

NO. A11-1695

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State of Minnesota
In Court of Appeals

Elizabeth Sietsema,

Appellant,

v.

In the Matter of the Estate of Darlene J. Neuman, Deceased,

and

In the Matter of the Estate of Lois Jeannette Wiggs, Deceased,

Respondents.

**BRIEF, ADDENDUM AND APPENDIX OF
APPELLANT ELIZABETH SIETSEMA**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

1. Whether the probate court erred in ordering Appellant Elizabeth Sietsema (“Sietsema”) to repay, jointly and severally with her co-defendant Kelvin Miller (“Miller”), a \$5,000 payment she received from the Estate of Darlene J. Neuman (the “Neuman Estate”).

The court held that Sietsema and Miller were jointly and severally liable for repayment of this amount to the Neuman Estate. (Order Adjusting Accounts; Surcharging Personal Representatives; and Order for Judgment dated July 29, 2011 (“July 29 Order”), p. 18.)

Most apposite authority: Minn. Stat. § 524.3-703; Minn. Stat. § 524.3-712

2. Whether the probate court erred in ordering Sietsema to repay, jointly and severally with Miller, \$43,000 in personal representative fees paid to Sietsema and Miller by the Estate of Lois Jeannette Wiggs (the “Wiggs Estate”).

The court held that Sietsema and Miller were jointly and severally liable for repayment of this amount to the Wiggs Estate. (July 29 Order, p. 18.)

Most apposite cases: *S. Sur. Co. v. Tessum*, 228 N.W. 326 (Minn. 1929); *Bouchard v. Tapper*, Nos. C4-87-1191, C6-87-1192, 1988 WL 10458 (Minn. App. Feb. 16, 1988); *In re Estate of Witherill*, 828 N.Y.S.2d 828 (N.Y. App. Div. 2007)

3. Whether the probate court erred in ordering Sietsema to repay, jointly and severally with Miller, \$108,519.61 in payments made to Primarius Promotions (“Primarius”) by the Wiggs Estate.

The court held that Sietsema and Miller were jointly and severally liable for repayment of this amount to the Wiggs Estate. (July 29 Order, p. 18.)

Most apposite cases: *S. Sur. Co. v. Tessum*, 228 N.W. 326 (Minn. 1929); *Bouchard v. Tapper*, Nos. C4-87-1191, C6-87-1192, 1988 WL 10458 (Minn. App. Feb. 16, 1988); *In re Estate of Witherill*, 828 N.Y.S.2d 828 (N.Y. App. Div. 2007)

STATEMENT OF THE CASE

This appeal is from a two-day bench trial, held on May 12 and 13, 2011, before Referee Dean M. Maus of the Hennepin County District Court, Probate/Mental Health Division. The trial arose from (1) Miller's petition for approval of the final accounting of the Neuman Estate; (2) Miller and Sietsema's petition for approval of the final accounting of the Wiggs Estate; and (3) objections filed by two beneficiaries – Friends of Animal Adoptions d/b/a Animal Ark (“Animal Ark”) and the University of Minnesota Foundation (the “Foundation”) – to the final accountings of the Neuman Estate and the Wiggs Estate. (Appellant's Appendix (“A.App.”) 14-30, 31, 32-42, 63-73, 74-75, 76-78.)

Following the trial, on July 29, 2011, Referee Maus issued his July 29 Order. (Appellant's Addendum (“A.Add.”) 1-19.) The July 29 Order was signed by Judge Jay M. Quam of the Hennepin County District Court. (*Id.*) In the July 29 Order, Referee Maus ordered the following with respect to Sietsema:

3. Kelvin Miller and Elizabeth Sietsema, jointly and severally, are ordered to repay to the Neuman Estate the sum of \$5,000.00 for improper payment to Sietsema of unearned compensation.

4. Kelvin Miller and Elizabeth Sietsema, jointly and severally, are ordered to repay to the Wiggs Estate the sums of \$43,000.00 for unearned personal representatives' fees and \$108,519.61 for excess payments to Primarius on work done for the Wiggs Estate, for a total of \$151,519.61.

(July 29 Order, Order, ¶¶ 3, 4, A.Add. 18.) Miller was also ordered, individually, to repay \$88,001.53 in unearned personal representative fees and excess payments to Primarius for work done on the Neuman Estate and for Lois Jeannette Wiggs (“Wiggs”) personally. (*Id.*, Order, ¶ 1, A.Add. 18.)

On or about August 15, 2011, the Neuman and Wiggs Estates filed their judgment with the Hennepin County District Court. On September 16, 2011, the district court issued two Corrected Notices of Entry and Docketing of Judgment: one, in the name of Neuman Estate, against Sietsema and Miller for \$5001.10; and the other, in the name of the Wiggs Estate, against Sietsema and Miller for \$151,602.63. (A.App. 89-90.)

Sietsema filed her Notice of Appeal and Statement of the Case on September 21, 2011. (A.App. 91-93.) On November 30, 2011, Referee Maus ordered that Sietsema post a supersedeas bond in the amount of \$180,000. The bond was filed with the Hennepin County District Court on December 2, 2011. Miller did not appeal from the July 29 Order and is not a party to this appeal.

STATEMENT OF FACTS

A. Sietsema's employment with Primarius

Sietsema worked for Miller and his company, Primarius, from January 1987 through October 2009. (Tr. 32:21-33:6, 204:13-18, 207:20-25.) Primarius was, in Miller's words, a "promotions agency" that offered a "laundry list" of services that included event planning and publishing services. (Tr. 59:21-60:1.) Primarius billed its clients on an hourly basis. (Tr. 34:12-35:10.) Its rates ranged from \$60 per hour to \$125 per hour. (Tr. 72:15-73:3.) These rates were established and could only be changed by Miller.¹ (Tr. 28:9-12, 75:8-11, 140:15-20; 207:7-16.) Miller would collect client billing information from his employees and generate an invoice that would be typed up (in letter format) and sent to the client. (Tr. 35:6-23, 206:16-207:3.)

