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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-62**

Theresa Ann Hagman, Trustee for the Next of Kin
of Joseph Daniel Hagman, Decedent; et al.,
Appellants,

vs.

James Lee Schmitz,
Respondent,

Stephanie Stolp,
Respondent,

Richard Guerre d/b/a Russell's Bar and Grill, Inc.,
Defendant.

**Filed July 11, 2011
Affirmed
Collins, Judge***

Wright County District Court
File No. 86-CV-10-102

Gregory S. Malush, Milavetz, Gallop & Milavetz, P.A., Edina, Minnesota; and

Michael R. Docherty, Michael R. Docherty, Attorney at Law, PLLC, Edina, Minnesota
(for appellants)

Thomas S. McEachron, Votel, Anderson & McEachron, St. Paul, Minnesota (for
respondent James Lee Schmitz)

T. Joseph Crumley, Nicole L. Bettendorf, Bradshaw & Bryant, PLLC, Waite Park,
Minnesota (for respondent Stephanie Stolp)

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

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and Collins, Judge.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant challenges the distribution of settlement proceeds in this wrongful-death action, arguing that the district court erred by (1) failing to include all of the decedent's next-of-kin in the distribution and (2) failing to award attorney's fees according to the contingent-fee agreement. Because the district court correctly applied the law to distribute the settlement proceeds and did not abuse its discretion in determining the attorney's fees, we affirm.

FACTS

On May 27, 2007, Joseph Daniel Hagman (Joseph) was a pedestrian on Highway 55 in Wright County when he was struck by a vehicle driven by defendant James Lee Schmitz; Joseph died from his injuries. At the time, Joseph was in a relationship and living with respondent Stephanie Stolp; they had one child, I.H., who was born in 2005, and Stolp was pregnant with the couple's second child, E.H., who was born in December 2007. Joseph was also survived by other relatives, including his mother, two brothers, and a sister.

Appellant Theresa Hagman, Joseph's mother, was appointed trustee for Joseph's next-of-kin and filed a wrongful-death action seeking recovery for pecuniary losses resulting from Joseph's death. Schmitz impleaded the bar at which he had been drinking

that evening, but the parties stipulated to dismissal of that claim. The wrongful-death action was settled for \$76,000 paid by Schmitz's liability insurance company.

Appellant-trustee's attorney filed a petition for distribution of the settlement proceeds in accordance with Minn. Stat. § 573.02 (2010). The petition requested approval of the settlement and the following distribution: (1) \$28,693.89 to the attorney, pursuant to an agreed-upon contingent fee of one-third of the proceeds, plus expenses; (2) \$3,149.95 for the purchase of a headstone; (3) \$22,078.08 (50% of the remainder) in structured settlements for Joseph's minor children; and (4) \$22,078.08 (the other 50%) divided equally among appellant-trustee and Joseph's three siblings. Without objection, Joseph's father and grandparents were not included in the proposed distribution. The petition was supported by affidavits from appellant-trustee and Joseph's three siblings asserting their pecuniary-loss claims.

Stolp objected to the proposed distribution, contending that, after payment for the headstone and reasonable attorney's fees, the entire remainder should be devoted to the benefit of Joseph's minor children. Stolp argued that, under the appellant-trustee's proposed distribution, the children would each receive only 14.5% of the settlement proceeds. Stolp also challenged the amount proposed for attorney's fees.

Following a hearing, the district court ordered the following distribution of the settlement proceeds: (1) \$3,149.95 for the headstone; (2) \$15,000 for attorney's fees; and (3) the remainder divided equally to fund structured settlements for Joseph's two minor children. The district court reasoned that Joseph had been employed and financially supporting his immediate family, and that although other family members also lost

Joseph's advice, assistance, comfort, and protection, they were able to work and support themselves. The district court noted that the judicially recognized "support years" formula considers only factors of the life expectancy of the decedent's spouse and the number of years until the decedent's minor children reach 21; that the letters from other family members emphasized the importance of Joseph's role as a father; and that the nature of Joseph's relationship with his children outweighed the pecuniary losses suffered by other family members. Also, the district court reduced the amount of the proposed attorney's fees, based on its findings that the attorney did not spend a significant amount of time on the case, and the trustee was appointed without the need for a court hearing. The district court denied appellant-trustee's request for reconsideration, and this appeal followed.

DECISION

I.

In Minnesota, following a determination of the amount of recovery in a wrongful-death action, "[t]he court . . . determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly." Minn. Stat. § 573.02, subd. 1. The "persons entitled to the recovery" are defined as the decedent's "surviving spouse and next of kin." *Id.* "Next of kin" in this context "means blood relatives who are members of the class from which beneficiaries are chosen under the intestacy statute." *Wynkoop v. Carpenter*, 574 N.W.2d 422, 427 (Minn. 1998). Therefore, all parties who are members of that class are entitled to present evidence of pecuniary loss suffered as a

result of the decedent's death. *See id.* (stating that “the court may not pick and choose among eligible members of the class entitled to present evidence of pecuniary damages”).

