BOKF also fails to support its statement that the Trust "document does not allow for Co-Trustees." In fact, the Trust Declaration discusses the power and authority of "Trustees" and even discusses the power and authority "for more than one Trustee." Nor does BOKF show how the relief sought in the motion to reopen is moot, or that Lynn lacks standing, based on its claim that "[b]y its own terms the [T]rust should now be terminated." See A.R.S. § 14-10816(26) (providing trustees authority to wind up a trust). Similarly, BOKF has not shown how the limitations period applicable for a beneficiary's claim against a trustee under A.R.S. § 14-11005(C)(2) would bar Lynn's motion to reopen, filed as trustee against a prior trustee.

¶13 Although BOKF argues with some force that the motion to reopen should have been filed as a petition, it is unclear that BOKF properly raised this argument in the superior court. Even if BOKF had done so, the superior court apparently construed the motion to reopen as a petition by resolving the matter in a final appealable judgment under Ariz. R. Civ. P. 54(c). Finally, notwithstanding BOKF's invitation to do so, this court will not, for the first time on appeal, address BOKF's substantive responses to the issues raised in the motion to reopen. See, e.g., *Broadband Dynamics, LLC v. SatCom Mktg., Inc.*, 244 Ariz. 282, 287 ¶ 14 (App. 2018) (declining to consider issue "not addressed by the superior court and the facts are not sufficiently developed to permit a proper legal analysis" on appeal) (citing cases). For these reasons, as to Lynn, the final judgment denying her motion

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to reopen is vacated and remanded to the superior court for further proceedings.<sup>2</sup>

**III. Attorneys' Fees On Appeal.**

¶14 Appellants and BOKF seek attorneys' fees incurred on appeal pursuant to A.R.S. § 14-11004. BOKF also seeks (1) attorneys' fees pursuant to Ariz. R. Civ. P. 11 and A.R.S. § 12-341.01 and (2) taxable costs pursuant to A.R.S. § 12-341. The request for attorneys' fees by Ryan and Sharon is denied. Similarly, BOKF's request for attorneys' fees pursuant to Ariz. R. Civ. P. 11 and A.R.S. § 12-341.01 is denied.

¶15 As to Ryan and Sharon, BOKF's request for attorneys' fees on appeal pursuant to A.R.S. § 14-11004, and for taxable costs on appeal, are granted in part, such that BOKF is awarded a portion of its attorneys' fees incurred on appeal addressing arguments applicable to Ryan and Sharon only, and taxable costs against Ryan and Sharon only, contingent upon its compliance with Ariz. R. Civ. App. P. 21. Lynn is awarded her taxable costs incurred on appeal, as to BOKF, contingent upon her compliance with Ariz. R. Civ. App. P. 21. The competing requests by Lynn and BOKF for attorneys' fees incurred on appeal pursuant to A.R.S. § 14-11004 are denied without prejudice, leaving to the superior court resolution of those requests on remand at the end of these proceedings.

**CONCLUSION**

¶16 The appeal by Ryan and Sharon is dismissed and, as to Lynn only, the final judgment denying her motion to reopen is vacated and this matter remanded for further proceedings consistent with this decision.



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

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<sup>2</sup> Particularly given the skeletal nature of the record on appeal, this court does not address the merits of the competing positions of Lynn and BOKF, which are to be resolved on remand.