COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP817 **Cir. Ct. No. 2003PR221**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE ESTATE OF MARGARET J. ELEGREET:

NORA DESALVO,

APPELLANT,

V.

ESTATE OF MARGARET J. ELEGREET,

RESPONDENT.

APPEAL from a judgment and orders of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. This appeal arises out of the formal administration of the Estate of Margaret Elegreet (the Estate), which took place over a period of

approximately four and one-half years. During the Estate's formal administration, the beneficiaries were embroiled in a separate civil lawsuit regarding the disbursement of Elegreet's personal property, the original appointed personal representative died, a successor personal representative was appointed, and gift taxes went unpaid for tax years 2001 and 2002, resulting in significant fees and interest owing to the Internal Revenue Service. The length of time it took to discover and pay the delinquent gift taxes and blame for that oversight became a significant theme throughout the final years of the administration.

¶2 Eventually, in February 2010, the probate court entered a judgment approving the final account and settlement of the Estate, which included a payment of attorney's fees for the personal representative, and entered an order discharging the personal representative. Nora DeSalvo, a beneficiary of the Estate, appeals both the judgment and orders. Because the Estate had no assets remaining, the court entered an order requiring each beneficiary to deposit $5,000 with the clerk of the court to finance the appeal. DeSalvo appeals that order as well.

¶3 On appeal, DeSalvo challenges the following decisions by the probate court with respect to the final accounting of the estate: (1) the court's determination as to the amount of fees the personal representative is entitled to; (2) the court's decision not to reduce the personal representative's compensation by the amount of interest and fees that accrued on the delinquent gift taxes during his tenure as personal representative and by an unspecified amount in light of his performance; (3) the court's decision not to award a larger amount of fees to the attorneys DeSalvo privately retained during the course of the administration; and (4) the court's decision not to assess those attorney fees against the personal representative. DeSalvo also appeals the court's discharge of the personal

representative and decision not to reappoint him as personal representative for the present appeal, as well as the court's order that each beneficiary deposit $5,000 with the clerk of court to finance this appeal. For the reasons discussed below, we affirm in part and reverse in part.

I. BACKGROUND

¶4 Margaret Elegreet died testate on December 2, 2002. In her last will, Margaret named her three adult children, DeSalvo, Karen (Carrie) Walls, and Steven Elegreet, as equal beneficiaries of her estate. Disputes arose among the beneficiaries regarding the distribution of Margaret's personal property and a civil action between those parties ensued. The probate court directed that a formal administration of the Estate be conducted and the court appointed Attorney John Stoltz as personal representative of the Estate.

¶5 In April 2006, Stoltz died and the court appointed Attorney Karl Green, a law partner of Stoltz, as successor personal representative of the Estate. In June 2007, the court authorized an interim payment to Green for his fees and expenses up until May 11, 2007, in the amount of $7,703.50.

¶6 In October 2008, a hearing was held at the direction of the court on the issue of why the Estate had not been closed. The day before the hearing, Green notified the court that the tax department in his office had recently noticed that the Estate may have had an outstanding gift tax obligation in excess of $100,000. In light of this information, the court entered an order directing Green to "open a dialogue with the IRS" to determine the amount of any delinquency, penalties, and the amount still owed by the Estate. DeSalvo, who had retained Scott Franklin, a certified public accountant and attorney, as an expert witness, offered to provide assistance to Green regarding the issue. The court stated that it

was "sure [] Green [would] welcome any positive, constructive assistance with direction in dealing with this."

¶7 In March 2009, Green filed a final account reflecting a payment to the U.S. Treasury in the amount of $16,433.07, which included interest and fees on the delinquent 2001 and 2002 gift taxes. The final account also reflected the interim attorney's fees payment of $7,703.40 and a request by Green for an additional $5,136.60 in fees and expenses.

