IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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IN RE THE ESTATE OF
HELEN M. SHERWOOD, DECEASED.

PATRICIA BYRD,
*Respondent/Appellant*,

*v.*

DOROTHY SHERWOOD COONEY,
*Personal Representative/Appellee*.

No. 2 CA-CV 2016-0037
Filed November 30, 2016

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Appeal from the Superior Court in Pima County
No. PB20140703
The Honorable Kyle Bryson, Judge
The Honorable Christopher P. Staring, Judge

**AFFIRMED**

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COUNSEL

Patricia Byrd, Tucson
*In Propria Persona*

Curtis & Cunningham, Tucson
By Marjorie Fisher Cunningham
*Counsel for Personal Representative/Appellee*

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Judge Vásquez and Judge Kelly[1] concurred.

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E S P I N O S A, Judge:

**¶1** Patricia Byrd, daughter of Helen Sherwood, appeals the trial court's appointment of her sister, Appellee Dorothy Sherwood, as personal representative of her mother's estate, and raises numerous issues with the lower court proceedings. For the following reasons, we affirm.

**Factual and Procedural Background**

**¶2** The operative facts are gleaned from the record provided on appeal.[2] Helen and Frank Sherwood had five children:

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]Patricia's opening brief contains numerous factual assertions not supported by the record and denied by Dorothy, which we do not consider. *Cf. Sholes v. Fernando*, 228 Ariz. 455, n.2, 268 P.3d 1112, 1114 n.2 (App. 2011) (we disregard factual assertions with no apparent support in record). Nor do we consider the facts alleged in Patricia's untimely filed Reply Brief. Ariz. R. Civ. App. P. 15(a)(3) ("appellant may file a reply brief within 20 days after service of the answering brief"). We view the record in the light most favorable to

Carolyn, Joanna, Margaret, Dorothy, and Patricia.[3] Frank passed away in 2003, and after Helen had been diagnosed with dementia, Dorothy sought and was appointed as her mother's guardian and conservator. Patricia objected to Dorothy's accounting of Helen's estate, but the trial court dismissed Patricia's objection, determining her status as a devisee in Helen's will was insufficient to meet the statutory definition of an "interested person," and she therefore lacked standing to challenge the accounting. Dorothy served as Helen's guardian and conservator until Helen's death in January 2014.

**¶3** Helen's will was admitted into probate on April 2, 2015. The persons she nominated to serve as personal representative declined to serve, and Joanna and Margaret both filed declinations concurring in Dorothy's appointment as personal representative.[4] Patricia objected to the appointment, however, alleging Dorothy had "skimmed funds" from Helen's accounts while serving as guardian and conservator, and was unsuitable to serve as the personal representative for Helen's estate.

**¶4** A bench trial on the appointment of a personal representative was held in April 2015. The trial court heard testimony from Dorothy, Patricia, and three other witnesses who had known Helen and Frank Sherwood when they resided in Cochise County. In an unsigned minute entry, the trial court concluded that Patricia had presented "no credible evidence" that Dorothy was unsuitable to serve as personal representative.

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sustaining the decision below. *See Blake's Estate v. Benza*, 120 Ariz. 552, 553, 587 P.2d 271, 272 (App. 1978).

[3]Although Helen Sherwood's final will and testament refers to the five individuals as her "children," it appears Patricia, who was a former foster child of Frank and Helen, was never legally adopted, a fact having no bearing on our resolution of her appeal.

[4]Because Carolyn predeceased Helen without issue, Helen's will directed that her estate be split equally among Patricia, Dorothy, Margaret, and Joanna.

Accordingly, pursuant to A.R.S. § 14-3203(B)(3), the court found Dorothy "acceptable to the heirs and devisees whose interest in the estate exceed one half of the probable distributable value of the estate," and appointed her personal representative. The court additionally found Patricia's conduct at trial "unreasonable," and awarded Dorothy, on behalf of Helen's estate, $8,706 in attorney fees.

**¶5** At a hearing in November, the trial court approved the proposed distribution of the estate, ordered Patricia's share "reduced by $8,706.00 to reflect the attorney's fees award," and issued a signed minute entry entering judgment pursuant to Rule 54(b), Ariz. R. Civ. P. The distribution of the estate was stayed pending the outcome of this appeal, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1). *See In re Estate of Newman*, 219 Ariz. 260, n.2, 196 P.3d 863, 867 n.2 (App. 2008).

**Personal Representative Action**[5]

**¶6** Patricia first disputes Dorothy's appointment as personal representative, arguing her sister is "unqualified" and "unsuitable" to serve as personal representative. Patricia cites A.R.S. § 14-3611(B)(3), which allows for removal of a personal representative who has "mismanaged the estate," and "American

[5]Ignoring Rule 13(a)(7), Ariz. R. Civ. App. P., Patricia has in large part failed to present discernable issues, develop her arguments, or cite relevant authorities, statutes, or parts of the record. Although she has represented herself in the lower court proceeding and on appeal, Patricia is held to the same standard as attorneys. *See In re Marriage of Williams*, 219 Ariz. 546, ¶ 13, 200 P.3d 1043, 1046 (App. 2008). Failure to develop or support arguments may result in waiver of claims. *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009). We have, however, in our discretion, addressed Patricia's claims as best we can, when discernable and supported by her explanations, record citations, or authority. *See In re Aubuchon*, 233 Ariz. 62, ¶ 6, 309 P.3d 886, 888-89 (2013).

Jurisprudence, Proof of Facts[ ]3d" for the proposition that "any fiduciary can be removed for '. . . engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.'" In support of her argument, Patricia refers to her "Declaration . . . in Support of her Response to [Dorothy]'s 2nd Amended Motion for Summary Judgment" which provides "bank statements for some questionable accounting" as proof of "mismanagement of the estate."

