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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **DENNIS MURPHY, as Personal Representative**
3 **of the Estate of ANDRAE DAVIS, deceased,**
4 **LORRAINE CALKIN, Individually and as parent**
5 **and next friend of CASEY DAVIS, a minor, and**
6 **KOBE DAVIS, a minor,**

7 Plaintiffs-Appellees,

8 and

NO. A-1-CA-35379

9 **JENNIFER L. DAVIS, as Parent and**
10 **Next Friend of Andrae Davis II, a minor,**

11 Plaintiff in Intervention/Appellant,

12 v.

13 **THE EAGLE'S NEST CONDOMINIUMS**
14 **ASSOCIATION, a New Mexico Nonprofit**
15 **Corporation, and ROGER COX AND**
16 **ASSOCIATES PROPERTY MANAGEMENT**
17 **COMPANY, LLC, a New Mexico Limited**
18 **Liability Company,**

19 Defendants/Defendants in Intervention.

20 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

21 **Francis J. Mathew, District Judge**

1 Kerry Kiernan, P.C.
2 Kerry Kiernan
3 Albuquerque, NM

4 for Appellees
5 Warner & Finley
6 Charles R. Finley
7 Albuquerque, NM

8 Alex Chisholm
9 Albuquerque, NM

10 for Appellants

11 **MEMORANDUM OPINION**

12 **VARGAS, Judge.**

13 {1} This appeal asks us to resolve a dispute over attorney fees between the attorneys
14 for a wrongful death estate and the attorney for one of the estate's statutory
15 beneficiaries. Attorney Charles Finley (Finley), retained by the mother of one of
16 Decedent's minor sons, appeals the district court's denial of his motion to supervise
17 the contingency fee agreements associated with Plaintiffs' wrongful death action and
18 the accompanying derivative claims of the statutory beneficiaries. On appeal, Finley
19 argues that he is entitled to collect fees from his client's share of the Estate's wrongful
20 death recovery. Alternatively, Finley contends that the Wrongful Death Act requires
21 that the personal representative of the Estate distribute the proceeds of the recovery
22 to the statutory beneficiaries without any deductions for costs or attorney fees incurred

1 by the Estate. Because Finley failed to show that he had been retained by the personal
2 representative to represent the Estate in the wrongful death action, because the
3 personal representative is entitled to choose his counsel and enter into an agreement
4 to pay that counsel, and because the record supports the district court's finding that
5 there was no evidence that the personal representative distributed the judgment
6 proceeds contrary to his statutory mandate, we affirm.

7 **BACKGROUND**

8 {2} Andrae Davis (Decedent) was shot and killed while inside his residence. Dennis
9 Murphy, acting as personal representative of Decedent's Estate (the Estate), retained
10 two law firms (Plaintiffs' attorneys) to bring a wrongful death action against the
11 Eagle's Nest Condominiums Association and Roger Cox and Associates Property
12 Management, LLC, the owner and the manager of the condominium complex where
13 Decedent was killed. Plaintiffs' attorneys also brought separate individual claims for
14 negligence, negligent hiring, and negligent infliction of emotional distress on behalf
15 of Decedent's fiancé, Lorraine Calkin, and their two sons, Casey and Kobe
16 (collectively, Plaintiffs).

17 {3} A little over a year after the complaint was filed, Decedent's ex-wife, Jennifer
18 Davis (Jennifer), through her lawyer, Finley, filed a motion to intervene in the

1 wrongful death action to bring claims for loss of consortium on behalf of Jennifer, as
2 next friend for her son with Decedent, Andrae Davis II (Little Andrae).

3 {4} Following a trial on the merits, the jury awarded compensatory damages of
4 \$2,835,000 to the Estate and \$455,000¹ to each of Decedent’s children. The jury also
5 awarded \$6 million in punitive damages.

6 {5} After entry of the judgment on the jury’s award, Finley filed a motion asking
7 the court to supervise the contingency fee agreements between Plaintiffs and
8 Plaintiffs’ attorneys as well as the contingency fee agreement between Finley and
9 Jennifer. In his motion, Finley argued that as counsel for one of the three statutory
10 beneficiaries, he was entitled to collect attorney fees on his client’s one-third share of
11 the Estate’s total damages award and that the Estate should distribute its proceeds to
12 the statutory beneficiaries without deducting any costs or attorney fees.

13 {6} Following a hearing, the district court denied the motion, finding Finley’s
14 representation of Jennifer, on behalf of Little Andrae, was limited to the loss of
15 consortium claim alone, and did not include representation of Little Andrae as a
16 statutory beneficiary of the Estate’s wrongful death action. The district court also
17 found that the term “proceeds,” as defined in the Wrongful Death Act and applied to

18 ¹These amounts reflect the court’s calculations of comparative fault attributed
19 to each of the defendants.

