NOS. 4-10-0344, 4-10-0345 cons.

Filed 1/27/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KEVIN N. McDERMOTT, as Administrator of the Estate of BARBARA SIBERT, Deceased, Petitioner-Appellee, v. (No. 4-10-0344) MARK SIBERT, Respondent-Appellant.	)	Appeal from Circuit Court of Sangamon County No. 04P417
KEVIN N. McDERMOTT, as Administrator of the Estate of JAMES J. SIBERT, Deceased, Petitioner-Appellee, v. (No. 4-10-0345) MARK SIBERT, Respondent-Appellant.	)	No. 04P254 Honorable Peter C. Cavanagh, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice Steigmann concurred in the judgment.
Justice Turner specially concurred.

ORDER

Held: (1) If, in making a distribution to an heir, the administrator overpays the heir because of a mistake of fact as to the value of the estate, the administrator has an equitable cause of action against the heir for money had and received, to recover the overpayment.

(2) Attorney fees are not a "cost of the proceeding" within the meaning of section 16-1(d) of the Probate Act of 1975 (755 ILCS 5/16-1(d) (West 2008)).

(3) Insomuch as an issue on appeal challenges a factual determination by the trial court, any doubts arising from an incomplete record will be resolved against the appellant.

Christina Sibert and Troi Gibbs were coadministrators of the estates of their

parents, James J. Sibert and Barbara Sibert, and in that capacity, they distributed to their half brother, respondent, Mark Sibert, $24,151–ostensibly from both estates, even though respondent was a descendant only of his father, James, and not of his stepmother, Barbara. After the trial court removed Christina and Troi from their positions as coadministrators and replaced them with the public administrator, Kevin N. McDermott, McDermott brought a citation proceeding against respondent pursuant to section 16-1 of the Probate Act of 1975 (755 ILCS 5/16-1 (West 2008)) on the ground that the $24,151 was an overpayment. McDermott contended that respondent actually was entitled to only $12,809.55 from James's estate, and he sought to recover from respondent the difference of $11,341.45. The trial court ordered respondent to reimburse the estates $11,353.51 and not only that, but to pay "the costs of the proceeding." 755 ILCS 5/16-1(d) (West 2008). In the court's view, such "costs" included the $9,686.24 in attorney fees that McDermott and Christina had incurred in the citation proceeding.

Respondent appeals, arguing that (1) he and the coadministrators had a contract whereby he was to receive no less than $24,151 from the estates and (2) the trial court lacked statutory authority to require him to pay McDermott's and Christina's attorney fees and costs. We find no merit in the first argument; the coadministrators could not contractually bind the estates to pay respondent any sum. As for respondent's second argument, we agree that attorney fees are not a "cost of the proceeding" within the meaning of section 16-1 (755 ILCS 5/16-1 (West 2008)). Nevertheless, the incomplete record affords no basis for overturning the award of costs. Therefore, we affirm the judgments in part and reverse them in part: we affirm the judgments insomuch as they require respondent to reimburse the estates for the overpayment of $11,353.51, but we reverse the judgments

insomuch as they require him to pay McDermott's and Christina's attorney fees.

I. BACKGROUND

A. The Family Relationships

On October 2, 2003, James J. Sibert died intestate and was survived by his wife, Barbara Sibert, and his four adult children. Three of these children, Craig Sibert, Troi Gibbs, and Christina Sibert, were by James's marriage to Barbara. The fourth child, respondent, had a different mother, making him Barbara's stepson and the half brother of the other three children.

B. Barbara's Tentative Valuation of James's Estate

On April 13, 2004, Barbara filed a petition to be appointed the administrator of James's estate. In her petition, she averred that the approximate value of the estate was $217,000 ($12,000 in personal property and $205,000 in real property). On April 20, 2004, the trial court granted her petition.

