

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2009AP2337
2009AP3191
STATE OF WISCONSIN**

Cir. Ct. No. 2007PR1642

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE ESTATE OF ARLENE W. BOWSHER:

RICK GUERARD,

APPELLANT,

V.

**MARQUETTE UNIVERSITY, ST. VERONICA'S CHURCH, LAURA
GUENTHER, MESSMER CATHOLIC SCHOOLS, JOHN CLIFFORD,
GERALDINE CLIFFORD, REV. EDWARD J. COOK AND PROVINCE OF
ST. JOSEPH'S OF THE CAPUCHIN ORDER, INC.,**

RESPONDENTS.

IN RE THE COSTS AND FEES IN THE ESTATE OF ARLENE W. BOWSHER:

RICK S. GUERARD,

APPELLANT,

V.

MARQUETTE UNIVERSITY, ST. VERONICA'S CHURCH, LAURA

**GUENTHER, MESSMER CATHOLIC SCHOOLS, JOHN CLIFFORD,
GERALDINE CLIFFORD, REV. EDWARD J. COOK AND PROVINCE OF
ST. JOSEPH'S OF THE CAPUCHIN ORDER, INC.,**

RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DI MOTTO, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Rick S. Guerard appeals from a judgment that admitted the will of Arlene W. Bowsher to probate and stated that Guerard, the sole beneficiary under the will, could not withdraw an amended partial assignment that he made earlier in this probate case. In response, one of the respondents, The Province of St. Joseph's of the Capuchin Order (hereafter, "Capuchin"), contends that Guerard should be judicially estopped from asking the court to allow withdrawal of the amended partial assignment.¹ We agree with Capuchin that judicial estoppel applies and, therefore, we affirm the judgment.²

¹ The only respondents participating in the appeal are Capuchin, St. Veronica's Church and Laura Guenther.

² In addition to urging us to apply judicial estoppel against Guerard, Capuchin argues that we should reverse the judgment and declare the will to be invalid. Capuchin did not file a cross-appeal seeking to modify the judgment and, therefore, we do not consider its argument. *See State v. Huff*, 123 Wis. 2d 397, 407-08, 367 N.W.2d 226 (Ct. App. 1985) ("A respondent may raise an issue in his brief without filing a cross-appeal 'when all that is sought is the raising of an error which, if corrected, would sustain the judgment.' If the respondent seeks modification of an order ... the respondent must file a notice of cross-appeal.") (citation omitted); WIS. STAT. RULE 809.10(2)(b) ("A respondent who seeks a modification of the judgment or order appealed from or of another judgment or order entered in the same action or proceeding shall file a notice of cross-appeal.").

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶2 Guerard also appeals from a trial court order directing that the Estate pay the amended partial assignment prior to paying attorney fees to Guerard's attorney.³ Guerard argues that the trial court erroneously exercised its discretion. We reject his argument and affirm the order.

BACKGROUND

¶3 The following facts are taken from the record and from the findings of fact made by the trial court after a contested trial concerning the admission of Bowsher's will.⁴ Bowsher died on July 28, 2007, at the age of 91. Bowsher's husband died in the 1960s; they did not have any children. Between 1990 and 2001, Bowsher drafted and executed five different wills, all with the assistance of the same attorney. In each of those wills, she made detailed bequests to various charities and individuals. No one person or entity was the recipient of her entire estate in any of the wills.

¶4 In the Spring of 2007, Bowsher decided to execute a new will. She asked her friend and primary caretaker, Guerard, to find a new lawyer to draft a will for her. Guerard contacted Sandra A. Edhlund, who subsequently met with Bowsher and drafted a new will and durable power of attorney for Bowsher. The will awarded Guerard the entire estate.

¶5 On the day the will was executed, Bowsher dictated to Guerard a list containing the names of charities and individuals together with percentages and

³ The appeal from this order was consolidated with the appeal from the judgment by order of this court dated May 10, 2010.