¶8 A hearing was held in May 2009 regarding the March 2009 final accounting. At the hearing, DeSalvo asked that the court order that Green personally pay $5,000 in interest on the delinquent gift taxes because it was partly Green's fault that interest had accrued on the delinquent taxes. The court declined to enter such an order at that time. However, after a discussion between the court and the parties regarding the delinquent taxes and Green's efforts to resolve that issue, the court directed DeSalvo's attorney, Thomas Olsen, to determine who was responsible for interest and penalties on the delinquent taxes, at various times since 2001, and in what amount.

¶9 In November 2009, Green filed another final accounting. That accounting reflected that Green had issued two additional payments to the U.S. Treasury, one in the amount of $4,459.08 for "2001 Form 709 Penalty/Add[itional] Interest," and one in the amount of $3,051.34 for "2002 Form 709 Penalty/Add[itional] Interest." Green also requested an additional $5,590 in fees. All of Green's fees were calculated at an hourly rate of $200.

¶10 At a hearing on the November 2009 final accounting, the court addressed, among other things: (1) the amount of compensation Green should receive; (2) whether Green should be penalized for the fees and interest that the

Estate incurred because the 2001 and 2002 gift tax returns were not timely paid; and (3) whether and to what extent DeSalvo should be reimbursed for legal expenses she paid her attorney, Olsen, and expert witness, Franklin. With respect to Green's fees, the court found that the amount of fees requested by Green was reasonable. Nevertheless, it reduced the total fees to be awarded to Green by $1,550.73, which was the amount of interest incurred by the Estate for the delinquent 2001 and 2002 gift taxes while Stoltz served as personal representative of the Estate. The court declined to assess any additional sums against Green. The court also ruled that the Estate was to reimburse DeSalvo $1,580,25 of the $3,1675.50 in fees and expenses DeSalvo paid Franklin, and awarded Olsen a "token" amount of $1,000 in attorney fees.

¶11 In January 2010, Green filed another final accounting, which incorporated the court's rulings at the November 2009 hearing, and which reflected that the three beneficiaries would each receive a distribution of approximately $455.20. In February 2010, the court entered a final judgment closing the estate and a separate order discharging Green as personal representative.

¶12 DeSalvo appeals the final judgment and the order discharging Green as personal representative. In May 2010, the probate court entered an order directing each of the beneficiaries of the Estate to deposit $5,000 with the court to finance the appeal. DeSalvo appeals that order as well.

¶13 Additional facts will be discussed below as necessary.

II. DISCUSSION

¶14 On appeal, DeSalvo contends that the probate court abused its discretion in the following five respects: (1) determining that Green should be paid by the Estate at his hourly rate as an attorney rather than the personal representative rate under WIS. STAT. § 857.05(2);[1] (2) declining to assess against Green the interest that accrued on the delinquent 2001 and 2002 gift taxes during the time period he served as personal representative of the Estate; (3) refusing to award a larger amount of attorney fees to Franklin and Olsen; (4) awarding Franklin and Olsen fees out of the Estate; and (5) discharging Green as personal representative of the Estate and refusing to reappoint Green as personal representative in the present appeal. DeSalvo also contends that the court erred as a matter of law in directing each of the beneficiaries of the estate to deposit $5,000 with the court to finance this appeal. We address each of DeSalvo's contentions below.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

WISCONSIN STAT. § 857.05(2) provides:

> **(2)** SERVICES. Subject to the approval of the court the personal representative shall be allowed for his or her services commissions computed on the inventory value of the property for which the personal representative is accountable less any mortgages or liens plus net principal gains in the estate proceedings at a rate of 2% or a rate that the decedent and the personal representative, or the persons who receive the majority interest in the estate and the personal representative, agree to in writing; and such further sums in cases of unusual difficulty or extraordinary services as the court determines reasonable. If a personal representative is derelict in duty, his or her compensation for services may be reduced or denied.