C. Barbara Dies, Whereupon Troi and Christina Are Appointed Coadministrators of Both Estates

On May 10, 2004, Barbara died intestate, leaving Craig, Troi, and Christina as her heirs. On July 12, 2004, the trial court granted a petition of Troi and Christina to be appointed coadministrators of both James's estate and Barbara's estate.

D. The "Personal Contract"

One of the assets of James's and Barbara's estates was the real property at 3377 West Washington Street in Springfield. Respondent had been living on this property and operating a business on it. After Barbara died, his three half-siblings negotiated a deal with him whereby he agreed to vacate the property. The deal was memorialized in a

document entitled "Personal Contract," which all four of them signed on December 30, 2005. The contract provides: "From the date of acceptance of $24,151.00 from the estate of James and Barbara Sibert, Mark Sibert agrees to remove all personal and business property [from the premises]."

E. The "Partial Payment of Inheritance"

On December 29, 2005, Christina and Troi signed, as drawers, a check in the amount of $24,151, payable to the order of respondent. A copy of the check is in the record. On a line at the top of the check, to the right of "Name," the words "Estate of Jim and Barbara Sibert" are written. On a line at the bottom of the check, to the right of "For," the words "Partial Payment of Inheritance" are written. At some point, this check was delivered to respondent.

F. McDermott Replaces Christina and Troi as Administrator of the Two Estates

On July 12, 2007, the trial court removed Christina and Troi from their position as coadministrators of James's and Barbara's estates and appointed the Sangamon County public administrator, Kevin N. McDermott, as administrator of both estates.

G. McDermott's Petition for the Issuance of a Citation Against Respondent

On October 10, 2009, McDermott filed a petition for the issuance of a citation against respondent pursuant to section 16-1 (755 ILCS 5/16-1 (West 2008)). According to the petition, the check for $24,151 that Christina and Troi had issued to respondent as his "share of the Estates" was an overpayment; it was "$11,341.45 greater ('Overage') than his estimated actual share of the Estates of $12,809.55."

Here is how McDermott calculated respondent's actual share. An auction of estate property had fetched $82,522.33. The property distributed to the heirs was worth

$38,366. Craig owed the estates $10,037 (apparently for his purchase of 3377 West Washington Street). Adding those three figures together yielded a total estate value of $130,925.33. Subtracting attorney fees of $28,448.91 left a net estate value of $102,476.42, half of which would go to James's four heirs (respondent, Troi, Craig, and Christina) and the other half to Barbara's three heirs (Troi, Craig, and Christina). Half of $102,476.42 was $51,238.21, and $51,238.21 divided by 4 was $12,809.55. Thus, McDermott reasoned, respondent's actual share of James's estate was $12,809.55. Subtracting $12,809.55 from the check in the amount of $24,151 that Christina and Troi had issued to him yielded an overpayment of $11,341.45. According to McDermott, this overpayment of $11,341.45 was estate property that respondent was obliged to return.

H. "Order: Citation To Recover Assets"

On January 7, 2010, the trial court executed and filed a document entitled "Order: Citation To Recover Assets." In its order, the court found that the parties to the "Personal Contract" intended the check in the amount of $24,151 to be "a partial distribution to Mark Sibert and not a final distribution." In making that finding, the court relied on the following evidence: (1) the notation on the check "Partial Payment of Inheritance," (2) respondent's testimony that he expected to receive any additional money to which he was entitled as an heir (it is unclear when and in what hearing respondent so testified), (3) the absence of any mention in the contract that the payment of $24,151 was a final distribution, and (4) respondent's "continuing to participate in the administration of the Estates by consulting with the administrator on distributions and proposed settlements." The court further found that "the partial distribution to Mark Sibert was in excess of his share of the Estates, resulting in Mark Sibert having received funds that must

now be returned to the Estates."