⁴ We do not attempt to resolve factual discrepancies or detail conflicting testimony. This information is provided for background.

assets of her estate.⁵ According to Guerard, it was not until Bowsher died that Guerard learned he was the sole beneficiary under the will. Guerard shared with Edhlund the list of individuals and charities that Bowsher had dictated to him. On September 21, 2007, Edhlund filed a Petition for Formal Administration listing Guerard as the petitioner.

¶6 Numerous individuals and charities who had been beneficiaries under Bowsher's prior wills filed objections to the admission of Bowsher's 2007 will. A pretrial conference was held, after which the trial court appointed a guardian ad litem to seek unknown heirs-at-law,⁶ as well as a special administrator. After it became clear that Edhlund would likely testify at trial concerning the will's creation (which she ultimately did), Guerard secured new counsel. On November 27, 2007, attorney Janet F. Resnick filed a notice of appearance, indicating that she represented Guerard, the will proponent.

¶7 On February 7, 2008, Guerard personally wrote the trial court a letter. In it, Guerard recognized that the will was being contested and stated that he "was not [Bowsher's] first choice for executor and quite frankly this is already way more than I would have agreed to." His letter continued in relevant part:

I would like to make an offer that hopefully will stimulate an early settlement to the case. This would save the court some time and save money for those that [Bowsher] cared about.

....

⁵ Bowsher's intentions concerning the dictated list were an issue at trial, as we discuss *infra*.

⁶ No legal heirs were ever located.

The will as it stands leaves everything to me. I know that everything does not go to me and I offered the list [that Bowsher dictated to Guerard in May 2007] that showed where things were to go.... I did not know how [Bowsher] made her will until it was too late or I would have insisted she clarify it. I know she would not intend for me to be put in this situation and she would understand this decision.

The list leaves money to various entities including one of my dogs and one of my cats.... I propose that [they] ... be removed from the list.

The list also leaves a big chunk to me. I never expected to get anything because ... [Bowsher] gave me things while she was alive and always said it was part of my inheritance. Not getting something will not kill me and I will hopefully return to a peaceful life.... I propose that I be removed from the list.

....

This would allow for those on the list to divide my share and the share given to the dog and cat.

....

I would only ask two things:

1) The costs associated with the estate should be divided amongst all the parties. Not just those [receiving part of Bowsher's investments].... Actually I feel the challengers on the list should pay all the costs.

2) Only those on the list should receive anything and the percentages should not change. The only change being the aforementioned removals.

¶8 Although Guerard's letter to the trial court indicated that he wished to give up all of his rights to the estate, on February 13, 2008, Guerard filed with the trial court a document entitled "PARTIAL ASSIGNMENT" that was drafted by his attorney and signed by Guerard. That document stated: "Rick Guerard, as sole beneficiary of [Bowsher's will] ... partially assigns his interest pursuant to ... Bowsher's verbal instructions that she delivered to him prior to her death." The

document then listed thirteen individuals and entities, along with the percentage of Bowsher's house proceeds that each was to receive; the percentages totaled one hundred percent. Next, the document listed five individuals and entities who were each to receive ten percent of "Residue."

¶9 On March 4, 2008, Guerard filed a document entitled "AMENDED PARTIAL ASSIGNMENT" that was identical to the previous document, but changed the heading of the second list of beneficiaries from "Residue" to "Investments."

¶10 On March 10, 2008, the personal representative filed a formal inventory with the trial court. The inventory indicated that the total value of the property subject to administration was \$885,968.38, including a \$110,000 house, \$3220 in personal property and the remainder in bank accounts, brokerage accounts and savings bonds.

¶11 On June 6, 2008, objector Marquette University filed a motion seeking leave to voluntarily withdraw its objection to the will. The motion indicated that Marquette University was a named beneficiary under Bowsher's 2001 will and was named as an assignee in the partial assignment executed by Guerard.⁷ The motion stated: "Under the circumstances, Marquette University wishes to withdraw voluntarily its objection to the Petition for Formal Administration." Another objector, MHS, Inc., the manager and partner of the Catholic Urban Academies of St. Leo and St. Rose—entities which were named as assignees in the partial assignment and amended partial assignment—filed a

⁷ Although the motion referenced only the partial assignment, we note that the amended partial assignment did not alter the assignment to Marquette.

similar motion on June 11, 2008. On June 17, 2008, the trial court signed orders allowing Marquette and MHS, Inc., to withdraw their objections.