A. GREEN'S RATE OF COMPENSATION

¶15 "Generally, the expenses and fees for a personal representative are committed to the [probate] court's discretion, as is the decision of what fees are reasonable for an attorney providing services for an estate …." ***Bell v. Neugart***, 2002 WI App 180, ¶35, 256 Wis. 2d 969, 650 N.W.2d 52 (internal citation omitted). WISCONSIN STAT. § 857.05(3) permits the probate court, at its discretion, to allow a personal representative who is also an attorney to receive executor's commissions, attorney fees, or both. Section 857.05(3) provides:

> If the personal representative or any law firm with which the personal representative is associated also serves as attorney for the decedent's estate, the court may allow him or her either executor's commissions, (including sums for any extraordinary services as set forth in sub. (2)) or attorney fees. The court may allow both executor's commissions and attorney fees, and shall allow both if the will of the decedent authorizes the payments to be made.

¶16 In the amended final accounting filed with the court in November 2009, Green requested a final payment of fees totaling $5,590 for work done subsequent to May 11, 2007, the date to which he had previously been paid. Green charged the estate $200 per hour for his services. Green did not bill any of his services at the personal representative rate authorized under WIS. STAT. § 857.05(2).

¶17 At the November 2009 hearing, DeSalvo disputed the amount of fees to which Green was entitled. Limiting its review to those fees requested by Green in the November 2009 final accounting, the probate court found that the amount requested by Green was reasonable. However, it reduced the total amount of fees by $1,550.73, which the court found to be the amount of interest and fees on the delinquent gift taxes attributable to Green's predecessor, Stoltz.

¶18 DeSalvo argues that the probate court erroneously exercised its discretion when it awarded Green his requested amount of fees less $1,550.73, because it failed to explain why Green was entitled to be compensated entirely at his attorney rate. Relying on ***Sherman v. Hagness***, 195 Wis. 2d 225, 536 N.W.2d 133 (Ct. App. 1995), DeSalvo argues that the probate court should have determined which of Green's billed services are customarily performed by an attorney and authorized only those services to be billed at Green's attorney rate. The remainder, according to DeSalvo, should have been paid at the rate authorized by WIS. STAT. § 857.05(2).

¶19 In ***Sherman***, we explained that although WIS. STAT. § 857.05(3) allows a personal representative who is also an attorney to be compensated at an hourly attorney fee for legal services provided and/or as a personal representative under § 857.05(2), it does not "empower the probate judge, in his or her discretion, to allow the attorney who also serves as personal representative to bill the estate at his or her customary hourly rate for *all* services." ***Sherman***, 195 Wis. 2d at 229-30 (emphasis added). Instead, "'[i]n probate proceedings the compensation for legal services rendered should be limited to those of a strictly professional character.'" ***Id.*** at 230 (quoted source omitted).

¶20 The probate court in this case reviewed Green's final bill at the November 2009 hearing and found the charges to be "reasonable under the circumstance[s] of this case." In reaching that decision, the court recognized that Green had not billed the Estate for all of his involvement with the estate. For example, Green had not billed the Estate for his appearance at the November 2009 hearing.

¶21 A proper exercise of discretion contemplates that the court explain its reasoning. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Although the court explained that it found Green's bill to be reasonable in light of the circumstances, it did not explain how or why all of the services provided by Green, including those not billed, were legal in nature. When the court does not explain its reasoning, we may search the record to determine if it supports the court's discretionary decision. ***Id.***

¶22 The evidence in the record relating to the fees requested by Green in the November 2009 final accounting includes Green's billing statement and statements made by Green at the November 2009 hearing. The billing statement itemizes Green's charges and includes a brief description of each service provided by Green for which the Estate is being billed. However, we are unable to say from those brief descriptions, with any degree of certainty, which of those services provided by Green were legal services.

¶23 At the hearing, Green advised the court that litigation between the beneficiaries took place until April 2008, and that "effectively almost all of the work [for the Estate prior to when the April civil litigation was resolved] … relates specifically to litigation work that an attorney would be paid for." According to Green, after April 2008, his work "was in pursuit of [the delinquent] tax problem." At that point, according to Green, he was "trying to assist the beneficiaries in resolving the tax issues which [he thought] require[d] an attorney or as the Court found out the assistance of an expert accountant." Green advised the court that in his view, it "is reasonable to state" that his bill was "essentially for attorney's fees." However, a review of Green's billing statement suggests that some of the charges after April 2008 are not for legal services, but rather services customarily performed by a personal representative. For example, on January 29, 2008, Green

billed the Estate for a letter to DeSalvo's attorney including receipts for the sale of a vehicle belonging to the Estate and an interest income statement. We fail to see, from the brief description provided by Green, how this charge relates to the delinquent tax issue, or why it should be considered a legal service.

