

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-233**

In the Matter of the Estate of:
Genelda M. Nelson,
a/k/a Genelda Mae Nelson,
a/k/a Gen Nelson, Decedent.

**Filed August 1, 2011
Affirmed in part and remanded
Collins, Judge***

Ramsey County District Court
File No. 62-PR-09-669

Lori Swanson, Attorney General, Shannon M. Harmon, Assistant Attorney General, St. Paul, Minnesota (for respondent State of Minnesota)

Gregory R. Merz, Sitso W. Bediako, Gray Plant Mooty Mooty & Bennett PA, Minneapolis, Minnesota (for respondent Animal Humane Society)

Hugh P. Markley, St. Paul, Minnesota (appellant attorney pro se)

Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and
Collins, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant, attorney Hugh P. Markley, challenges the amount awarded to him by the district court for his representation of the decedent's estate. Respondent Animal Humane Society (AHS) filed a notice of related appeal, contending that the district court erroneously failed to consider the extent to which certain estate securities appreciated in value between the time of the decedent's death and the settling of her estate. We affirm the attorney fees award because it is supported by the record and is not an abuse of the district court's discretion. We remand, however, for the district court to address and decide whether the final probate account properly recognized appreciation in the value of the estate stocks during the pendency of the probate administration.

FACTS

Genelda Nelson died on July 21, 2009. By will, she devised the residue of her estate, in equal shares, to her sister, Gloria J. Nyberg, and seven named charities.¹ In accordance with the will, Nyberg was named personal representative, and she retained Markley to represent the estate.

The initial estate inventory showed that Nelson's assets included a house worth \$85,000; cash and personal property worth more than \$50,000; and securities worth \$60,840.14, comprised of 944 shares of 3M stock, valued at \$64.05 per share, and 47

¹ The charities are First Lutheran Church, St Paul; Salvation Army, St. Paul; Dorothy Day Center of Catholic Charities of Archdiocese of St. Paul; Children's Hospital, St. Paul; Minnesota Valley Humane Society; and AHS. AHS received two shares, because it represented a merger of two devisees named in the will, Ramsey County Humane Society and St. Croix Humane Society.

shares of Imation stock, valued at \$8.02 per share. The inventory tallied the value of Nelson's estate at the time of her death as \$196,681.93.

In an attachment to a petition for an interim probate order, Nyberg asked that she and Markley be permitted "to receive all or a portion of" their fees "in the form of [date of death] values of decedent's securities." By interim order, the district court denied this request because it found that the proposed valuation "would be detrimental to the residual beneficiaries of the estate." The court reasoned that "[a]llowing payment of administration expenses in stock at date of death values would result in a windfall to [Markley] and [Nyberg], while disproportionately reducing the assets available for distribution to the residuary beneficiaries." The district court also noted that the estate included \$47,000 in cash, which would be "more than sufficient to pay administration expenses in this estate of relatively few assets and a relatively uncomplicated administration."

On July 27, 2010, Nyberg petitioned the district court to allow a final account and settle the estate. The proposed final account showed the final value of the estate as \$207,937.19, an \$11,255.26 increase from the time of Nelson's death, detailing the increase in value "after the sale of stocks" as \$5,430.83. The proposed final account requested \$16,100 for Nyberg's compensation as personal representative and \$27,140.63 for Markley's past and future attorney fees.

A hearing on the final account occurred on September 7, 2010. Respondent State of Minnesota did not appear at the hearing. The district court kept the record open to receive further evidence on the issues of personal-representative compensation, attorney

fees, and stock valuations. The state and AHS submitted evidence; the five other charitable beneficiaries of the estate consented to the proposed final account.

In a post-hearing letter to the district court dated October 14, 2010, the state questioned the reasonableness of Nyberg's requested compensation and Markley's requested attorney fees because, together, they amounted to 21% of the total value of the estate; the estate was not particularly complex; and no circumstances justified awards of those amounts. The letter also states:

[I]t appears that Markley and Nyberg were paid at least some portion of attorney fees and personal representative compensation in the form of date of death valuations of decedent's securities. It is this Office's understanding that the value of these securities has increased significantly since Ms. Nelson's date of death on July 21, 2009, and it is unclear from the Final Account whether the amounts listed for personal representative compensation and attorney fees reflect such increase or are based solely on the date of death value of any securities received from the estate. Indeed, the Final Account does not appear to reflect the payments in securities at all. Accordingly, this raises concerns that Markley and Nyberg may have been overpaid for their services to the estate as a result of the increased value of the securities.