¶12 On July 25, 2008, less than a month before the scheduled court trial on the validity of the will, Guerard fired his attorney. The trial court granted Resnick's motion to withdraw at a hearing on August 5. The trial court did not take action on Resnick's motion for attorney fees, indicating that the issue of attorney fees would be handled later in the case. Guerard's new counsel, Mitchell Barrock, filed a notice of retainer on August 8, 2008.

¶13 On August 11, 2008, Guerard filed a motion seeking to allow him "to withdraw and strike all portions of the Amended Partial Assignment" other than the assignments to Marquette, St. Leo and St. Rose. In support, Guerard filed an affidavit indicating that Resnick had told him that he had to file the partial assignment with the trial court, which was "not what [Guerard] wanted to do." Guerard's affidavit also stated that "the purpose of [his] 2/08 letter to the Court was to act as a compromise settlement over the estate and to resolve the estate, which has not happened." Guerard asked the court "to strike the remaining parts of the Assignment, other than the provisions that have been accepted" by Marquette, St. Leo and St. Rose.

¶14 Two of the will objectors filed documents opposing Guerard's motion to withdraw the amended partial assignment. The trial court asked about the motion prior to the start of the trial on August 18, 2008. Guerard's trial counsel told the court that the motion could be addressed in the coming days, rather than "right now." The trial court agreed that the motion should be on the "back burner" because the amended partial assignment was valid only if the will was valid.

¶15 The trial was held over the course of seven days between September 18, 2008, and October 10, 2008. Numerous individuals testified about Bowsher’s relationships and mental state. As relevant to this appeal, Guerard testified that he did not know Bowsher had named him as her sole beneficiary in the 2007 will until after her death. Guerard explained that on the day Bowsher signed the will, she was in the hospital. Guerard did not see the contents of the will and was not in the room when Bowsher executed it with Edhlund. Rather, Guerard said that he went into the room after it was signed and that Bowsher told Edhlund to give the will to Guerard for safekeeping. Guerard testified: “Edhlund sealed the envelope, and then slapped it in my hands, and then turned to [Bowsher] and said, [‘I strongly suggest you get the original will and destroy it so that there’s no confusion.’]”

¶16 Guerard said Bowsher called the attorney who had drafted the prior will and said she was sending Guerard over to pick it up. Guerard said he retrieved the will and brought it to Bowsher at the hospital. Guerard said Bowsher told him to read the will to her, which he did. Guerard testified that when he was halfway done reading it, Bowsher said, “Well, write this down.” In response, Guerard wrote, directly on the old will, numbers such as “[t]en percent here, five percent here,” listing “percentages and people.” Guerard testified that Bowsher did not say, “I want this to go there,” and Guerard assumed that Bowsher was telling him what was in the will she had just signed so that he could “keep an eye on Edhlund.”

¶17 Guerard said that after he handwrote the list, Bowsher told him, “Go home, and type that up, and bring it back, and read it to me.” Guerard said he did so, and that Bowsher told him he had forgotten to include something. Thus, Guerard revised the list and showed it to her a second time. Guerard then kept the

list and, when he learned the contents of Bowsher's will after her death, gave the list to Edlund to share with the objectors, which occurred in the fall of 2007.

¶18 At trial, Guerard was asked about his February 2008 letter to the trial court and the partial assignments he filed with the trial court. Guerard acknowledged writing and filing those documents, but testified that in retrospect, he was not sure if Bowsher's intent was to give him "instructions" on how to distribute the estate. He testified that he did not know her intent and that "[i]t would've been easier if she said do this for me."