**¶7** Patricia's "declaration" contains much of the same information presented at the April 2015 bench trial, during which, as Dorothy points out, Patricia was allowed to present evidence of "improprieties and loss," and was given broad latitude to establish Dorothy's alleged inappropriate conduct. After hearing Patricia's testimony and allegations, the trial court determined "no credible evidence" had been presented that Dorothy was unsuitable to serve as personal representative. Patricia has not meaningfully explained how the court erred, and we find her renewed argument unsupported and unpersuasive.

**¶8** Moreover, Patricia's disagreement with the trial court's determination provides an insufficient legal basis for us to "[a]ppoint a Public Fiduciary to replace [Dorothy]," the remedy Patricia seeks in this appeal.[6] The trial court is in the best position to judge the credibility of witnesses and resolve conflicting evidence. *See Vincent v. Nelson*, 238 Ariz. 150, ¶ 18, 357 P.3d 834, 839 (App. 2015). Accordingly, we defer to the court's implicit and

[6] Patricia's arguments are additionally unsupported in the record. Under the Arizona Rules of Civil Appellate Procedure, the appellant's opening brief must contain "supporting reasons for each contention," with "citations of legal authorities and appropriate references to the portions of the record on which the appellant relies." ARCAP 13(a)(7)(A). Each argument must additionally contain "the applicable standard of appellate review with citation to supporting legal authority." ARCAP 13(a)(7)(B). Patricia's failure to meet those requirements means we could find appellate review of her claim waived; in our discretion, however, we address its merits, to the extent feasible. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004).

explicit factual findings. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa Cty.*, 208 Ariz. 532, ¶ 10, 96 P.3d 530, 535 (App. 2004). Patricia has the burden of showing the trial court erred, *see Myrick v. Maloney*, 235 Ariz. 491, ¶ 12, 333 P.3d 818, 822 (App. 2014), a burden she has not met with bare allegations and mere disagreement with the trial court's determinations.

**Guardianship and Conservatorship**

**¶9** Patricia next attempts to relitigate issues related to the guardianship and conservatorship proceedings, arguing she recently uncovered evidence of fraud. At trial, the court made clear it would not reopen the guardianship or conservatorship issue or address previous accountings, but would allow Patricia to present evidence that Dorothy was unfit to serve. The evidence Patricia cites on appeal, however, was not presented below, and she has provided no basis for our consideration of the evidence in the first instance. *See Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 17, 160 P.3d 223, 228 (App. 2008) (appellate court generally does not consider issues not raised in the trial court). As we have previously observed, "consideration of belatedly urged issues undermines 'sound appellate practice,' and violates the interests of the party against whom the claim is newly asserted on appeal." *Id.* (citations omitted). Although Arizona appellate courts have jurisdiction to hear arguments first raised on appeal, we rarely exercise that discretion, *id.*, and will not do so here. Moreover, we find no error with the trial court's decision not to reconsider accountings previously approved by the probate court. *See Kadish v. Ariz. State Land Dep't*, 177 Ariz. 322, 327, 868 P.2d 335, 340 (App. 1993) (under doctrine of res judicata, judgment on merits in a prior action bars second suit on same cause of action).

**Ambiguity of the Will**

**¶10** Patricia next argues there is "no ambiguity in Helen's Will" that all her children share equally, and alleges Dorothy "sold everything she could," "gave away things," and "sold the note" to the house so that she could "do an informal probate" so as to exclude Patricia from "the remaining interest in the funds from the sale of the note." At trial, Patricia cross-examined Dorothy on the

circumstances of Dorothy's obtaining title and selling Helen's manufactured home and furnishings. As noted earlier, however, the trial court concluded that Patricia had failed to present any "credible evidence" that would suggest Dorothy was unsuitable to serve as personal representative.

**¶11** Patricia's failure to meaningfully develop her argument, or cite any support, precludes substantive review of her claim. *See In re $26,980 in U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000) (declining to consider party's "bald assertion[s] offered without elaboration or citation to . . . legal authority"). From the facts and arguments presented, we see no error in the trial court's ruling.

**Attorney Fee Affidavit**

**¶12** Patricia finally contends the trial court erred in awarding attorney fees against her interest in Helen's estate, alleging that the "accounting is so erroneous and confusing, Judge Bryson undoubtedly never looked at the affidavit and its three pages of billing slips." We review a trial court's award of attorney fees for an abuse of discretion, and as long as the record reflects a reasonable basis for the award we will uphold it. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶¶ 18, 23, 99 P.3d 1030, 1035-36 (App. 2004). Fee applications are generally found adequate if they contain sufficient information to assess the reasonableness of the fee request. *State ex rel. Goddard v. Gravano*, 210 Ariz. 101, ¶ 39, 108 P.3d 251, 260 (App. 2005).

**¶13** In this case, the fee application indicated the agreed upon hourly billing rate, type of legal services provided, the date the service was provided, and the attorney providing it. *See Schweiger v China Doll Rest.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983). The trial court found the fees charged and time expended to be "reasonable," and the hourly rate to be "commensurate with others in the legal community." Such an application clearly satisfying the *China Doll* requirements, we find no abuse of the trial court's discretion in awarding attorney fees to Dorothy on behalf of Helen's estate. *Gravano*, 210 Ariz. 101, ¶¶ 37-39, 108 P.3d at 260; *see also China Doll*, 138 Ariz. at 188, 673 P.2d at 932.

## Conclusion

**¶14** For the reasons discussed above, we find no error in the trial court's appointment of Dorothy as personal representative or its refusal to address certain issues litigated at the guardianship and conservatorship proceedings. We also see no error in its award of attorney fees to Dorothy, and therefore affirm the judgment in full.