“Pecuniary loss” refers not just to loss of income; it also includes the loss of aid, advice, comfort, assistance, and protection that the survivor reasonably could have expected if the decedent had lived. *Rath v. Hamilton Standard Div. of United Techs. Corp.*, 292 N.W.2d 282, 284-85 (Minn. 1980); *Fussner v. Andert*, 261 Minn. 347, 359, 113 N.W.2d 355, 363 (1961). The Minnesota Supreme Court has concluded that “the support years formula provides a satisfactory starting point for the distribution of the proceeds of wrongful death cases.” *Rath*, 292 N.W.2d at 285. Under that doctrine, a court determines the number of years of support lost by a surviving spouse and each next of kin as a result of the decedent's death, and the court divides the recovery proportionately. *Id.* at 285; *see also* David F. Herr, 3A Minn. Pract. § 144.6, at 314 (2010) (citing Minn. R. Gen. Pract. 144.05 and stating that a minor child is assumed to receive support until the child reaches age 21). In making its distribution, the court may also consider additional relevant factors of “the nature of the person's relationship with the decedent, the extent to which the decedent had supported the person in the past, or whether the person is now employed or supported by another person.” *Rath*, 292 N.W.2d at 286; *see also Martz v. Revier*, 284 Minn. 166, 172, 170 N.W.2d 83, 86 (Minn. 1969) (stating that one consideration in determining recovery is dependency of eligible persons on decedent).

Appellant-trustee argues that the district court committed legal error by failing to distribute any of the settlement proceeds to her and to Joseph's siblings, each of whom

submitted evidence of pecuniary losses. Because Joseph's mother and siblings are members of the class of persons from which beneficiaries are chosen under the laws of intestacy, they were entitled to present evidence showing that they had suffered pecuniary losses resulting from Joseph's death. *See* Minn. Stat. § 524.2-103 (2010) (stating persons other than surviving spouse entitled to recover from intestate estate). But the district court did accept evidence of claimed pecuniary losses from appellant-trustee and Joseph's siblings and nonetheless ordered distribution to to Joseph's minor children alone, based on its application of the law as stated in the support-years formula and the additional considerations in *Rath*. The court acknowledged the pecuniary losses of the other next-of-kin resulting from Joseph's death, but noted that that those family members were able to work and financially support themselves. And the district court reasoned that "the nature of [Joseph's] relationship with the minor children far outweighs the other family members' loss of advice, comfort, assistance and protection."

Whether or not next of kin have incurred a pecuniary loss presents a question of fact. *Wynkoop*, 574 N.W.2d at 427 n.3. "[I]f a member of the eligible class fails to present sufficient evidence of pecuniary loss, that question can be resolved by a motion for summary judgment or a directed verdict." *Id.* at 427. Here, the district court considered the issue of proportionate distribution pursuant to the parties' request for a hearing, rather than a trial. *Cf. id.* at 427-28 (concluding, following jury trial in wrongful-death action, that district court should have allowed jury to consider pecuniary loss suffered by next-of-kin who was within the class from which beneficiaries are chosen under intestacy statute). The district court properly applied the relevant law of the

support-years formula and other considerations stated in *Rath* in ordering its proportionate distribution. Application of the support-years formula results in the minor children receiving a greater amount of support because of their young age. *See Rath*, 292 N.W.2d at 285 (apportioning recovery based on years children have until reaching majority). And although the record shows that appellant-trustee and Joseph's siblings are deprived of his companionship, comfort, and advice, they do not allege that Joseph supported them financially in the past, an additional relevant factor under *Rath*.

Appellant-trustee argues that the district court should have duly considered that the minor children had also jointly received \$20,000 in no-fault survivors' benefits paid by Schmitz's insurance company, and would receive Social Security death benefits of about \$250 per month each until their majority. But the statute does not require the consideration of these sources in making a proportionate distribution of a wrongful-death recovery. We see no error in the district court's application of law relating to its proportionate distribution of the wrongful-death settlement proceeds and in ordering the distribution of the proceeds in this case.

II.

Appellant-trustee argues that the district court abused its discretion by reducing the amount of attorney's fees proposed according to the contingent-fee agreement for one-third of the settlement amount plus expenses. This court reviews the district court's grant of attorney's fees for an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). What amount constitutes reasonable fees for legal services presents a question of fact, and we will not set aside findings of fact unless

they are clearly erroneous. *Thomas A. Foster & Assocs., LTD v. Pauslon*, 699 N.W.2d 1, 4 (Minn. App. 2005).

Minnesota courts have generally recognized as reasonable attorney's fees of one-third of a settlement amount. *In re Next of Kin of Markuson*, 685 N.W.2d 697, 705 (Minn. App. 2004). But even a customary contingent fee may be invalid if it is excessive. *Holt v. Swenson*, 252 Minn. 510, 514, 90 N.W.2d 724, 727-28 (1958). And "[i]n actions for personal injury or death by wrongful act, brought by persons acting in a representative capacity, contracts for attorney's fees shall not be regarded as determinative of fees to be allowed by the court." Minn. R. Gen. Pract. 143; *see also* David. F. Herr, 3A Minn. Pract. § 143.2, at 307 (stating that additional factors of the reasonableness of the fees and cost expenditures, the difficulty or novelty of the issues and the results obtained, counsel's expertise in the area, the time reasonably expended to secure the result, and counsel's responsibility are assumed).

Here, based on the record, notwithstanding the contingent-fee agreement, the district court found the proposed attorney's fees of more than \$28,000, inclusive of expenses, to be excessive. Instead, the district court approved the distribution of attorney's fees and expenses in the amount of \$15,000. The district court noted that the attorney's work on the case included taking one deposition, exchanging discovery, preparing a demand letter, and settling without any contested hearing or trial, and that the appointment of the trustee did not require a court appearance.

We conclude that district court did not abuse its discretion by reducing the amount of the proposed attorney's fees. The attorney argues that he extensively investigated the

case and negotiated a favorable settlement, demonstrating his entitlement to the contracted-for one-third of the wrongful-death recovery. He also notes that he appeared in court against Stolp's motion to remove appellant as trustee. But although the attorney obtained an acceptable settlement, the issues presented were not novel or complex. And the attorney's defense of the trustee's appointment as against a good-faith, competing proposed appointment was not an element of the time necessarily expended to obtain the settlement.

Affirmed.