Sietsema began her employment with Primarius as a receptionist and secretary. (Tr. 204:20-22.) She later became an administrator and/or office manager. (Tr. 205:2-7.) Her duties included answering telephones, assisting clients in the office, cleaning, filing, composing letters, typing and mailing invoices,² and proofing and editing copy. (Tr. 205:8-25.) With respect to invoices, Sietsema would receive a handwritten document from Miller setting forth the hourly rates and number of hours worked, and would

¹ Miller's hourly rate was \$125. (Tr. 72:23-25.) Sietsema's hourly rate was \$85. (Tr. 251:23-252:7.) Attorney Ronald Kopeska – who was retained to provide legal services for the Neuman and Wiggs Estates (Tr. Exs. 5, 14) – was familiar with these rates and did not tell Miller or Sietsema that they were inappropriate. (Tr. 172:15-24, 225:22-226:3.)

² Sietsema was not the only Primarius employee who generated invoices. Rose Johnson also generated invoices for Miller and Primarius. (Tr. 177:8-18; *see also* Tr. Ex. 4, Invoices dated July 29, 2008, Aug. 20, 2008, Sept. 24, 2008, Dec. 16, 2008, Jan. 8, 2009, Feb. 11, 2009, March 9, 2009, May 15, 2009, Sept. 8, 2009 (all marked "rmj/enclosure").)

convert this document to a letter invoice. (Tr. 35:19-36:7, 205:21-206:6; Tr. Ex. 4.) Significantly, Sietsema's role in generating invoices was restricted to typing them and checking the math calculations; she had no authority to alter billing rates or hours on the invoices. (Tr. 206:1-6, 207:7-16.) Sietsema also acted as a bookkeeper for Primarius, writing checks to pay the bills and balancing the company's checkbook. (Tr. 36:8-19, 271:15-21.)

B. Primarius's work for the Neuman Estate and Wiggs

Darlene Neuman died on March 1, 2008. (July 29 Order, ¶ 1, A.Add. 1.) Her Last Will and Testament dated February 4, 2008 bequeathed her entire estate to Wiggs. (July 29 Order, ¶ 2, A.Add. 1-2; Tr. 260:5-9.) In the Will, Neuman nominated Wiggs to serve as personal representative of her estate.³ (July 29 Order, ¶ 2, A.Add. 1-2.) In mid-March 2008, Wiggs met with Miller, whom she had known for 30-plus years and with whom she had done business "off and on" for 20 of those years, to discuss having Primarius assist her in handling the Neuman Estate.⁴ (Tr. 34:5-11, 59:2-17, 60:13-61:4.) Because of her business relationship with Miller, Wiggs was familiar with Primarius's billing rates – which had not changed in 20 years – as well as with how matters were billed. (Tr. 34:12-35:5, 208:16-18.) According to Miller, Wiggs selected Primarius because:

she was distraught with the kind of laundry list of responsibilities that her attorney had given her, and the kinds of fees that were being charged by the attorney were ones that she could not abide. She knew that our fees were substantially less than any attorney would ever charge and asked that we would take on those responsibilities for her. She trusted us, not the attorneys.

³ The Neuman Estate was worth \$115,274.77. (Tr. Ex. 9, A.App. 9-13.)

⁴ Sietsema did not attend this meeting. (Tr. 209:22-210:3.)

(Tr. 60:17-61:4; *see also* Tr. 211:20-212:6.)

In April 2008, Wiggs and Primarius entered into an agreement whereby Primarius was to “act on [Wiggs’] behalf in all matters related to [her] being named beneficiary of the Estate of Darlene J. Neuman or other property to which [she] may be entitled.” (Tr. Ex. 1; Tr. 62:21-63:5, 65:14-20.) Primarius’s services for Wiggs in connection with the Neuman Estate ranged from “personal services” (such as helping Wiggs plan Neuman’s funeral) to “business transactions” (such as cashing in Neuman’s life insurance policies). (Tr. 61:9-16.) Sietsema worked on the Neuman Estate in her capacity as a Primarius employee. (Tr. 295:9-296:18.) Although Primarius did not have “regular” experience in handling such affairs, it did have some experience completing such tasks in its 35 years of business. (Tr. 62:11-20; 214:18-215:1.) In addition, Miller had a longstanding relationship with attorney Ronald Kopeska, who he hired to assist him in handling the Neuman Estate and, eventually, the Wiggs Estate.⁵ (Tr. Exs. 5, 14; Tr. 30:23-25, 43:20-22, 93:3-5, 116:15-117:6, 222:19-223:23.)

Primarius also assisted Wiggs with her own personal matters, such as paying household bills, going to the bank, and picking up and dropping off groceries for her. (Tr. 213:8-214:17, 215:2-9.) According to Sietsema, Wiggs needed this help because she was overwhelmed:

Q: And how did it happen that [Wiggs] came to ask for additional help on things that weren’t specifically related to Ms. Neuman?

⁵ Unfortunately, Kopeska was suspended from the practice of law on December 31, 2008. (Tr. Ex. 6.) He also failed to carry malpractice insurance. (Tr. Ex. 7.) Miller did not know about the suspension or the malpractice insurance. (Tr. 90:23-92:6.)

Meaning, you know, her own financial affairs or other things of that nature.

A: About a week and a half after she visited our office, she called one morning at 7:30 and was in tears.

Q: And –

A: And she wanted to know – she said, I have this mess of things on my table. And she said, I cannot cope with these today or any day. She said, I need help. And so I just said to her, Jan, you know, if you want to, I'm happy to come there and help you write your checks, get your things in order. She was concerned about household bills that needed to be paid.

Q: Okay.

A: Or, I said, if you want to sign a few of your checks, I will send a courier to pick them up, and we will help you with them. And I will complete your check register, send everything back to you marked paid with the date and the check number. And she said that would be very helpful. She preferred that I not come to her home for whatever reason. She would have them ready. I did that, sent them back to her.