1 the Estate’s judgment, referred to net proceeds, rather than gross proceeds. Finley
2 appealed.

3 **DISCUSSION**

4 {7} Finley raises two issues on appeal. First, he claims he is entitled to collect fees
5 from Little Andrae’s share of the Estate’s wrongful death recovery because Little
6 Andrae is a statutory beneficiary of the Estate and Jennifer retained him to represent
7 Little Andrae’s interests. Second, Finley argues that the Wrongful Death Act requires
8 that Little Andrae receive his gross share of the Estate’s recovery distributed to him
9 without any deductions for attorney fees and costs. We are not persuaded by either
10 argument.

11 **Finley’s Right to Collect Fees From Estate Proceeds**

12 {8} We first address Finley’s claim that, as the attorney for one of the Estate’s
13 statutory beneficiaries, he is entitled to collect attorney fees on Little Andrae’s share
14 of the proceeds of the judgment entered in favor of the Estate. In support of his claim,
15 Finley relies on his contingency fee agreement with Jennifer. We have previously held
16 that “[w]here one employs an attorney and makes an express valid contract, stipulating
17 for the compensation which the attorney is to receive for his services, such contract
18 is generally speaking, conclusive as to an amount of such compensation[.]” and, “[i]t
19 is the function of the court to enforce the contract as made.” *Citizens Bank v. C & H*

1 *Constr. & Paving Co.*, 1979-NMCA-106, ¶ 39, 93 N.M. 422, 600 P.2d 1212 (internal
2 quotation marks and citation omitted). Further, the party seeking enforcement of a
3 contract, in this case, Finley, carries the burden of persuasion. *See Farmington Police*
4 *Officers Ass’n v. City of Farmington*, 2006-NMCA-077, ¶ 16, 139 N.M. 750, 137 P.3d
5 1204.

6 {9} Before addressing the parties’ arguments on appeal, we note that Finley, as the
7 appellant, has the responsibility to provide a proper record for appellate review. *See*
8 *Brown v. Trujillo*, 2004-NMCA-040, ¶ 34, 135 N.M. 365, 88 P.3d 881 (stating the rule
9 that a party seeking review bears the burden of providing the court with an adequate
10 record to review issues on appeal); *Williams v. Bd. of Cty. Comm’rs of San Juan Cty.*,
11 1998-NMCA-090, ¶ 10, 125 N.M. 445, 963 P.2d 522 (declining to consider matters
12 not of record, noting that the appellant has a duty to provide “an adequate record
13 sufficient to review the issue on appeal”). Finley agrees that the contingency fee
14 agreements establishing a legal relationship “between the personal representative, the
15 statutory beneficiaries[,] and the lawyers would define and control the distribution of
16 the ‘proceeds of any judgment.’ ” In fact, Finley touts the importance of the
17 contingency fee agreements in this Court’s decision, conceding that “[t]he contracted
18 rights subsume any other issue in this case and inform the court on how the Wrongful
19 Death Act is to be interpreted.”

1 {10} Notwithstanding the importance he has assigned to the contingency fee
2 agreements, Finley failed to include his contingency fee agreement with Jennifer in
3 the record before this Court. Under such circumstances, we have held that, “[u]pon a
4 doubtful or deficient record, every presumption is indulged in favor of the correctness
5 and regularity of the [district] court’s decision, and the appellate court will indulge in
6 reasonable presumptions in support of the order entered.” *Reeves v. Wimberly*, 1988-
7 NMCA-038, ¶ 21, 107 N.M. 231, 755 P.2d 75.

8 {11} Our caselaw is clear that statutory beneficiaries of a wrongful death action have
9 only one collective right of action rather than separate, divisible rights of action. The
10 right of action in this context arises from the right of the deceased to bring suit; and
11 that right is transmitted to the personal representative upon the death of the decedent.
12 *See Lewis v. Dairyland Ins. Co.*, 1992-NMSC-031, ¶ 6, 113 N.M. 686, 831 P.2d 985.
13 As such, the decedent’s beneficiaries are not the proper plaintiffs in a wrongful death
14 suit. *Id.* Instead, the personal representative acting on behalf of the estate is the party
15 “entitled to recover damages on behalf of the statutory beneficiaries.” *Id.*; *see Spoon*
16 *v. Mata*, 2014-NMCA-115, ¶ 27, 338 P.3d 113 (“[T]he structure and purpose of the
17 Wrongful Death Act militates against recognizing a right by statutory beneficiaries to
18 prosecute the claim on their own behalf.”). Further, “[a]s the sole party pursuing the

1 claims, the personal representative also has the right to choose counsel.” *Spoon*, 2014-
2 NMCA-115, ¶ 27.