In a letter to the district court dated October 27, 2010, AHS also addressed the issues of attorney fees and stock valuation, as follows:

The time logs provided by Markley and Nyberg are handwritten and are difficult to read. However, from what can be read, there lacks significant detail to justify the fees incurred in this case

Markley's time log, while appearing more detailed [than Nyberg's], is far less legible. Accordingly, it is impossible to determine what activities he was involved with, to what

extent his activities overlap with Nyberg's work and if his fees are reasonable.

AHS is similarly concerned whether payments to Markley and Nyberg for their services as attorney and personal representative of the Estate respectively occurred using stocks valued at the date of death. . . .

It is not AHS's intent to deplete the assets of the Estate by requesting the Court [to] take a closer inquiry into this case. However, the questions in this case related to the Final Account and management of the Estate require, at a minimum, that satisfactory answers be provided to the Court prior to approving the Final Account.

Finally, in another letter to the district court dated December 22, 2010, AHS discussed the windfall appellant and Nyberg would receive if they were paid in date-of-death securities, as follows:

[T]he value of the shares held by the Estate appreciated since the date of death. Markley does not describe specifically the amount of appreciation. However, AHS believes that it can calculate roughly the amount of appreciation. *Using the date of the Final Account of July 27, 2010* (which, admittedly, may not be the date on which some Estate securities were sold) *the average share price of the 3M Company stock was \$86.86. The average price of Imation stock increased to \$9.45. By AHS's calculation, the total appreciation of the shares between the date of death and July 27, 2010 was \$21,599.85.* Even if the shares were sold earlier in July, it is fair to say that there was a significant appreciation in the shares' value.² However, this appreciation is not represented on the Final Account. The Final Account represents that the gain on sale

² Markley's time records indicate that on July 9, 2010, he met with a 3M representative "to have 3M securities of decedent either transferred or sold at capital gain." Markley's July 13, 2010 entry states that he "[r]eceive[d] and review[ed] information on 3M securities from P.R." In his November 16, 2010 affidavit, Markley states that "On July 31, 2010; after sale of the remaining securities of decedent a[s] [sic] shown in the Final Account with a capital gains profit over DOD Inventory values." These entries suggest that the stocks were not sold until the latter half of July 2010, as argued by AHS.

of stock was \$5,430.83. AHS can only assume that this figure represents the capital gain actually realized from the sale of securities not being retained by Nyberg and Markley. Accordingly, if Nyberg and Markley are permitted to receive payment in DOD securities, they would effectively deprive the Estate of roughly \$16,169.02, and the percentage of their fees in relationship to the total value of the Estate would stand at 27%. Nyberg and Markley do not acknowledge that there is appreciation missing from its Final Account because of the payment in DOD securities, and they do not provide a basis for why payment in DOD securities is appropriate.

(Emphasis added.)

On January 18, 2011, the district court issued an order to allow the final account, settle the estate, and decree distribution of the estate's assets. The court determined that the reasonable compensation for Nyberg's services as personal representative was \$6,440 and that \$10,000 was a reasonable amount for Markley's attorney fees. The memorandum of law attached to the order states:

The decedent's estate in this case neither was complex nor were there any novel problems. There is nothing to indicate that the sale of the real estate was extraordinarily complex. There is no indication that the sale of stock in two major, well known companies, listed on the New York Stock Exchange, was difficult, unusual, or extraordinary. The attorney has many years of experience, including significant experience in probate of decedents' estates. The Court recognizes that court records list this attorney as an attorney of record in more than 75 probate cases. The Court finds that the amount of hours spent on probating this estate are excessive, given the nature of the assets and the purported experience of the attorney in probate matters.

The order did not address the state's and AHS's challenges to the valuation of the stocks.

In this appeal, Markley challenges the district court's reduction of his claimed attorney fees of \$27,140.63 to \$10,000. AHS filed a notice of related appeal and

challenges the district court's failure to address whether the final account included the proper valuation for the estate stocks.

D E C I S I O N

1. Attorney fees

“[T]he allowance of compensation for attorney[] fees in probate proceedings rests largely in the discretion of the [district] court; and . . . the reasonable value of such services is a question of fact.” *In re Estate of Baumgartner*, 274 Minn. 337, 346, 144 N.W.2d 574, 580 (1966). In all probate proceedings, an attorney working on behalf of the estate “shall have such compensation therefor out of the estate as shall be just and reasonable.” Minn. Stat. § 525.515(a) (Minn. 2010). However, the services provided by the attorney representing the estate must benefit the estate in order to be compensable. *In re Estate of Evenson*, 505 N.W.2d 90, 92 (Minn. App. 1993); *see In re Weisberg's Estate*, 242 Minn. 150, 153, 64 N.W.2d 370, 372 (1954) (stating, “courts have a duty to prevent dissipation of estates through allowance of exorbitant fees to those who administer them”).