¶19 Guerard did not offer any testimony that he intended to withdraw the amended partial assignment in the future and he did not explain why he filed a pretrial motion seeking permission to withdraw a portion of the amended partial assignment. Indeed, the only testimony he gave about his thoughts on the future distribution of the estate was in response to the trial court's question, "What should happen with all of that money?" Guerard responded: "As far as I'm concerned, they could give it to UNICEF."

¶20 At the trial's conclusion, the trial court did not immediately issue a decision. Rather, the trial court directed the parties to submit proposed findings of fact and conclusions of law after the trial transcripts were prepared.

¶21 Guerard filed his proposed findings of fact and conclusions of law on March 26, 2009. He did not propose any findings with respect to the amended partial assignment, but he did propose the following conclusion of law:

[T]he Amended Voluntary Assignments given by Guerard to Marquette and to St. Leo and St[.] Rose have been accepted in a timely fashion and have been approved by the Court. All other Voluntary Assignments (GIFTS) given by Guerard have been withdrawn on October 13[,] 2008, prior to acceptance by any other parties. That beneficiaries of an

Assignment are like recipients of a gift. Parties can not [sic] be forced to accept a gift and must show formal acceptance of the gift before being withdrawn for the same to be enforceable. Guerard made such a gift to several beneficiaries listed in the 1997 and 2001 wills prior to having any interest to even give to them. Guerard[']s interest if any was only contingent and was never vested to the point that it could be transferred to the beneficiaries if at all. Since the right to gift was contingent and was never completed by virtue of an acceptance from the beneficiaries, the gift can be withdrawn at any time. The record reflects that no beneficiaries have been documented [sic] their acceptance with the Court other than [Marquette, St. Rose and St. Leo].... Further that no detrimental reliance has been asserted by any party regarding enforcement of the same. The Court finds that the withdrawals were made in a timely fashion and [are] approved by the Court.

(First names omitted.)

¶22 Guerard also filed a “memo of law on issue of assignment of interest.” (Capitalization and bolding omitted.) In that memo, Guerard discussed the common law treatment of assignments and asserted that he should be permitted to withdraw the partial assignments with respect to any objector who had not accepted the assignment. Guerard attached to his memo a supporting document that was signed by Guerard’s trial counsel, dated October 13, 2008, and entitled “withdrawal of voluntary assignment and amended voluntary assignment.” (Capitalization and bolding omitted.)

¶23 The trial court issued a twenty-two page decision with detailed findings and conclusions. It admitted the will to probate after finding that the objectors had failed to prove that the will was not duly executed, that Bowsher lacked testamentary capacity or that Guerard exerted undue influence on Bowsher.

¶24 The trial court made specific findings with respect to Guerard’s influence on Bowsher, including:

The court finds that the execution of the “list” by Guerard at the request of Bowsher, the fact that Guerard turned the “list” over to [his attorney,] ... [and] the fact that he did in fact make a Partial Assignment followed by an Amended Partial Assignment which superseded the Partial Assignment is strong evidence that he did not have the disposition to exercise undue influence over Bowsher and that being the sole beneficiary in her will was not a coveted result he sought.

(Paragraph numbering and first names omitted.) The trial court concluded that the partial assignment and the amended partial assignment were accepted and approved by the trial court at the time of filing. The trial court ruled that the amended partial assignment “which was properly filed with the court, accepted by the court and approved by the court is in full force and effect and cannot be withdrawn.”

¶25 Guerard filed a motion for reconsideration pursuant to WIS. STAT. § 805.17(3). Guerard asked the trial court to honor his request to withdraw the amended partial assignment⁸ on grounds that the list that Bowsher dictated to Guerard “was not executed under the required will formalities and thus can not [sic] be considered valid.” Guerard also argued that most of the objectors did not accept the amended partial assignment and, therefore, he had “an unfettered right to withdraw this gift.”