(Tr. 213:9-214:5.)

In mid-April 2008, Wiggs began to feel ill. (Tr. 215:20-25.) During this time, she continued to ask Miller and Sietsema to run personal errands for her. (Tr. 216:1-9.) As she became more ill, however, she grew tired of having to attend certain errands – such as the bank – with Miller and/or Sietsema. (Tr. 37:15-38:1, 216:3-9.) On several occasions, she asked that Miller and Sietsema execute a power of attorney form. (Tr. 38:2-6, 216:10-217:7.) They eventually agreed, and Wiggs, Miller, and Sietsema executed power of attorney forms on April 23, 2008 and May 15, 2008. (Tr. Ex. 2, 3, A.App. 1-2, 3-4; Tr. 38:2-6, 217:5-7, 255:5-12.) In addition to continuing to run personal errands for Wiggs, Sietsema and Miller could now more easily pay her bills and assist her in making health care decisions:

- Q: And after you became power of attorney, how did your duties for Ms. Wiggs change, if they did?
- A: Not a great deal other than it was a bit easier to pay her bills or help her make decisions.
- Q: And when you say help her make decisions, do you mean with respect to – what are you referring to? Health care, the estate?
- A: Well, it wasn't long. And it was health care.
- Q: Okay.
- A: It was just shortly in fact.

(Tr. 217:24-218:8.)

Primarius billed Wiggs for these services in the same manner it billed its other clients.⁶ (Tr. 72:15-73:15, 219:17-22.) Sietsema – who began providing services in April 2008 and often assisted Wiggs after business hours – did not bill Wiggs for all of her time; she estimated that 15 to 20 percent of her time was not recorded in her Primarius time sheets. (Tr. 219:23-220:23, 254:15-21, 256:9-12.) In May 2008, Primarius billed Wiggs for \$7,678.93 for services rendered in April 2008. (Tr. Ex. 4, Invoice dated May 7, 2008.) In June 2008, Primarius billed Wiggs \$13,110.40 for services rendered in May 2008. (*Id.*, Invoices dated June 2 and June 18, 2008.) In July 2008, Primarius billed the Neuman Estate \$14,367.75 for services rendered in June 2008.⁷ (*Id.*, Invoice dated July 29, 2008.)

According to Miller, he was the only one at Primarius with control or authority over the bills; he reviewed them and only he could adjust hours or rates. (Tr. 39:16-40:19, 174:18-175:13.) Miller did not allow Sietsema to share in this control or

⁶ Primarius billed Wiggs for work performed by Miller and Sietsema as power-of-attorney and for services rendered by other Primarius employees. (Tr. 69:19-70:3.)

⁷ In September 2008, Primarius billed the Neuman Estate \$5,802.08 for services rendered in August 2008. (Tr. Ex. 4, Invoice to The Estate of Darlene Neuman dated Sept. 24, 2008.)

authority. (*Id.*) Miller authorized payment of these invoices from Wiggs' personal checking account. (Tr. 78:9-19; Tr. Ex. 30, Account Statement for April 24-May 23, 2008 (Check No. 5045, dated May 19, 2008), Account Statement for May 24-June 24, 2008 (Check No. 5028, for \$10,590.19, dated June 5, 2008), and Account Statement for Oct. 11-Nov. 13, 2008 (Check No. 3026, for \$16,887.96, dated Oct. 14, 2008⁸.)

On or about June 5, 2008, Miller paid Sietsema \$5,000 for her work on the Neuman Estate.⁹ (Tr. 28:25-29:2, 260:13-261:5). When Sietsema expressed surprise at receiving this check, Miller told her that it was for her work "assist[ing] [Wiggs] with work on behalf of [Neuman]." (Tr. 29:7-15, 260:20-24.) Wiggs herself had told Sietsema that, "you will be getting something for all of this you're helping me with as far as [Neuman]." (Tr. 260:24-261:2; *see also* Tr. 29:3-6.)

C. Sietsema's work on the Wiggs Estate

Wiggs died on June 22, 2008. (July 29 Order, ¶ 4, A.Add. 2; Tr. 145:1-6, 261:17-19.) Before she passed away, Wiggs asked Miller and Sietsema to serve as co-personal representatives of her estate. (Tr. 96:19-25, 218:9-15; Tr. Ex. 15, A.App. 5-6.) On August 18, 2008, Miller and Sietsema executed an Acceptance of Appointment as Personal Representative and Oath by Individual. (Tr. Ex. 13, A.App. 8; Tr. 96:23-25,

⁸ Check No. 3026 paid two invoices – the June 18, 2008 invoice to Wiggs for \$2,520.21 and the July 29, 2008 invoice to the Neuman Estate for \$14,367.75. (Tr. Ex. 4, Invoices dated June 2 and July 29, 2008; Tr. Ex. 30, Account Statement for Oct. 11-Nov. 13, 2008, Check No. 3026, for \$16,887.96, dated Oct. 14, 2008.)

⁹ Curiously, in the Final Account for the Neuman Estate, Miller characterized this payment as "Repayment of Advances to Estate." (Tr. Ex. 10, "Expenses of Administration"), A.App. 15.) At trial, however, he admitted that this entry represented the \$5,000 payment to Sietsema. (Tr. 81:8-82:16.)

262:6-12.) The Wiggs Estate consisted of a house, personal belongings, various bank accounts, insurance proceeds, and three vehicles. (Tr. 263:9-264:10; Tr. Ex. 18, A.App. 43-50.) The estate was valued at \$466,395.73. (Tr. Ex. 18, A.App. 43-50.)