Accordingly, the trial court ordered as follows:

> "(A) A Citation to Recover Assets pursuant to 755 ILCS 5/16-2 [sic] be issued against Mark Sibert ordering the return to the Estates of the partial distribution he received in excess of his share of the final distribution as determined by the Administrator in an amount not less than $11,355.20;
>
> (B) Mark Sibert is hereby ordered to pay the costs and reasonable attorneys' fees charged by Kevin N. McDermott and by [the law firm retained by Christina,] Sorling, Northrup, Hanna, Cullen & Cochran, Ltd., for work concerning the Petition for Issuance of Citation Against Mark Sibert, as provided under 735 [sic] ILCS 5/16-1(d).
>
> (C) Kevin N. McDermott and Sorling, Northrup, Hanna, Cullen & Cochran, Ltd. will submit affidavits of attorneys' fees itemizing the fees and costs for work concerning the Petition for Issuance of Citation Against Mark Sibert for approval of the Court."

From the record or at least from respondent's brief, it is unclear where the trial court obtained the figure of $11,355.20 and why the court made that figure open-ended--"an amount *not less than* $11,355.20"--considering that, in his petition, McDermott sought to recover a specific amount from respondent: $11,341.45. (Emphasis added.) It also is unclear in what hearing respondent testified (the record includes no transcript, and

the docket entries do not appear to mention the hearing) and why, if respondent already had appeared and testified regarding the matter, the court was ordering the issuance of a citation pursuant to section 16-1(a) (755 ILCS 5/16-1(a) (West 2008)).

I. Affidavits Regarding Attorney Fees

On February 4, 2010, Michael G. Horstman, Jr., of Sorling, Northrup, Hanna, Cullen & Cochran, Ltd., filed an affidavit seeking $5,910.57 in attorney fees for the work he had done in connection with McDermott's petition for the issuance of a citation against respondent. On February 10, 2010, McDermott filed an affidavit seeking $930 in attorney fees for his work on the petition.

J. Respondent's Motion for Reconsideration

On February 8, 2010, respondent filed a motion for reconsideration of the order of January 7, 2010, in which the trial court held he was obligated to refund the overpayment and pay Christina's and McDermott's attorney fees. In his motion, respondent made essentially two arguments. First, he was contractually entitled to the $24,151, and reducing that amount would deprive him of the benefit of his bargain. Second, section 16-1(d) (755 ILCS 5/16-1(d) (West 2008)) did not authorize the assessment of attorney fees, because the statutory phrase "the costs of the proceeding" did not mean attorney fees. In further support of this second argument, respondent's attorney, Sara M. Mayo, wrote the court a letter on April 14, 2010, with copies to opposing counsel, pointing out that in *Negro Nest, LLC v. Mid-Northern Management, Inc.*, 362 Ill. App. 3d 640, 651 (2005), we held that attorney fees were "not recoverable absent express statutory or contractual language" and that the term " 'all costs of collection' " did not qualify as express language authorizing an award of attorney fees.

On April 16, 2010, the trial court entered an order denying respondent's motion for reconsideration. Paragraphs B and C of the order provided as follows:

> "B. The final amount of the Citation to Recover Assets previously issued against Mark Sibert is to be $21,039.75 based on Mark Sibert's excess distribution from the Estate in the Administrator's Final Accounting in the amount of $11,353.51 and costs, including attorney's fees in the amount of $9,686.24.
>
> C. The Estate pay Kevin N. McDermott the sum of $1,230.00 and Sorling, Northrup, Hanna, Cullen & Cochran, Ltd. the sum of $8,456.24 for work concerning the Petition for Issuance of Citation Against Mark Sibert based on their Affidavits of Attorneys' Fees itemizing the fees and costs submitted to the Court."

These appeals followed.

II. ANALYSIS

A. The Lack of a Brief by the Appellee

The appellee in these cases, McDermott as administrator, has filed no brief. It does not follow, however, that the appellant, Mark Sibert, automatically prevails. Rather, we will evaluate the merits of his appeals. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131 (1976) ("the judgment of a trial court should not be reversed *pro forma* for the appellee's failure to file its brief ***. A considered judgment of the trial court should not be set aside without some consideration of the merits of the appeal").