¶26 At a subsequent status conference, the trial court asked Guerard to confirm that he was seeking reconsideration of its ruling that the assignments

⁸ Guerard’s pretrial motion, his motion for reconsideration and his appellate brief refer to his wish to withdraw the amended partial assignment, while the trial court’s decisions reference both the partial assignment and the amended partial assignment. This difference in terminology does not affect our analysis, as no one is arguing that the original partial assignment must be followed.

could not be withdrawn. When Guerard's trial counsel did so, the trial court then said it would set the matter for a motion hearing and establish a briefing schedule, but it also noted its concern about the substance of the motion for reconsideration. Specifically, the trial court observed that it had accepted Guerard's testimony that he did not exercise undue influence over Bowsher based on Guerard's February 2008 letter to the trial court and his decision to assign a portion of the assets consistent with Bowsher's wishes. The trial court encouraged Guerard to talk to his trial counsel about whether he wanted to pursue the motion.

¶27 Two weeks later, Guerard filed a notice that he was withdrawing his motion for reconsideration. It stated that Guerard "is hereby withdrawing his Motion for Reconsideration previously filed with the Court on June 13th, 2009, which should alleviate the parties' needs for having to respond to said Motion."

¶28 The trial court then considered a motion for reconsideration filed by some of the will opponents in which they argued that the will was invalid due to mistake. Guerard opposed the objectors' motion for reconsideration, filing both a legal memorandum and an affidavit in opposition to it. In the affidavit, Guerard referred to the withdrawal of his own motion for reconsideration, stating: "I withdrew my Motion for Reconsideration of the Assignments because I felt that this would hopefully bring a fast resolution to the case and put closure to Arlene Bowsher's case."

¶29 The trial court's written decision denying the objectors' motion for reconsideration amended numerous findings of fact and conclusions of law from its previous decision, including several that discussed the assignments, but it still

upheld the will and did not alter its decision that the partial assignments could not be withdrawn.⁹ Judgment was entered and Guerard appealed.

¶30 While Guerard's appeal of the judgment was pending, he filed a motion seeking to have his attorney fees paid from the estate. Guerard's attorney fee contract with Barrock indicated that Guerard was to pay one-third of his recovery, prior to distribution of the assignments. The trial court questioned the use of a one-third contingency fee agreement in a probate case, but ultimately said that Guerard could choose to honor the agreement and pay one-third of his interest in the estate to Barrock. However, the trial court said that Guerard had to first pay valid claims, administrative costs and the amended partial assignment. The order provided that after those items were paid, Guerard could pay "his attorney fees equivalent to one-third of his remaining interest" to Barrock. Guerard appeals from that order.

DISCUSSION

I. Withdrawal of the amended partial assignment.

¶31 Guerard argues that the trial court erred when it concluded that Guerard could not withdraw the amended partial assignment. In response, Capuchin contends that Guerard should be judicially estopped from seeking to withdraw the amended partial assignment. We agree with Capuchin that judicial estoppel applies.

⁹ We note that the record copy of the trial court's August 21, 2009 decision is incomplete. Specifically, pages 17-21 of the decision are missing, although they appear later in the record as an attachment to Guerard's notice of appeal. On remittitur, we direct the clerk of courts to correct the record.

¶32 “Judicial estoppel precludes a party from asserting inconsistent positions in a legal proceeding.” *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶24, 303 Wis. 2d 258, 735 N.W.2d 93. “This equitable doctrine is intended to protect against a litigant playing fast and loose with the courts by asserting inconsistent positions.” *Id.* (citation and internal quotation marks omitted). As we noted in *State v. English-Lancaster*, 2002 WI App 74, ¶19, 252 Wis. 2d 388, 642 N.W.2d 627: “It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous and then after the court maintains that position, argue on appeal that the action was error.”

¶33 *Kolupar* summarized the elements of judicial estoppel: “A party asserting judicial estoppel must show: ‘(1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped convinced the first court to adopt its position.’” *Id.*, 303 Wis. 2d 258, ¶24 (citation omitted). “Whether these elements are met is a question of law, which this court reviews de novo; whether to apply the doctrine if the elements are met is a matter for the trial court’s discretion.” *State v. White*, 2008 WI App 96, ¶15, 312 Wis. 2d 799, 754 N.W.2d 214 (citation omitted).