Following Wiggs' death, Sietsema and Miller made arrangements for Wiggs' funeral and burial, attempted to negotiate down her credit card debt, and continued to pay her household bills. (Tr. 294:8-22.) They arranged to have the house cleaned in anticipation of an estate sale and the sale of the house itself. (Tr. 231:9-232:25.) Ultimately, the house sold for \$361,000. (Tr. 123:24-124:3; Tr. Ex. 28.) The estate sale yielded \$18,051.60. (Tr. 127:14-16; Tr. Ex. 29.) In April 2009, Sietsema made partial distributions – in the amount of \$35,000 – to beneficiaries Animal Ark and Feline Rescue.¹⁰ (Tr. 238:9-241:19; Tr. Ex. 30, Account Statement for March 12-April 10, 2009 (Check No. 3073, dated April 30, 2009, in the amount of \$70,000 for cashier's checks for Animal Ark and Feline Rescue); Tr. Exs. 51, 52, A.App. 85-86.) In June 2009, Sietsema made a partial distribution in the amount of \$35,000 to the Kitty Trust (a trust established for Wiggs' three cats).¹¹ (Tr. Ex. 30, Account Statement for June 11-July 10, 2009 (Check No. 3077, dated \$35,000).)

¹⁰ Sietsema testified that she intended to continue making payments to these beneficiaries. (Tr. 292:22-24.)

¹¹ The Kitty Trust was drafted by Kopeska and signed by Wiggs (as settlor) and Miller and Sietsema (as trustees) in May 2008. (Tr. Ex. 16.) The Court declared the Kitty Trust invalid on April 20, 2010. (July 29 Order, ¶ 7, A.Add. 2.)

Primarius billed the Wiggs Estate for these services.¹² (Tr. 70:4-71:9; Tr. Ex. 4.) In July 2008, Primarius billed the Wiggs Estate \$21,923.55 for services that were rendered to Wiggs prior to her death. (Tr. Ex. 4, Invoice to The Estate of L. Jeannette Wiggs dated July 29, 2008.) The remaining charges were as follows:

- August 2008 (for services rendered in July 2008): \$13,790.75
- September 2008 (for services rendered in August 2008): \$9,262.35
- October 2008 (for services rendered in September 2008): \$25,454.30
- December 2008 (for services rendered in October 2008): \$16,936.02
- January 2009 (for services rendered in November 2008): \$6,884.08
- February 2009 (for services rendered in December 2008): \$4,860.16
- March 2009 (for services rendered in February 2009): \$4,998.26
- May 2009 (for services rendered in March 2009): \$1,271.97
- June 2009 (for services rendered in May 2009): \$2,181.91
- July 2009 (for services rendered in June 2009): \$4,069.91
- September 8, 2009 (for services rendered in July 2009): \$1,870.97

¹² Miller characterized Primarius's work for the Wiggs Estate as a "continuation" of the arrangement he reached with Wiggs in March 2008. (Tr. 87:2-88:12.) When asked whether he disputed that he, as personal representative, retained Primarius to provide services for the Wiggs Estate, Miller stated:

I think I would, yes. I would object to that because again, I believe that all of that was set up in advance by [Wiggs]. It was not an action that I took later as personal representative, as power of attorney, as anything. It was before all of that that [Wiggs] wanted us to be the sole, the sole agency hired to do all of these things.

(Tr. 87:2-11.)

- September 30, 2009 (for services rendered in August 2009): \$4,580.55

(Tr. Ex. 4.)

Sietsema paid these bills in her capacity as co-personal representative. (Tr. 40:1-22, 264:11-21.) Significantly, however, the invoices were reviewed by Miller and paid “[u]nder [his] direction.” (Tr. 107:24-108:5.) Sietsema testified that objecting to these bills was “out of [her] realm.” (Tr. 268:17-23.) As a Primarius employee, “[she] did not set the rules”; it was Miller who did.¹³ (Tr. 301:23-302:10) Accordingly, she did not believe that she had any authority to object to the invoices. (Tr. 301:23-302:10.)

In addition to authorizing the payment of Primarius’s bills, Miller authorized two payments to Sietsema for personal representative fees. (Tr. 28:18-24, 30:13-22, 110:22-25, 302:23-303:2.) Sietsema received payments of \$7,500 and \$9,000.¹⁴ (Tr. 110:22-25; Tr. Ex. 30, Account Statement for Sept. 12-Oct. 10, 2008 (Check No. 3012, dated Sept. 19, 2008) and Account Statement for Feb. 12-March 11, 2009 (Check No. 3068, dated

¹³ Sietsema did object when she discovered that Miller and Primarius were borrowing money from the Wiggs Estate. (Tr. 277:12-24, 304:11-14.) Miller borrowed \$72,019.00 from Wiggs’ checking account. (Tr. 130:5-16; Tr. Ex. 22, “Advances to Kelvin Miller,” A.App. 71.) Miller also borrowed \$15,000 from the Kitty Trust. (Tr. 133:9-134:4; Tr. Ex. 34.) Primarius borrowed \$19,000 from the Wiggs Estate. (Tr. 136:2-13; Tr. Ex. 22, “Advances to Primarius Promotions,” A.App. 72.) Miller ultimately repaid both of these amounts. (Tr. Ex. 22, “Repayments by Kelvin Miller,” A.App. 71; Tr. 133:9-12, 135:19-21, 136:10-13.) Sietsema did not know about the loans until Miller reported them to her for recordkeeping purposes. (Tr. 131:16-132:9, 134:15-17.) When she learned of them, she objected “strongly” and was “adamant” about it. (Tr. 277:21-24, 304:11-14.) However, she testified that she was not in a financial position to do anything more. (Tr. 304:15-22.)

¹⁴ Miller paid himself personal representative fees in the amount of \$7,500, \$7,000, and \$35,500. (Tr. 110:19-111:9; Tr. Ex. 30, Account Statement for Sept. 12-Oct. 10, 2008 (Check No. 3013, dated Sept. 19, 2008), Account Statement for Nov. 14-Dec. 10, 2008 (Check No. 3047, dated Dec. 4, 2008), Account Statement for Dec. 11, 2008-Jan. 13, 2009 (Check No. 3049, dated Dec. 15, 2008); Tr. Ex. 36, A.App. 79-82.)