3 {12} Indulging every presumption in favor of the correctness and regularity of the
4 district court’s decision, *Reeves*, 1988-NMCA-038, ¶ 21, the record supports the
5 district court’s finding that Plaintiffs’ attorneys were the only attorneys retained to
6 represent the Estate and thereby collect attorney fees from recovery by the Estate.
7 Murphy was appointed as personal representative of the Estate in April 2012, without
8 any challenge from Jennifer or Finley. In fact, Jennifer, acting on behalf of Little
9 Andrae, consented to Murphy’s appointment as personal representative, renouncing
10 her right to appointment. The second amended complaint lists Plaintiffs’ attorneys as
11 counsel for the personal representative and for Calkin and her sons Casey and Kobe.
12 It also identifies Finley as counsel for Jennifer on behalf of Little Andrae, and states
13 that Little Andrae has “a separate claim for loss of consortium[.]” The record reveals
14 that in June 2013, Plaintiffs’ attorneys sent a letter to Finley in which they explicitly
15 sought to clarify Finley’s role in the representation:

16 To be clear, Ms. McGraw and I represent: (a) Dennis Murphy as
17 personal representative for the Estate . . . and (b) Lorraine Calkin,
18 individually and as next of friend of Casey and Kobe Davis, minors. . . .
19 It is our understanding that you only represent Jennifer . . . as next of
20 friend of [Little Andrae], a minor. It is also my understanding that
21 [Jennifer] intends to bring bystander claims as well as loss of consortium
22 and loss of guidance types of claims on [Little Andrae]’s behalf.

1 *Ms. McGraw and I are the only attorneys representing the*
2 *Estate If we are successful in a recovery for [the Estate], then Mr.*
3 *Murphy will be charged with dividing the monies among the wrongful*
4 *death beneficiaries pursuant to the Wrongful Death Act. It is our*
5 *understanding that Casey Davis, Kobe Davis and [Little Andrae] are the*
6 *only beneficiaries to [the Estate]. Importantly, you would not be entitled*
7 *to any attorney’s fees from the Estate . . . for your representation of*
8 *[Little Andrae].*

9 (Emphasis added.) Finley objected to these statements in a response letter dated July
10 3, 2013, requesting that the personal representative “recognize [him] as [Jennifer’s]
11 attorney on behalf of [Little Andrae,]” but conceding that he was retained “to
12 represent the interests of [Jennifer’s] minor child for damages *other than those*
13 *encompassed in the wrongful death estate,*” asking only “to be recognized by the
14 personal representative as the attorney for the child as a statutory beneficiary of the
15 wrongful death estate.” At trial, Finley’s explanation of his role in the case was even
16 more limited: “My job in this case is to show what this loss is for Little Andrae, what
17 was caused to him as far as the loss of companionship and society by this tragic
18 event.” He also notified the jury that at the end of the trial, he would ask them “to
19 award Little Andrae \$2 million for his loss of consortium claim[,]” making no mention
20 of the wrongful death claim or Little Andrae’s right to collect damages as a statutory
21 beneficiary of the Decedent. During closing arguments, Finley identified himself
22 simply as “the attorney for Little Andrae,” acknowledging that he had been an
23 observer throughout most of the trial because he “only had a part of it to put on.”

1 Finley did not litigate the wrongful death suit at trial. He presented no evidence to the
2 district court to suggest he acted on behalf of the Estate in the wrongful death suit. He
3 does not point to anything in the record other than his own arguments to demonstrate
4 that he was retained to represent the Estate. *See, e.g., In re Application of Metro. Invs.,*
5 *Inc.*, 1990-NMCA-070, ¶ 15, 110 N.M. 436, 796 P.2d 1132 (“[A]rguments of counsel
6 are not evidence.”).