B. Procedural Irregularities

Section 16-1 of the Probate Act of 1975 (755 ILCS 5/16-1 (West 2008)) contemplates the following procedural steps: (1) the filing of a petition for the issuance of a citation (755 ILCS 5/16-1(a) (West 2008)), (2) the issuance and service of a citation requiring the respondent to appear at a designated time and place and answer questions under oath regarding estate property that the respondent allegedly possesses (755 ILCS 5/16-1(a), (b) (West 2008)), (3) the holding of the evidentiary hearing announced in the citation (755 ILCS 5/16-1(c), (d) (West 2008)), and (4) the rendition of a judgment on the basis of evidence adduced in that hearing (755 ILCS 5/16-1(d) (West 2008)). In its order of January 7, 2010, the trial court appears to confuse the citation (step 2) with the judgment (step 4). See Black's Law Dictionary 260 (8th ed. 2004) (defining "citation" as "A court-issued writ that commands a person to appear at a certain time and place to do something demanded in the writ, or to show cause for not doing so"). The record appears to lack a citation, properly speaking. Nevertheless, respondent does not complain of the flawed procedure, and hence we assume he suffered no prejudice from it.

C. Action for Money Had and Received

Respondent argues that the trial court violated the parol evidence rule by considering extrinsic evidence when interpreting the "Personal Contract" between himself, Craig Sibert, Christina Sibert, and Troi Gibbs. According to respondent, the contract was unambiguous, and hence the court should have stayed within the four corners of the contract when interpreting it. See *Omnitrus Merging Corp. v. Illinois Tool Works, Inc.*, 256 Ill. App. 3d 31, 34 (1993). Instead, the court looked outside the contract and considered the parties' testimony as to what they subjectively intended the contract to mean, and on

the basis of that testimony, the court concluded that the parties intended the $24,151 in the contract to be a partial distribution to respondent, even though the contract said nothing about the $24,151 being a distribution.

It is true that the contract does not use the word "distribution," but the contract speaks of respondent's "acceptance of $24,151.00 *from the estate of James and Barbara Sibert*." (Emphasis added.) The agreed-on source of the payment is enough to make the contract a red herring, for insomuch as the contract purports to bind the estates to pay any sum to respondent, the contract is ineffectual. It really does not matter what one calls the sum (a "distribution" or something else); the contract to pay that sum does not bind the estates. Absent a court order, an executor "may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator." *Bauerle v. Long*, 187 Ill. 475, 478 (1900); *Sanni, Inc. v. Fiocchi*, 111 Ill. App. 3d 234, 236 (1982); 19 Ill. Law and Prac. *Executors and Administrators* §44 (2010).

Having disposed of the "Personal Contract" as an irrelevancy, we now consider whether the trial court erred in ordering respondent to refund the amount by which he was overpaid in the distribution of James's estate. Respondent does not appear to dispute that if one disregarded the "Personal Contract" and looked solely at the assets of James's estate, he was, objectively speaking, overpaid in roughly the amount the trial court determined in its ruling on his motion for reconsideration. Or, if respondent means to dispute that proposition, he is in no position to do so, considering that he has provided us no transcript of any evidentiary hearing--and he admits in his brief that at least one evidentiary hearing occurred, because he criticizes the court for violating the parol evidence rule by considering extrinsic evidence in the form of his and others' testimony. See

Midstate Siding & Window Co. v. Rogers, 204 Ill. 2d 314, 319 (2003) (any doubts arising from the incompleteness of the record are resolved against the appellant). We will assume that in this evidentiary hearing, the transcript of which we lack, the court heard evidence to support its finding that respondent was overpaid in the amount of $11,353.51 (as the court found in its order denying respondent's motion for reconsideration). See *Midstate*, 204 Ill. 2d at 319.