Feb. 11, 2009), Tr. Ex. 37, A.App. 83-84.) According to Miller, these payments were “for time above and beyond the care of [Wiggs]. Things we didn’t charge for along the way.”¹⁵ (Tr. 111:1-9.) Although Sietsema understood from Miller that she could “potentially” receive personal representative fees, she was surprised when she received the \$7,500 and \$9,000 payments. (Tr. 236:17-21, 237:8-25.) She had not discussed personal representative fees with Kopeska. (Tr. 236:7-16.)

D. Sietsema’s removal as personal representative of the Wiggs Estate

Miller and Sietsema served as co-personal representatives until February 2010, when they were removed for cause. (Tr. 56:6-12, 250:4-12; July 29 Order, ¶¶ 15-16, A.Add. 3.) Following her removal, Sietsema met with the successor personal representative, Terrence McCool. (Tr. 242:12-243:12, 244:15-245:3.) She and McCool reviewed the financials for the Wiggs Estate. (Tr. 243:7-12.) At the conclusion of this meeting, McCool remarked that Sietsema had been “painted with the wrong brush.” (Tr. 245:10-16; *see also* Tr. 347:15-348:5.) Sietsema took this statement to mean that, “we had a good meeting. That at that point he had no reason to doubt me.”¹⁶ (Tr. 245:25-246:2.) Following this April meeting, Sietsema helped McCool obtain any additional

¹⁵ Miller had discussed the appropriateness of personal representative fees with attorney Kopeska. (Tr. 31:1-6.) Kopeska testified that he and Miller had a “general discussion about what’s normal for personal representatives in estates.” (Tr. 191:21-25.) Specifically, Kopeska provided “information, statutes and what they say in terms of reasonableness and the amount of effort and what was done.” (Tr. 192:1-6; *see also* Tr. 193:20-23.) Sietsema was not present for this discussion. (Tr. 236:11-21.)

¹⁶ When asked about this statement, McCool testified that Sietsema “could not have been more accommodating, more cordial, more helpful.” (Tr. 347:15-22.) He further testified that, “I was led to believe that I was going to have all sorts of problems. And I went to the meeting thinking – and in my line of work it happens – that I would get tossed out because someone would get angry or take offense....” (Tr. 347:25-348:5.)

paperwork he needed. (Tr. 243:20-25.) She also wrote him a \$20,000 check “to get him going on what he needed to do as the new personal representative” and closed out some bank accounts. (Tr. 244:1-12; Tr. Ex. 30, Account Statement for April 13-May 12, 2010 (Check No. 3088, dated April 15, 2010).)

McCool testified at the trial of this matter. (Tr. 342-409.) He has served as a “professional private fiduciary serving in the roles of conservator, guardian, attorney in fact, trustee and personal representative” for 18 years. (Tr. 343:3-11.) During his testimony, he conceded that, for someone without his experience as a “professional” personal representative, “I would expect them to ask for legal-type advice that I wouldn’t have to because I already know – I’m aware of that.” (Tr. 374:20-375:9.) McCool also admitted that he had never served as a co-personal representative with his employer. (Tr. 392:10-13.) Finally, he agreed that he took longer to complete tasks when he first started as a personal representative:

Q: And it might take a little longer when you’re starting out or you’re doing something for the first time to do it – to complete a task than it would for you now say finishing an estate, it’s now a simpler project for you than it was when you first started?

A: That is an accurate statement.

Q: Okay. Because you’ve gained experience over your – I don’t remember exactly how long – 29 years of experience?

A: A long time, yes.

(Tr.408:20-409:4.)

E. The July 29 Order

The probate court held a two-day trial on May 12 and 13, 2011. (July 29 Order, A.Add. 1-19.) The court issued its order on July 29, 2011. (*Id.*) In it, the court found

that Miller and Sietsema breached their fiduciary duties and were negligent in their handling of the Neuman and Wiggs Estates. (July 29 Order, ¶¶ 22, 23, A.Add. 4.) The court held that Miller and Sietsema “should be held jointly and severally responsible for repayment of the excess compensation charged to the Wiggs Estate”; “jointly and severally responsible for reimbursement of the \$5,000.00 gratuitous payment to Sietsema”; and “jointly and severally responsible for reimbursement of \$43,000.00 of personal representative fees paid to them.” (July 29 Order, ¶¶ 85, 92, A.Add. 16, 17.) The court ordered Miller and Sietsema, jointly and severally, “to repay to the Neuman Estate the sum of \$5,000.00 for improper payment to Sietsema of unearned compensation” and “to repay to the Wiggs Estate the sums of \$43,000.00 for unearned personal representatives’ fees and \$108,519.61 for excess payments to Primarius on work done for the Wiggs Estate, for a total of \$151,519.61.” (July 29 Order, Order, ¶¶ 3, 4, A.Add. 18.)

ARGUMENT

This case presents a unique factual scenario: the relationship between two co-personal representatives (Miller and Sietsema) who also are employer/supervisor (Miller) and employee/subordinate (Sietsema). In its July 29 Order, the probate court fails to account for this important distinction. Rather, it groups them together without regard to the unequal decision-making power between Miller (the supervisor) and Sietsema (the subordinate). For the reasons that follow, this Court should reverse the probate court’s finding that Sietsema is jointly and severally liable for various damages and/or losses of the Neuman and Wiggs Estates.

I. Standard of review.

In reviewing an order of the probate court, this Court's scope of review "is limited to deciding whether the probate court's findings are clearly erroneous and whether it erred in its legal conclusions." *In re Estate of Simpkins*, 446 N.W.2d 188, 190 (Minn. App. 1989) (citing *Hardwick v. Hansen*, 374 N.W.2d 297, 299 (Minn. App. 1985)). Clearly erroneous means that, "upon review of the entire evidence, a reviewing court is left with the definite and firm conviction that a mistake has been made." *Gjorvik v. Strobe*, 401 N.W.2d 664, 667 (Minn. 1987) (citation omitted). In this case, a review of the evidence will leave this Court with the definite and firm conviction that a mistake has been made with respect to Sietsema's liability for damages and/or losses caused by Miller, her co-personal representative, employer, and boss.