¶24 Because we are unable to determine that the record supports the probate court's decision, we conclude that the court erroneously exercised its discretion in authorizing that Green be compensated entirely at an attorney rate. On remand, we direct the court to make specific findings as to which of Green's charges were for legal services and which, if any, were for his services as personal representative.

B. REDUCTION OF THE AMOUNT OF GREEN'S COMPENSATION

¶25 The probate court reduced Green's fees by $1,550.73, which was the amount of interest and fees for the delinquent taxes that accrued while Stoltz served as personal representative of the Estate.

¶26 DeSalvo argues that the probate court failed to properly exercise its discretion when it failed to reduce Green's compensation by an unspecified amount in light of Green's performance. According to DeSalvo, the court "ignored evidence of Green's poor performance as a personal representative and fiduciary with regard [] to managing the tax obligations of the [E]state and [] his handling of the notice of tax delinquency from the IRS." DeSalvo argues that the court "should [] have found Green derelict in his duty as a fiduciary and even remiss in exercising the 'ordinary care and good faith' required" by Green.

¶27 DeSalvo's argument is undeveloped. She has made no showing that Green should have been aware of the delinquent tax issue at an earlier date, nor

has she shown in what manner Green's performance was, as she alleges, "derelict" or "remiss in exercising [] 'ordinary care and good faith.'" We therefore do not further address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court may decline to address issues that are insufficiently developed).

¶28 DeSalvo also contends that the probate court failed to properly exercise its discretion when it failed to reduce Green's fees by the amount of interest and fees that accrued on the delinquent gift taxes while Green served as personal representative. In an exhibit to the probate court, DeSalvo estimated that the amount of interest and penalties that accrued while Green served as personal representative is $4,249.54.

¶29 In probate proceedings, a personal representative acts as a fiduciary in managing another's assets. ***Robert Hill Found. v. Learman***, 30 Wis. 2d 116, 118, 140 N.W.2d 196 (1966). A personal representative must carry out his or her duties in good faith and with reasonable care. ***Old Republic Surety Co. v. Erlien***, 190 Wis. 2d 400, 411, 527 N.W.2d 389 (Ct. App. 1994). If a personal representative breaches a duty, costing the estate money, the court may, in its discretion, assess against the personal representative an amount to compensate the estate for the amount lost. *See, e.g.*, ***Hegner v. Van Rossum***, 117 Wis. 2d 314, 322, 344 N.W.2d 160 (1984) ("If an administrator breaches the duty to make the estate productive, the trial court may, in its discretion, assess a surcharge against the administrator to compensate the estate for interest that could have been earned had the duty been fulfilled.")

¶30 DeSalvo argues that Green had a duty under WIS. STAT. § 857.03[2] to pay the delinquent taxes and that Green failed to carry out his duty in good faith and with reasonable care, which cost the Estate additional interest and fees on the delinquent taxes. According to DeSalvo, Green did not act in good faith and with reasonable care because Green failed to act on the tax issue until September 2008, and took ten months to pay the taxes after Franklin, DeSalvo's tax expert, confirmed the amount of the Estate's gift tax liability.

¶31 The circuit court found that when Green took over as personal representative of the Estate, he was unaware of the delinquent taxes. The court found that Green became aware of the issue at some point in 2008 and pursued the issue. According to the court, "a combination of people dropped the ball," including her accountant and the entity that oversaw Margaret's trust when she was alive. However, in the court's view, Green "exercised due diligence in pursuing [the delinquent tax issue], getting the taxes prepared and ultimately with [] assistance[,] … he did get the matter resolved."