¶34 Capuchin’s assertion that Guerard should be judicially estopped from pursuing withdrawal of the amended partial assignment on appeal did not arise until Guerard filed his appeal. Thus, the trial court did not consider judicial estoppel and we consider the issue *de novo*.

¶35 At the outset, we observe that we are considering whether judicial estoppel applies to Guerard’s actions within the same case, and in particular we are comparing positions Guerard took at the trial court and on appeal. Thus, the

second element of judicial element is satisfied. *See English-Lancaster*, 252 Wis. 2d 388, ¶22 (finding second element satisfied where facts at issue on appeal “are the same as before the trial court”).

¶36 Whether the first and third elements of judicial estoppel are satisfied requires greater analysis. We begin by highlighting key events in this case, discussed in detail above. It is undisputed that in his February 2008 letter, Guerard told the trial court that “everything does not go to me” and that he explicitly proposed that both he and his pets should be removed from the list of recipients of Bowsher’s assets.

¶37 About a week later, Guerard filed a partial assignment that assigned over half of the estate to other people and institutions.¹⁰ The document stated that he was partially assigning his interest “pursuant to ... Bowsher’s verbal instructions that she delivered to him prior to her death.” Shortly thereafter, he filed an amended partial assignment that reduced the partial assignment, although not dramatically.

¶38 Five months later, after securing new trial counsel, Guerard filed a motion seeking to withdraw the amended partial assignment. He asserted that he had not wanted to assign assets to others and that his previous trial counsel had not represented him well in explaining the assignment, preparing it or filing it. He also stated that his February 2008 letter had been intended to “act as a compromise settlement over the estate,” implying that the assignments were designed to be part of that settlement offer.

¹⁰ Contrary to Guerard’s assertion on appeal, the partial assignment clearly did not give “the entire estate away to various people and organizations.”

¶39 When the case proceeded to trial, Guerard’s trial counsel agreed with the trial court that the motion to withdraw the amended partial assignment could be decided after the trial court considered whether to admit the will. At trial, Guerard offered no testimony concerning his intent to withdraw the assignment or his belief that the objectors had to take action to accept the amended partial assignment. His only testimony about the assignments concerned how they came to be filed, not whether he wished to withdraw them. It was not until Guerard filed his proposed findings of fact and conclusions of law—five months after the trial—that Guerard argued that he should be allowed to withdraw the amended partial assignment with respect to any objectors who did not “accept” the assignments.

¶40 The trial court considered the voluminous and conflicting testimony of Guerard and many witnesses in making its decision to accept the will. Ultimately, it found that:

the execution of the “list” by Guerard at the request of Bowsher, the fact that Guerard turned the “list” over to [his attorney,] ... [and] the fact that he did in fact make a Partial Assignment followed by an Amended Partial Assignment which superseded the Partial Assignment is strong evidence that he did not have the disposition to exercise undue influence over Bowsher and that being the sole beneficiary in her will was not a coveted result he sought.

(Emphasis added and first names omitted.)

¶41 Guerard then filed his motion for reconsideration, arguing as a matter of law that the amended partial assignment “was legally a gift” that was “incomplete” based on the lack of acceptance. Guerard did not comment on or challenge the trial court’s key factual finding underlying its rejection of the will challenge: that Guerard’s decision to make the assignments was “strong

evidence” that he had not exerted undue influence on Bowsher. When the trial court observed that pursuing the motion would call into question the trial court’s acceptance of Guerard’s testimony on the subject, *Guerard withdrew the motion for reconsideration*, thereby signaling to the court and all of the parties that he was not pursuing his argument. As a result, the parties did not file arguments on the issue and the trial court did not address Guerard’s request.

¶42 Subsequently, the trial court considered the merits of a motion for reconsideration of the admission of the will that was brought by several objectors.¹¹ In Guerard’s legal memorandum opposing the objectors’ motion for reconsideration, he suggested that several findings of fact could be written differently. His memorandum said nothing to indicate that he intended to continue to seek to withdraw the amended partial assignment. Indeed, an affidavit Guerard filed in support of his memorandum opposing the objectors’ motion for reconsideration noted that Guerard had withdrawn his own motion for reconsideration in order to facilitate resolution of the case.