II. The probate court erred in ordering Sietsema to repay, jointly and severally with Miller, the \$5,000 payment she received from the Neuman Estate.

The probate court clearly erred when it ordered Sietsema to repay, jointly and severally with Miller, the \$5,000 payment she received from the Neuman Estate. The undisputed evidence in this case establishes that Miller was the sole personal representative for the Neuman Estate, and that Miller authorized the \$5,000 payment to Sietsema. (Tr. Ex. 8 (Miller's Acceptance of Appointment as Personal Representative and Oath by Individual for the Neuman Estate), A.App. 7; Tr. 28:25-29:14.) Sietsema did not request this payment; in fact, she was surprised when she received it. (Tr. 29:7-11, 260:13-262:2.) The payment, according to Miller, was one that he felt Wiggs wanted Sietsema to have. (Tr. 29:3-6.)

Sietsema provided services for the Neuman Estate in her capacity as a Primarius employee. (Tr. 219:9-22.) As such, she owed no fiduciary duties to the estate.¹⁷ Rather, it was Miller who owed such duties to the estate. Minn. Stat. § 524.3-703(a) (“A personal representative is a fiduciary who shall observe the standards of care in dealing with the estate assets that would be observed by a prudent person dealing with the property of another...”). It is Miller, then, and not Sietsema, who is responsible for repayment of this amount. Minn. Stat. § 524.3-712 (“If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust”).

Significantly, the July 29 Order lacks both a factual and legal basis for the court’s conclusion that Sietsema is liable – let alone jointly and severally liable – for repayment of the \$5,000. The court addresses the \$5,000 payment only in the context of inaccurate estate inventories and final accounts:

[a] payment to Sietsema of \$5,000.00 is described in the Neuman Final Account as a “repayment of advance.” Miller and Sietsema both testified that this amount was not a repayment or reimbursement for an advance, but rather a gratuitous payment to Sietsema. This payment should not only be

¹⁷ During the trial, the probate court incorrectly found that Sietsema had an interest in the Neuman Estate such that she should have questioned Miller’s payment of \$30,000 in personal representative fees to himself. (See Tr. 113:24-115:13.) The court reasoned that, because Sietsema was a personal representative of the Wiggs Estate, which was the sole beneficiary of the Neuman Estate, she somehow had an “interest” in the Neuman Estate. (Tr. 115:8-13.) The court did not cite any authority in support of this proposition, either at trial or in its July 29 Order. (*Id.*; July 29 Order, A.Add. 1-19.) The undisputed evidence in this case is that Sietsema was a Primarius employee, with no fiduciary duties owed to or “interest” in the Neuman Estate.

disallowed, but demonstrates the accounts prepared by Primarius are inaccurate and appear to be misleading or even deceptive.

(July 29 Order, ¶ 24(b), A.Add. 5.) Nowhere in the July 29 Order does the court find that Sietsema authorized/made the \$5,000 payment to herself, or that she was responsible for mischaracterizing the payment as “repayment of an advance” in the final account.¹⁸ Nor does the court cite any legal authority for the proposition that the recipient of an allegedly improper payment by a personal representative is liable for repayment of that amount. To the contrary, Minnesota law provides that it is the personal representative who is responsible for such “damage or loss.” Minn. Stat. § 524.3-712.

The probate court erred in finding that Sietsema is jointly and severally liable for repayment of the \$5,000 payment she received from the Neuman Estate. Accordingly, Sietsema respectfully requests that this Court reverse the probate court’s finding and remand with instructions to enter a finding that it is Miller alone who is responsible for repayment of this amount.

III. The probate court erred in finding that Sietsema is jointly and severally liable for repayment of \$43,000 in personal representative fees made by the Wiggs Estate to Miller and Sietsema.

The probate court also clearly erred in finding Sietsema jointly and severally liable, with Miller, for repayment of \$43,000 in personal representative fees made by the

¹⁸ The Final Account for the Neuman Estate was drafted by attorney Kopeska and signed by Miller in his capacity as personal representative. (Tr. 192:10-14; Tr. Ex. 10, A.App. 14-30; Tr. Ex. 17 (Kopeska’s billing records for 8/7/09 (“Final Account – First Draft”), 8/10/09 (“Work on final accounting on Wiggs and Neuman”), 8/25/09 (“Work on Inventory & Final Accounting”), 8/27/09 (“Work on Final Accounting”), 8/28/09 (“Work on Final Accounting: Get PR to sign Inventory Accounting”), 9/15/09 (“Work on Final Accounting: Letter to Cohen”), 9/16/09 (“Meeting with PR on Final Accounting”), 9/17/09 “Complete final Accounting: Fact [sic] to PR for Review: Letter to Court”).)

Wiggs Estate. The evidence at trial establishes that it was Miller, and not Sietsema, who authorized these payments to himself and Sietsema. Thus, there is no evidentiary support for the probate court's finding that "Miller and Sietsema paid themselves additional amounts for personal representative fees that are duplicative of fees paid to Primarius, that were not paid for any services provided to the estates, and that are unwarranted." (July 29 Order, ¶ 23(a), A.Add. 4 (emphasis added).) It was Miller, and not Sietsema, who paid the fees at issue.