¶32 We have reviewed the record and DeSalvo's arguments, and conclude that the circuit court's findings were not clearly erroneous. *See* WIS. STAT. § 805.17(2) (we accept a circuit court's findings of fact if not clearly erroneous). DeSalvo has not shown that Green's fees should have been reduced for any other reason. Accordingly, we conclude that the court did not erroneously exercise its discretion by not reducing Green's compensation by the amount of

[2] WISCONSIN STAT. § 857.03)(1) provides that "[t]he personal representative shall … pay and discharge out of the estate all … taxes …."

interest and fees that accrued on the delinquent gift taxes during the time period he served as personal representative of the estate.

C. DeSalvo's Reimbursement for Legal Fees She Paid Franklin and for Attorney Fees for Her Personal Attorney

¶33 At the November 2009 hearing, DeSalvo sought reimbursement for legal fees she paid Franklin, an attorney and certified public accountant she personally retained to provide assistance regarding the delinquent gift tax issue, in the amount of $3,167.50, which included payment for 17.1 billable hours and a computer processing fee. An itemized bill from Franklin detailing each of the charges was presented to the court as an exhibit. The probate court, after reviewing the bill and hearing testimony from Franklin regarding the charges, found that 9.03[3] of the hours were "directly related to [] assisting [Green] in the preparation of taxes." Multiplying that amount by Franklin's hourly rate of $175, the court ordered that the Estate should reimburse DeSalvo $1,580.25. DeSalvo, through her attorney, F. Thomas Olsen, also made a request for Olsen's attorney's fees. The court awarded a "token" amount of $1,000 to Olsen in recognition of his efforts, which the court thought "were invaluable to the [E]state."

¶34 DeSalvo contends that the probate court erroneously exercised its discretion by failing to award larger amounts of attorney's fees for the services performed by Attorneys Franklin and Olsen, which she maintains directly benefited the Estate, because she was a prevailing party.

[3] We have recalculated the billable hours that the court found to be directly related to assisting Green and it appears that the court, as well as DeSalvo's counsel, slightly miscalculated. The correct total is 9.02.

¶35 Pursuant to WIS. STAT. § 879.37,[4] courts are authorized to award attorney fees and costs to prevailing parties in contested will proceedings. ***Bloom v. Grawoig***, 2008 WI App 28, ¶8, 308 Wis. 2d 349, 746 N.W.2d 532. We explained in ***Wheeler v. Franco***, 2002 WI App 190, ¶6, 256 Wis. 2d 757, 649 N.W.2d 711 (citations omitted):

> A court's decision whether to allow attorney fees under WIS. STAT. § 879.37 to a prevailing party has two components. First, the court must decide whether the party seeking reimbursement of attorney fees is a prevailing party. This decision involves the application of facts to a particular legal standard, which is a conclusion of law that we review independently. If the court concludes that the party is a prevailing party, then the court may, but need not, award attorney fees. This decision calls for an exercise of discretion. We affirm a trial court's discretionary decision if the court applied the correct law to the relevant facts and reasoned its way to a reasonable conclusion.

¶36 DeSalvo argues that she is a prevailing party because "as a result of the work performed by … Franklin, and by her attorney, [Olsen,] the [e]state realized significant benefits." With respect to Attorney Franklin, she asserts that all of Franklin's charges submitted to the probate court for reimbursement were for services that directly assisted Green, and thus benefitted the Estate. However, she does not explain how or why the probate court was wrong in its findings

[4] WISCONSIN STAT. § 879.37 provides:

> Reasonable attorney fees may be awarded out of the estate to the prevailing party in all appealable contested matters, to an unsuccessful proponent of a will if the unsuccessful proponent is named in the will to act as personal representative and propounded the document in good faith, and to the unsuccessful contestant of a will if the unsuccessful contestant is named to act as personal representative in another document propounded by the unsuccessful contestant in good faith as the last will of the decedent.

regarding the charges it rejected as not benefiting the Estate. With respect to Olsen, she merely asserts that the court should have awarded a larger amount of fees in light of the court's acknowledgement that Olsen's services were invaluable to the estate.