7 {13} It is the district court’s duty to review a request for attorney fees and determine
8 what portion of the work done is attributable to each claim for which fees are sought.
9 *See generally Dean v. Brizuela*, 2010-NMCA-076, ¶ 18, 148 N.M. 548, 238 P.3d 917.
10 We review the district court’s ruling on attorney fees for an abuse of discretion.
11 *Garcia v. Jeantette*, 2004-NMCA-004, ¶ 15, 134 N.M. 776, 82 P.3d 947 (“An abuse
12 of discretion occurs if the decision is against the logic and effect of the facts and
13 circumstances of the case.” (internal quotation marks and citation omitted)). The
14 district court explicitly found that Finley “represented [Jennifer] on the loss of
15 consortium claim that she brought on behalf of her minor child, [Little Andrae], who
16 is one of the statutory beneficiaries of the Estate . . . and was not retained by [Jennifer]
17 for the purpose of representing the statutory beneficiary’s interest in the Estate’s
18 wrongful death action[.]” The district court made this finding based on the pleadings,
19 as the contingency fee agreement between Finley and Jennifer was not entered into the

1 record. The district court did not abuse its discretion by finding that Finley did not
2 represent the Estate and was therefore not entitled to collect attorney fees on Little
3 Andrae's one-third share of the Estate's total damages award.

4 {14} Finley's argument that because neither Plaintiffs' attorneys, nor the personal
5 representative, have any contingency fee agreement with Jennifer or Little Andrae,
6 they are precluded from collecting attorney fees from Little Andrae's portion of the
7 Estate proceeds demonstrates a fundamental misunderstanding of the law. As counsel
8 for the personal representative, the only party entitled to bring the wrongful death
9 action on behalf of the Estate, Plaintiffs' attorneys did not need to enter into a
10 contingency fee agreement with Jennifer or Little Andrae. Indeed, neither Jennifer nor
11 Little Andrae had any authority to retain counsel on behalf of the Estate. *See Spoon*,
12 2014-NMCA-115, ¶ 27 (stating that as the sole party entitled to bring a wrongful
13 death action, the personal representative is entitled to choose counsel). The evidence
14 in the record reveals that at all points throughout this litigation, it was Plaintiffs'
15 attorneys who represented Murphy in his capacity as the personal representative of the
16 Estate in the wrongful death suit, while also representing Kobe, Casey, and Calkin on
17 their derivative claims. As Jennifer renounced any right she may have had to serve as
18 the personal representative of the Estate, she also gave up any right or authority to
19 retain counsel for the Estate to prosecute the wrongful death action. Absent such

1 authority, any agreement between Jennifer and Finley to pay Finley for recovery on
2 the wrongful death claims is of no effect. Finley is therefore not entitled to collect an
3 attorney fee based on the Estate’s judgment proceeds.

4 **Statutory Beneficiary’s Right to Collect Net Proceeds or Gross Proceeds**

5 {15} Finley seeks to circumvent Plaintiffs’ attorneys’ collection of fees and
6 presumably claim his fees from Little Andrae’s share of the Estate proceeds by asking
7 the district court to order that Little Andrae’s gross share of the Estate proceeds be
8 distributed to him without any deductions for costs and attorney fees. In support of his
9 argument, Finley points to the Wrongful Death Act, which provides, simply, that
10 “[t]he proceeds of any judgment obtained . . . shall be distributed” to the beneficiaries
11 in the order as set out in the Act. NMSA 1978, § 41-2-3 (2001). The Act makes no
12 mention of gross proceeds or net proceeds. As we have previously noted, however, the
13 personal representative has the right to choose counsel to represent the Estate on the
14 wrongful death claim. *See Spoon*, 2014-NMCA-115, ¶ 27. The personal
15 representative’s right to choose counsel must also include the right to enter into an
16 agreement to pay that counsel, and we note that Rule 16-105(D) NMRA expressly
17 requires that a contingency fee agreement be in writing and provide whether expenses
18 “are to be deducted before or after the contingent fee is calculated.” Finley’s failure
19 to provide us with a complete record on appeal, namely the relevant contingency fee

1 agreements emphasizes the difficulty of addressing Finley’s arguments about the
2 deduction of costs and attorney fees from Little Andrae’s share of the recovery before
3 distribution.

4 {16} Nonetheless, we note that the record supports the district court’s finding that
5 there was no evidence the personal representative acted contrary to his statutory
6 mandate regarding distribution of the judgment proceeds by treating any of the three
7 statutory beneficiaries differently. While Finley argues that by deducting attorney fees
8 from the Estate’s proceeds prior to distributing them to the statutory beneficiaries, the
9 personal representative improperly exercised discretion not granted by the Wrongful
10 Death Act, he points to nothing in the record to indicate the statutory beneficiaries
11 received disproportionate sums from the Estate proceeds or were otherwise treated
12 unfairly.

13 **CONCLUSION**

14 {17} We affirm the district court’s decision.

15 {18} **IT IS SO ORDERED.**

16
17

JULIE J. VARGAS, Judge

1 **WE CONCUR:**

2

3 _____
LINDA M. VANZI, Chief Judge

4

5 _____
J. MILES HANISEE, Judge