Further, we conclude, from *Wolf v. Beaird*, 123 Ill. 585 (1888), that the administrator had a cause of action against respondent to recover the overpayment. In *Wolf*, 123 Ill. at 589, John Wolf, the executor of Edward J. French's estate, paid 100% of a claim that John B. Gharst had filed against the estate. Wolf paid the full amount of this claim in the belief that the estate was solvent and would be able to pay all its debts, with assets left over for the heirs. *Wolf*, 123 Ill. at 589. Later, however, two large claims were allowed against the estate, and as a result, the assets were so reduced that the estate was able to pay only 61.72% of claims of the seventh class, the class to which Gharst's claim belonged. *Wolf*, 123 Ill. at 589. Thus, as it turned out, Wolf had overpaid Gharst by 38.28%, the difference between 100% and 61.72%. *Wolf*, 123 Ill. at 589. After Gharst died, Wolf brought an action against Gharst's estate to recover the overpayment. *Wolf*, 123 Ill. at 589. The supreme court held that because Wolf had paid the full amount of the claim under a mistake of material fact, *i.e.*, the mistaken belief that French's estate would be able to pay 100% of all claims, Wolf could bring an equitable action against Gharst's estate for money had and received. *Wolf*, 123 Ill. at 590-91. *Cf. Western & Southern Life Insurance Co. v. Brueggeman*, 323 Ill. App. 173, 178 (1944) ("a payment made, with full knowledge of the facts and circumstances and in ignorance only of legal rights, cannot be recovered

back").

Likewise, in the present case, the coadministrators, Christina and Troi, overpaid respondent because of a mistake of fact as to the value of James's estate, and therefore the succeeding administrator, McDermott, had a cause of action against respondent for money had and received. When the coadministrators distributed $24,151 to respondent, they did so apparently in the mistaken belief that James's estate was worth approximately $217,000, as Barbara had estimated in her petition for letters of administration. Barbara was entitled to half of James's estate, and James's four children were entitled to the other half, meaning that they each would receive one-eighth. See 755 ILCS 5/2-1(a) (West 2008). Respondent says: "Based on that alone," *i.e.*, the estimated value of $217,000, of which he was entitled to an eighth, he "expected to receive approximately $27,125[,] to be adjusted by costs of administration and unexpected valid claims." See 755 ILCS 5/2-1 (West 2008) ("after all just claims against his estate are fully paid").

Evidently, the coadministrators shared respondent's expectation, but it was an expectation founded on the false premise that James's estate was worth $217,000. As it turned out, the gross value of the combined estates of James and Barbara was only $130,925, and the net value of the estates, after $28,448 in attorney fees, was only $102,238. Fifty percent of that amount was $51,238, which, divided equally between respondent, Troi, Craig, and Tina, was $12,809 apiece. The difference between $24,151 and $12,809 was $11,342. By the logic of *Wolf*, the administrator could recover that difference from respondent in an equitable action for money had and received. The amount the trial court ultimately arrived at in its ruling on the motion for reconsideration, $11,353.51, is

pretty close to $11,342. There must have been some minor adjustment--a triviality that need not concern us.

D. The Award of Attorney Fees

Respondent contends that the trial court lacked authority to order him to pay the costs and attorney fees that the administrator incurred in prosecuting the citation proceeding. According to respondent, section 16-1(d) of the Probate Act of 1975 (755 ILCS 5/16-1(d) (West 2008)) allowed the court to tax costs against him only if he refused to answer proper questions or to obey the court's order to turn over estate property; and besides, when section 16-1(d) refers to "the costs of the proceeding," it does not mean attorney fees.