¶37 DeSalvo's arguments are conclusory and undeveloped. This court does not consider conclusory assertions and undeveloped arguments. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56. Accordingly, we do not address this issue further. *See* ***id.***

D. RESPONSIBILITY FOR ATTORNEY FRANKLIN'S AND ATTORNEY OLSEN'S FEES

¶38 The probate court determined that the reimbursement for Franklin's and Olsen's fees be made from Estate funds. DeSalvo contends that the attorney fees should have instead been assessed against Green because Green was "derelict" in his duty, or, in the alternative, because she is a prevailing party. *See* WIS. STAT. § 879.37. We disagree.

¶39 WISCONSIN STAT. § 879.37 does not authorize a court to order a personal representative to pay a prevailing party's attorney fees. Section 879.37 provides that "[r]easonable attorney fees may be awarded *out of the estate* to the prevailing party in all appealable contested matters ...." (Emphasis added.) It does not provide that the fees may be awarded against the personal representative. Reducing the award of attorneys fees to Green would have had the same effect, but we have already determined (in paragraph 32) that the circuit court did not abuse its discretion in deciding not to do so.

E. DISCHARGE OF GREEN AS PERSONAL REPRESENTATIVE

¶40 The circuit court discharged Green as personal representative of the Estate at the same time it entered its final judgment which, among other things, approved the final account of the Estate. Following DeSalvo's appeal, Green notified this court that "he [would] not be accepting reappointment because he does not handle appellate work." We then directed the probate court to appoint a successor personal representative. DeSalvo argued to the probate court that Green should be reappointed as personal representative. The probate court, however, declined to do so, explaining that Green "feels he's not competent to prosecute the appeal on behalf of the [E]state" and that it was "not going to … force an attorney to act in ways that he is not professionally competent to act."

¶41 DeSalvo contends the probate court erroneously exercised its discretion when it failed to reappoint Green as personal representative, even though Green had indicated that he would not accept such an appointment. According to DeSalvo, Green would have been "eminently fair to the estate." She also argues that the probate court's basis for not appointing Green—Green's claimed lack of professional competency to oversee the appeal—was pure speculation. DeSalvo acknowledges that even if we agree that Green should have been reappointed as personal representative, it would be impractical to reappointment him at this point. However, she asks that in the event that this case is remanded, Green should be reappointed.

¶42 The appointment of the personal representative for the Estate for the present appeal was a matter of discretion for the probate court. *See* ***First Wis. Nat'l Bank of Oshkosh v. Circuit Court for Fond Du Lac County,*** 167 Wis. 2d 196, 200, 482 N.W.2d 118 (Ct. App. 1992). DeSalvo cites no legal authority

supporting her argument that it was an erroneous exercise of the probate court's discretion not to reappoint Green as personal representative of the Estate for the present appeal when he has declined such representation on the basis of lack of competency. We need not consider arguments unsupported by reference to legal authority. ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286. Furthermore, Green had the right, and in fact the obligation, to decline reappointment if he did not believe that he was competent to represent the Estate on appeal. *See* SCR 20:1:1 (an attorney is required to provide competent representation to his or her client); SCR 20:6:2(a) (an attorney may avoid an appointment by the court if his or her representation of the client "is likely to result in violation of the Rules of Professional Conduct"). Reappointment of Green as personal representative and Green's acceptance of that appointment may have been a violation of the Rules of Professional Conduct. Accordingly, we conclude that the court did not erroneously exercise its discretion, and we decline to order his reappointment on remand.

F. FUNDING OF PRESENT APPEAL BY BENEFICIARIES

¶43 By the time DeSalvo initiated the present appeal, the Estate had no remaining assets. The assets had been used to pay the Estate's expenses, and the remaining balance, $1365.61, was distributed nearly equally between DeSalvo and the other two beneficiaries. Presented with an obligation to appoint a successor personal representative for the Estate to oversee this appeal, but with no Estate funds remaining to pay the personal representative, the circuit court directed each of the three beneficiaries of the Estate to deposit $5,000 with the clerk of court to finance this appeal. The court explained that it had contacted two private attorneys, both of whom had "indicated that they would not under any circumstances involve themsel[ves] in this case if they were not assured that in

fact there would be financial means to pay them," and neither attorney was willing to oversee the matter pro bono. The court noted that it could not locate any "specific authority" permitting it to require that the beneficiaries deposit $5,000 with the clerk of court, but was "left with no other option."