¶43 Now, on appeal, Guerard argues that this court should allow him to withdraw the amended partial assignment as to any entity or individual that did not “accept” it. He does not challenge the trial court’s findings of fact upholding the validity of the will, and he does not address the fact that he is, in effect, seeking to undermine one of the bases for the trial court’s determination that he did not exercise undue influence over Bowsher: Guerard’s decision to assign to others a portion of the estate’s assets.

¹¹ The trial court’s consideration of this motion included reviewing Guerard’s legal memorandum in opposition to the motion for reconsideration in which Guerard suggested that several findings of fact could be written differently.

¶44 Based on these circumstances, we conclude that Guerard presented inconsistent positions at the trial court and on appeal, both with respect to how he characterized the partial assignments and whether he intended to pursue withdrawal of the amended partial assignment. As detailed above, at various times Guerard referred to the assignments as expressions of oral instructions from Bowsher, offers of settlement and voluntary gifts. On appeal, Guerard characterizes the assignments as gifts that reflect a “private list that he created” that named “various organizations and people to whom he might give some of the estate[,] believing that such actions would honor Bowsher’s memory.” This characterization on appeal is clearly contrary to Guerard’s own testimony—accepted by the trial court—that Bowsher dictated the list to him. With respect to honoring the assignments, Guerard presented numerous conflicting positions, beginning with his February 2008 letter to the trial court and continuing through this appeal. Most significantly, he withdrew his motion for reconsideration and even noted that he had done so in his affidavit opposing the objectors’ motion for reconsideration of the admission of the will. These actions are inconsistent with Guerard’s attempt to pursue the issue on appeal and, therefore, satisfy the first element of judicial estoppel. See *Kolupar*, 303 Wis. 2d 258, ¶24.

¶45 The final element that must be established is trial court reliance: Guerard must have convinced the first court to adopt its position. See *id.* While Guerard has a colorable argument that the existence of his outstanding motion to withdraw the amended partial assignment prevents a determination that it was he who convinced the trial court to rely on the assignments, we conclude that Guerard’s actions after the trial court issued its June 2009 decision establish the third element of judicial estoppel.

¶46 Specifically, after Guerard brought his motion for reconsideration and the trial court alerted both Guerard and his trial counsel to the trial court's concern that pursuing the motion would call into question the trial court's credibility and factual findings, Guerard withdrew his motion for reconsideration. Thereafter, he did not pursue his request to withdraw the amended partial assignment, and in fact referred to the fact that he had withdrawn his motion in his affidavit filed in response to the objectors' motion for reconsideration. Guerard's actions indicated that he was not pursuing his request to withdraw the amended partial assignment and, instead, was content to benefit from the trial court's reliance on his assignments as evidence that he lacked the intent to unduly influence Bowsher. The trial court relied on Guerard's strategic decision to withdraw the motion for reconsideration when it considered the objectors' motion for reconsideration, when it continued to stand by its findings that Guerard was a credible witness and had not exerted undue influence over Bowsher, and when it did not reconsider whether its determinations concerning Guerard's motivations in assisting Bowsher to find a new lawyer to draft her will.

¶47 For these reasons, we conclude that judicial estoppel bars Guerard from arguing the merits of whether the amended partial assignment should be withdrawn. Guerard is bound by the judgment that forbids him from withdrawing the amended partial assignment.

II. Payment of Guerard's attorney fees.

¶48 The second appeal concerns a motion Guerard filed seeking payment of attorney fees from the estate pursuant to WIS. STAT. § 879.37, which provides:

Attorney fees in contests. 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.

(Emphasis added).

¶49 Guerard’s motion is not in the record, so we do not know precisely how it was worded.¹² However, a partial transcript of the motion hearing is in the record. According to that transcript, Guerard executed a retainer contract with Barrock for “one third of the total value of the estate recovered prior to any assignment of interest given by the client.” At issue at the motion hearing was not whether Barrock should be paid from the estate, but when his one-third fee would be applied.