Generally speaking, a co-personal representative is "liable for his or her own acts or omissions, or for those of corepresentatives in which he or she concurs, or to which he or she assents." 34 C.J.S. *Executors and Administrators* § 1184 (2011). Minnesota law is consistent with this general rule. *S. Sur. Co. v. Tessum*, 228 N.W. 326, 329 (Minn. 1929) (observing that the "general rule is that an executor, administrator, or guardian is not liable for a devastavit committed by his cotrustee. [Citations omitted.] It is equally the law that by negligent inattention to his duties, by delinquency therein far short of active participation in the conversion of trust funds by a coguardian, a guardian may render himself liable"¹⁹); *Bouchard v. Tapper*, Nos. C4-87-1191, C6-87-1192, 1988 WL 10458, at *3 (Minn. App. Feb. 16, 1988) (citing rule set forth in *Southern Surety Co. v. Tessum*, 228 N.W. at 329) (A.App. 94-96). Courts in other jurisdictions apply the same rule. *See, e.g., In re Estate of Chrisman*, 746 S.W.2d 131, 134 (Mo. Ct. App. 1988)

¹⁹ A devastavit is defined as "[a] personal representative's failure to administer a decedent's estate promptly and properly, esp. by spending extravagantly or misapplying assets. A personal representative who commits waste in this way becomes personally liable to those having claims on the assets, such as creditors and beneficiaries." Black's Law Dictionary 461 (7th ed. 1999).

(stating that, “[a]s a general rule, co-personal representatives are jointly and severally liable if they act together or one approves or acquiesces in the improper conduct of the other”; collecting cases from several jurisdictions).

Thus, for Sietsema to be held jointly and severally liable with Miller for payment of personal representative fees by the Wiggs Estate, the evidence must demonstrate that she approved or acquiesced in Miller’s actions. This analysis is complicated, however, by Sietsema’s employment relationship with Miller. This relationship – in which Sietsema was at all times subordinate to her co-personal representative – made it difficult for Sietsema to question Miller’s actions or take alternative measures. For example, she testified as follows:

Q: When it came to the withdrawals that were made by Mr. Miller and voicing your objections to the same, is that something you felt strongly about?

A: I was adamant about it.

Q: Did you feel you had any recourse but making the objections you made?

A: I could have quit my job, I suppose. But that was not prudent at the moment especially in light of economy.

Q: So you weren’t – are you saying you weren’t in a financial position?

A: That’s right.

(Tr. 304:11-22.)

The evidence in this case establishes that the relationship between Miller and Sietsema was one of employer-employee rather than one of co-personal representatives. Miller was solely responsible for establishing Primarius’s billing rates and for reviewing and approving Primarius’s bills (including bills for the Neuman and Wiggs Estates). (Tr. 28:9-12, 39:16-40:19, 75:8-11, 107:24-108:5, 140:15-20, 174:18-175:13, 207:7-16.) He

testified that his employees – including Sietsema – had no ability to modify their billing rates or Primarius’s invoices:

- Q: And even if [Sietsema] had some belief that that amount was incorrect, she had no recourse with which to change that – your time card; is that correct?
- A: Sure.
- Q: Or anybody else’s?
- A: That’s true.
- Q: Once it’s submitted and it’s all turned over to you, it’s out of the employee’s hands?
- A: That’s right. I review it. If I feel that there is something that is inappropriate for the client, then I would make that change.
- Q: But no one else had the ability to do that?
- A: No one else.
- Q: And that was the same with respect [to] work done on the Neuman estate for Wiggs or for the Wiggs estate?
- A: Yes.
- Q: And it included work that Ms. Sietsema would do with respect – in her role as personal representative?
- A: That’s right.

(Tr. 40:7-25; *see also* Tr. 174:18-175:2.) Miller was also responsible for determining the amount and payment of personal representative fees by the Neuman and Wiggs Estates.

(Tr. 28:18-24, 30:13-22, 302:23-303:2.) He personally wrote the checks for the personal representative fees. (Tr. Ex. 31 (register entries for Check Nos. 3012, 3013, 3047, 3049, and 3069); Tr. Exs. 36, 37, A.App. 79-82, 83-84.)

This Court has recognized the unequal bargaining power that exists between employers and employees. *See, e.g., Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. App. 1993) (requiring independent consideration for restrictive covenants because “employers and employees have unequal bargaining power”). The same disparity in authority is present in this context: a personal representative who is employed by her co-

personal representative is not on equal footing with him. The evidence in this case is clear: Miller directed the administration of the estates, both in his role as owner of Primarius and as personal representative of the Neuman and Wiggs Estates. It is therefore inequitable to hold Sietsema jointly and severally liable for actions over which she had no control and which she could not question without potentially suffering adverse consequences.

The case *In re Estate of Witherill*, 828 N.Y.S.2d 722 (N.Y. App. Div. 2007), is instructive on this issue. In *Witherill*, the decedent appointed (1) Barker, her former attorney and, until her death, her financial advisor, and (2) Ritchie, Barker's former legal secretary and the decedent's administrative assistant and attorney-in-fact, as co-executors of her estate. 828 N.Y.S.2d at 724. Despite being co-executors, following the decedent's death, "Barker continued to exercise sole decision-making authority over decedent's assets and Ritchie's role was largely to carry out his directives." *Id.* Barker was surcharged for several improper advances and for mishandling estate assets. *Id.* at 725. On appeal, the estate's beneficiary argued that Ritchie "should have been denied commissions and held jointly and severally liable for the surcharges imposed upon Barker." *Id.* at 726. The appellate court disagreed:

...we note that Surrogate's Court acknowledged the fiduciary liability rule [citation omitted], but declined to apply it because there was no proof that Ritchie had participated in or been aware of Barker's misfeasance. Given Ritchie's passive, subservient role in handling estate assets and the assessment of surcharges against her in proportion to her conduct, we cannot say that the court abused its discretion [citation omitted].

Id. (emphasis added). In this case, Sietsema is in the same position as Ritchie: she played a passive, subservient role to Miller in administering the Wiggs Estate.