¶44 DeSalvo contends that we should vacate the court's order directing the beneficiaries to deposit $5,000 with the clerk of court because the court lacked legal authority to require that she and the other two beneficiaries use their personal funds[5] to finance litigation pertaining to the Estate.

¶45 The Estate does not dispute DeSalvo's contention that the court lacked the legal authority to require the beneficiaries to use personal funds to finance the Estate's litigation expenses on appeal. It is thus taken as admitted. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 (argument asserted by the appellant and not disputed by the respondent may be taken as admitted). However, the Estate argues that we should conclude that the probate court nevertheless had the *equitable power* to require that each of the beneficiaries deposit $5,000 with the court clerk to finance this appeal because the beneficiaries had, in the past, received substantial assets from Margaret's trust, the beneficiaries had been involved in extensive litigation that drained the Estate financially, and because the court was obligated to appoint a successor personal representative of the Estate, which had no assets from which the newly appointed personal representative could be paid. Aside from general

[5] DeSalvo calculates her personal contribution to be $4,544.80, $5,000 less the $455.20 disbursement she received from the Estate.

statements affirming that the probate court has equitable authority, the Estate fails to cite to any legal authority that supports its argument.

¶46 We have not been presented with any legal authority which would allow the circuit court through its equitable power to obligate an appellant, and parties not directly involved in an appeal, to pay an appellee's litigation expenses irrespective of the outcome, and we were unable to find any in our independent research. We therefore conclude that the court did not have such authority.

¶47 However, having reached that conclusion, we cannot say as a matter of law what amount of the $5,000 each beneficiary was obligated to contribute was personal funds, and what amount should be considered disbursements from the Estate available for return to the Estate. *See* WIS. STAT. § 863.01 (prior distributions may be required to be returned to an estate); WIS. STAT. § 863.31(1) (final judgment may be reopened). It appears from the record that the beneficiaries received disbursements from Margaret's trust, partial disbursements of property from the Estate, and a cash disbursement from the Estate when the Estate was closed. Amounts received by the beneficiaries from Margaret's trust were not part of the Estate and are thus personal assets of the beneficiaries. However, the value of any property or cash disbursements received by the beneficiaries from the Estate were assets of the Estate, which should be returned to the Estate to pay the additional expenses the Estate incurred during this appeal. On remand, we direct that the circuit court make appropriate factual findings

regarding what amount of prior distributions from the Estate the beneficiaries should return to the Estate, if any, and exercise its discretion accordingly.[6]

III. CONCLUSION

¶48 For the reasons discussed above, we conclude that the circuit court erroneously exercised its discretion when it found that Green should be compensated entirely at his attorney rate of compensation. We conclude that the court did not erroneously exercise its discretion by failing to reduce Green's compensation based on his performance or by the amount of interest and fees that accrued on the delinquent gift taxes during the period he served as personal representative of the Estate. We also conclude that the court did not erroneously exercise its discretion in failing to award DeSalvo a larger amount of reimbursement for the legal fees she paid Franklin or a larger amount of attorney fees for Olsen. Nor did the court err in determining that the reimbursement for Franklin's and Olsen's fees be paid from the Estate's funds. We further conclude that the court did not erroneously exercise its discretion in discharging Green as personal representative of the Estate or by refusing to reappoint him personal representative for purposes of this appeal. Finally, we conclude that the court erred to the extent that it required the beneficiaries to finance the Estate's expenses for this appeal with their personal funds. We remand this proceeding to the circuit court for further proceedings consistent with this opinion.

[6] The Estate also argues that under WIS. STAT. § 879.33, the probate court had the authority to require DeSalvo to deposit with the court a bond for costs that might be awarded by the court against her, and asks us to hold her responsible for all of the Estate's costs in defending this appeal. We decline to do so, however, since DeSalvo was partially successful in this appeal.

By the Court.—Judgment and orders affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.