We have held that "[a] statute *** must allow for attorney fees by specific language" and that unless the statute "specifically state[s] that 'attorney fees' are recoverable," it does not authorize an award of attorney fees. *Negro Nest*, 362 Ill. App. 3d at 642; see also *Meyer v. Marshall*, 62 Ill. 2d 435, 441-42 (1976) ("only those items of costs designated by statute may be allowed as such, and attorneys' fees are not of that character"). Section 16-1(d) (755 ILCS 5/16-1(d) (West 2008)) does not specifically state that "attorney fees" are recoverable, and the legislature knows how to say "attorney fees" when it intends to make them available in the Probate Act of 1975. See, *e.g.*, 755 ILCS 5/24-4(a) (West 2008) ("reasonable attorneys' fees"). Therefore, we conclude that section 16-1(d) does not authorize an award of attorney fees as a so-called "cost."

Apparently, attorney fees were not the only "cost" the trial court had in mind. In its order denying respondent's motion for reconsideration, the court required him to pay $11,353.51 and *costs, including* attorney fees in the amount of $9,686.24," as if attorney

fees did not exhaust the category of "costs." (Emphasis added.) Consequently, we will consider whether section 16-1(d) (755 ILCS 5/16-1(d) (West 2008)) allowed the court to tax any costs at all against respondent (excluding attorney fees, which, as we have explained, are not a "cost"). Respondent argues that because he never "refuse[d] to answer proper questions put to him or refuse[d] to obey the court's order to deliver any personal property," section 16-1(d) did not authorize the court to tax him with any costs at all. See 755 ILCS 5/16-1(d) (West 2008). Nevertheless, we cannot properly take respondent's word for it that he did neither of those things. We would have to look at the transcript and confirm that he did neither of those things. But we have no transcript of the citation hearing. Theoretically, it is possible that if we had a transcript, we might see instances in which respondent refused to answer questions on the stand or announced his intention to ignore any court order to relinquish estate property. Absent a transcript, we are obliged to resolve the doubt against respondent and presume that the trial court had a sufficient factual basis for taxing respondent with the costs (see *Webster v. Hartman*, 195 Ill. 2d 426, 433-34 (2001); *In re M.R.*, 393 Ill. App. 3d 609, 618 (2009), *appeal denied*, 233 Ill. 2d 559 (2009))--which, however, do not include attorney fees.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment in the two cases insomuch as it requires respondent to reimburse the estates in the amount of $11,353.51 for an overpayment, but we reverse the award of attorney fees.

Affirmed in part and reversed in part.

JUSTICE TURNER, specially concurring:

While I agree with the majority's conclusion, I write separately to express my opinion the lack of a transcript or an alternative report of proceedings (see Ill. S. Ct. Rs. 323(c), (d) (eff. December 13, 2005)) for the citation hearing in this case prevents us from reviewing all of the issues except for whether section 16-1(d) of the Probate Act of 1975 authorized an attorney-fees award.

Respondent, as the appellant, had the burden to present a sufficiently complete record. See *Webster*, 195 Ill. 2d at 432, 749 N.E.2d at 962. Regarding a record lacking a report of proceedings, our supreme court has stated the following:

> "This court has long recognized that[,] to support a claim of error, the appellant has the burden to present a sufficiently complete record. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156[, 839 N.E.2d 524, 531] (2005); *Webster* ***, 195 Ill. 2d [at 432, 749 N.E.2d at 962]; *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92[, 459 N.E.2d 958, 959] (1984). From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant. *Foutch*, 99 Ill. 2d at 391[, 459 N.E.2d at 959]. An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding. *Corral*, 217 Ill. 2d at 156[, 839 N.E.2d at 532]; *Webster*, 195 Ill. 2d at 432[, 749 N.E.2d at 962]. Without an

> adequate record preserving the claimed error, the court of review must presume the circuit court's order had a sufficient factual basis and that it conforms with the law." (Internal quotation marks omitted.) *In re Marriage of Gulla*, 234 Ill. 2d 414, 422, 917 N.E.2d 392, 397 (2009).

Without a report of proceedings for the citation hearing in this case, we lack the material needed for determining which issues were properly preserved for appellate review as well as the basis for the trial court's factual findings and legal conclusions. Accordingly, I would not analyze the merits of the issues that the majority addresses in subsection C of its analysis.