¶50 Barrock noted that the retainer agreement was not for a percentage of the estate, which he said would be an “unconscionable” arrangement, but was instead an agreement for a percentage of Guerard’s interest in the estate, which just happened to be one hundred percent of the estate because Guerard is the sole beneficiary. Barrock argued that the “hundreds of hours put into this case”

¹² According to online court entries, a “Notice of Motion and Motion for Payment of Attorney Fees and Costs” was filed on September 22, 2009, after the notice of appeal from the earlier judgment had already been filed. However, that motion has not been made part of the appellate record. “It is the appellant’s responsibility to ensure completion of the appellate record and when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court’s ruling.” *State v. Provo*, 2004 WI App 97, ¶19, 272 Wis. 2d 837, 681 N.W.2d 272 (citation and one set of quotation marks omitted).

justified paying him one-third of Guerard's interest prior to the amended partial assignment being paid.¹³

¶51 The trial court rejected this reasoning. It noted that the amended partial assignment was based on percentages of the estate and that paying the attorney fees first would reduce those assignments to those individuals and entities. It explained:

This was a very close case vis-a-vis the will contest.... [O]ne of the things that was very persuasive [to] this court that there was no undue influence was the fact that Mr. Guerard submitted assignments, which in many regards tracked awards in a prior will.

....

I realize you've got a contract with him, but that contract in essence is trying to bind this court on the attorney's fees issue and that's not going to happen.

The trial court ordered that Guerard should first pay valid claims, administrative costs and the assignment interest. After those are paid, Guerard must pay attorney fees to Barrock equivalent to one-third of the remaining interest. Guerard challenges the trial court's exercise of discretion.

¶52 A trial court's decision to order the payment of attorney fees to a prevailing party pursuant to WIS. STAT. § 879.37 has two components: (1) the trial court must decide whether the party seeking reimbursement of attorney fees is a prevailing party; and (2) if the party is a prevailing party, then the trial court must exercise its discretion and "may, but need not, award attorney fees." *Wheeler v.*

¹³ There is no indication that Barrock provided the trial court with any detailed billing records, or that he sought a specific dollar amount of attorney fees as an alternative to one-third of Guerard's interest in the estate.

Franco, 2002 WI App 190, ¶6, 256 Wis. 2d 757, 649 N.W.2d 711. At issue in this appeal is the second component. Specifically, we must consider whether the trial court erroneously exercised its discretion when it ordered the payment of attorney fees in this case. “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.” *Id.*

¶53 Guerard argues that his fee agreement was “not unconscionable or unreasonable,” and therefore should have been honored. We are not convinced that the trial court erroneously exercised its discretion. First, the trial court decided to award attorney fees—which it was not required to do—and even honored Guerard’s agreement with Barrock to a certain extent: Barrock will receive one-third of Guerard’s interest in the estate. The only difference between what was ordered and Barrock’s request is that any claims against the estate, administrative costs and the amended partial assignment will be paid first, before Guerard’s remaining interest is calculated. The trial court’s decision was reasonable: it did not want to reduce the partial assignments that it had relied upon in determining that the will was valid and not the product of undue influence.

¶54 In addition, we are not convinced by Guerard’s argument that *Bloom v. Grawoig*, 2008 WI App 28, 308 Wis. 2d 349, 746 N.W.2d 532, compels a different result. *Bloom* held that attorney fees must be awarded out of the estate as a whole and not from the portion of the estate that is distributed to particular heirs. *See id.*, ¶¶8, 11. In this case, there is only one heir: Guerard. The attorney fees have been awarded out of the entire estate, but only after other claims and the amended partial assignment are paid. *Bloom* does not forbid this arrangement and Guerard has not identified other cases that would require us to reverse the trial court’s exercise of discretion.

¶55 For the foregoing reasons, we reject Guerard's challenge to the trial court's exercise of discretion under WIS. STAT. § 879.37.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