In deciding what is “just and reasonable,” the district court “shall” consider the following five factors: “(1) the time and labor required; (2) the experience and knowledge of the attorney; (3) the complexity and novelty of problems involved; (4) the extent of the responsibilities assumed and the results obtained; and (5) the sufficiency of assets properly available to pay for the services.” Minn. Stat. § 525.515(b) (2010). Here, the parties offered evidence on each of the five statutory factors, and the district court considered the five factors when it ruled on this issue. The court's January 18, 2011

order on the final account addresses the lack of complexity or novelty in the probate issues presented by decedent's estate and notes that the sale of the two well-known stocks was ordinary. The order also cites Markley's many years of experience involving probate matters, noting specifically that he has handled more than 75 probate cases as an attorney of record. The district court also found that "the amount of hours spent on probating this estate are excessive, given the nature of the assets and the purported experience of the attorney."

While Markley offered evidence to support his claimed attorney fees, we affirm because the record reasonably supports the district court's decision to reduce Markley's claimed fees. *See Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (stating it is not appellate court's province to reconcile conflicting evidence); *Kenney v. Webb*, 352 N.W.2d 848, 849 (Minn. App. 1984) (stating that when both sides produce evidence inherently believable, "the [district] court will be upheld if there is evidence in the record which, if believed, would reasonably support its decision"). Markley's handwritten notes are barely legible, but his notes and time records suggest that he spent an inordinate amount of time working on a case that did not call for the amount of time he logged—he repeatedly met, contacted, and conferred with the personal representative and repeatedly reviewed, conferred on, drafted, and redrafted materials for the heirs, the attorney general's office, and the district court. Some of Markley's efforts appear to be redundant or unnecessary. Accordingly, we conclude that the district court did not abuse its discretion by setting Markley's attorney fees at \$10,000.

2. Valuation of estate stocks

AHS claims that the district court erred by allowing the final account because the account failed to include all assets of the estate. According to AHS, the estate's 3M and Imation stocks appreciated significantly during the pendency of the probate administration. AHS estimates that during the period between Nelson's death and the final account, the 3M stock increased in value from \$64.05 to \$86.86 per share and the Imation stock increased in value from \$8.02 to \$9.45 per share, resulting in an aggregate appreciation of \$21,599.85. However, only \$5,430.83 was recognized by the proposed final account as an increase in the value of the stocks, and this sum apparently represents capital gains and not value appreciation. Markley's reply brief to this court does not explain these discrepancies, stating only that "[o]ur [f]inal [a]ccount properly showed any increases in the value of the remaining securities that were converted to cash at a capital gain."

Normally, in completing a formal administration of probate, the personal representative or other interested party petitions the district court for complete settlement of the estate, which permits the court "to consider the final account or compel or approve an accounting and distribution, . . . and [to] adjudicate the final settlement and distribution of the estate." Minn. Stat. § 524.3-1001(a)(1) (2010). The statute contemplates that the district court will hold a hearing on the matter and will "enter its order allowing the account and issue its decree or order of distribution." Minn. Stat. § 524.3-1001(a)(3) (2010). But even after entry of a decree of disposition,

[w]henever real or personal property or any interest therein has been omitted from probate proceedings . . . [from] a decree of distribution . . . any person interested in the estate or claiming an interest in such property may petition the probate court of the county in which such proceedings were had for a decree to determine its descent and to assign it to the persons entitled thereto, or to amend the deed or transfer of distribution, decree of distribution, or order of distribution to include such omitted property[.]

Minn. Stat. § 524.3-413 (2010).

Here, with leave of the district court, the state and AHS offered post-hearing evidence on the issue of stock valuation, but the final decree of disposition does not address the issue. The stock-valuation issue had been raised to the district court early in this case and addressed by the district court's interim order, and was also raised by the parties during a hearing on the final account. On this record, we conclude that the district court erred by failing to address and resolve the stock-valuation issue in its final order and decree of distribution.

While neither the state nor AHS formally objected to the final account, directing the district court to decide this issue on the merits is consistent with the rule that procedural dismissal should not be favored over “the primary objective of the law . . . to dispose of cases on the merits.” *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 192 (Minn. 1990); *see also State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (“[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities.”); *Greenbush State Bank v. Stephens*, 463 N.W.2d 303, 306 n.1 (Minn. App. 1990 (applying *Hannuksela* in the civil arena), *review*

denied (Minn. Feb. 4, 1991). Here, the final account appears to be inaccurate in reflecting the appreciation in value of the estate securities between the time of the decedent's death and entry of the order allowing the final account, which occurred approximately a year-and-a-half later. We therefore remand for the district court to address and decide whether the final probate account properly recognized appreciation in the value of the estate's 3M and Imation stocks during the pendency of the probate administration. On remand, the district court may require further submissions from the parties or conduct such further proceedings as it deems necessary.

Affirmed in part and remanded.