Similarly, in *Southern Surety Co.*, the Minnesota Supreme Court reversed a finding by the trial court that Oluf Tessum – a co-guardian with his brother, Miller Tessum – and Oluf’s sureties were liable for a \$15,625.54 loss caused by his brother. 228 N.W. at 331. In doing so, the court noted that “Miller Tessum used the trust fund as though it were his own, and lost the sum stated. Oluf was held liable, not because of any active participation in the embezzlement, but solely because of his negligent failure to discharge his own duties as guardian.” *Id.* at 328. The court concluded that “Oluf Tessum and his sureties are entitled to judgment relieving them from all liability, unless on a proper accounting Oluf is found indebted to the estate on some ground other than that of his brother’s conversion or loss of the trust funds.” *Id.* at 330. The same can be said here: Sietsema should not be held responsible for conduct and actions that Miller admits were his own.

To allow this decision to stand would set an unwanted and undesirable precedent for future co-personal representatives. If a personal representative is responsible for the improper acts of his co-personal representative without regard to the relationship between them, there will be a chilling effect on whether anyone would willingly serve as a co-personal representative. Accordingly, Sietsema respectfully requests that this Court reverse the probate court’s finding that she is jointly and severally liable for repayment of \$43,000 on personal representative fees made by the Wiggs Estate.

IV. The probate court erred in finding that Sietsema is jointly and severally liable, with Miller, for repayment of \$108,519.61 made by the Wiggs Estate to Primarius.

For the same reasons set forth in Section III, this Court should reverse the probate court's finding that Sietsema is jointly and severally liable, with Miller, for \$108,519.61 in payments made by the Wiggs Estate to Primarius. The evidence in this case demonstrates that Miller was solely responsible for setting Primarius's billing rates and for reviewing and approving Primarius's invoices to the Wiggs Estate. (Tr. 28:9-12, 39:16-40:19, 75:8-11, 107:24-108:5, 140:15-20, 174:18-175:13, 207:7-16.) Sietsema paid these bills at Miller's direction (Tr. 107:24-108:5) – her only choice given her employment by Miller. Sietsema did not profit from Miller's conduct²⁰; Miller, on the other, stood to profit as the sole owner of Primarius. (Tr. 32:21-24.)

Under these circumstances, Sietsema cannot be held jointly and severally liable for Miller's misconduct. *See Witherill*, 828 N.Y.S.2d at 726 (taking note of co-executor's "passive, subservient role" in administering estate and refusing to hold her jointly and severally liable for co-executor's mishandling of estate assets); *S. Sur. Co.*, 228 N.W.2d at 329 (noting that Oluf Tessum "was not a participant in the wrong. He neither joined in the tortious act nor profited therefrom"). Significantly, Sietsema relied on the direction provided by Miller. And Miller relied, at least in part, on the advice of his longtime legal counsel, Kopeska – a move that the subsequent, "professional" personal representative, McCool, conceded was prudent. (Tr. 374:20-375:9.)

²⁰ In fact, Sietsema expressly denied that she had a "financial incentive ... to bill more rather than less" for Primarius. (Tr. 305:9-11.)

The probate court's expectation that Sietsema contact the court regarding Miller's conduct (*see* July 29 Order, ¶ 27, A.Add. 6) is untenable. Indeed, the expert relied upon by the court – McCool, the successor personal representative – conceded that he had never served as a co-personal representative with his employer. Thus, McCool's testimony (and the probate court's reliance on the same) must be disregarded to the extent it does not account for the unequal footing between Miller and Sietsema. Moreover, it was McCool who remarked that Sietsema had been "painted with the wrong brush." (Tr. 245:10-16.) It defies reason that someone who was complicit in Miller's wrongdoing – as is alleged of Sietsema here – would be so cooperative with her successor personal representative.

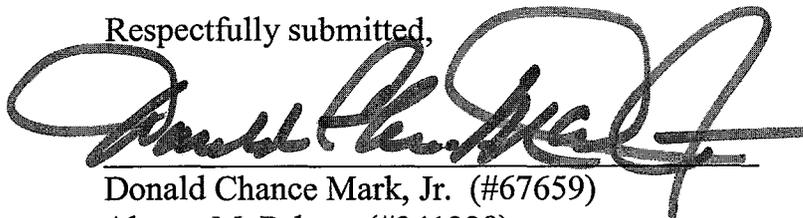
Sietsema therefore respectfully requests that the Court reverse the probate court's finding that she is jointly and severally liable for \$108,519.61 in payments made by the Wiggs Estate to Primarius.

CONCLUSION

This is not a case of two co-personal representatives collectively mismanaging the assets of an estate. Rather, this case involves the disproportionate relationship between a co-personal representative who is also a subordinate employee of her fellow co-personal representative. While courts have found, in some instances, that a co-personal representative may be held jointly and severally liable for the misconduct of his or her co-fiduciary, the requisite circumstances do not exist for such a finding here. The probate court erred in finding that Sietsema is jointly and severally liable for a \$5,000 payment made by Miller, the sole personal representative of the Neuman Estate, to which Sietsema

owed no fiduciary duties. Likewise, the probate court erred in finding Sietsema jointly and severally liable for \$151,519.61 in payments made by the Wiggs Estate. These payments were authorized, approved, and, in some cases made, by Miller. For these reasons, and for the reasons set forth above, Sietsema respectfully requests that this Court reverse the probate court's findings of joint and several liability and direct the probate court to enter an order finding that Miller is solely responsible for the losses of the Neuman and Wiggs Estates.

Respectfully submitted,



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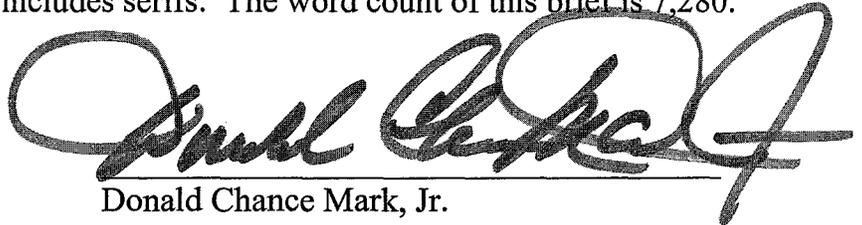
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Dated: January 9, 2012

FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2003. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 7,280.

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