

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0289**

Estate of:
Donald J. Kellett, a/k/a Donald Jean Kellett, Decedent.

**Filed August 7, 2023
Affirmed
Florey, Judge***

Hennepin County District Court
File No. 27-PA-PR-19-1453

Lezli M. Kellett, Duluth, Minnesota (self-represented appellant)

Michael J. Pfau, Mary Alice Fleming, Minneapolis, Minnesota (for respondent Christopher Kellett)

Considered and decided by Johnson, Presiding Judge; Gaitas, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

Appellant Lezli M. Kellett challenges the district court's order awarding the personal representative of the Donald J. Kellett estate attorney fees. Appellant argues the district court erred when it: (1) granted, in part, the personal representative's motion for attorney fees, (2) found the fees claimed by the personal representative's attorney fair and reasonable, and (3) denied appellant's motion for attorney fees. We affirm.

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

FACTS

Donald J. Kellett (decedent) died testate on January 22, 2019. Decedent's will and testament, dated August 31, 2010, listed appellant among decedent's beneficiaries. Decedent's will designated his wife and one of his sons as potential personal representatives of decedent's estate. The will gave decedent's wife higher appointment priority than decedent's son.

On November 15, 2019, the district court appointed an emergency guardian and conservator for decedent's wife.¹ A few days later, decedent's wife, through her conservator, signed a renunciation of priority for appointment as personal representative and renunciation of right to nominate personal representative. Then, on November 20, 2019, decedent's son filed a petition for formal probate of will and for formal appointment of personal representative (probate petition).

The district court scheduled a probate hearing for January 6, 2020. On November 27, 2019, decedent's son served notice of this hearing to interested parties, including appellant. Following the hearing, the district court formally appointed decedent's son as the personal representative of decedent's estate.²

On February 21, 2020, decedent's wife, through her conservator, challenged her capacity to have executed a deed conveying fee title in a homestead to decedent.³

¹ In the case involved in this appeal, the district court took judicial notice of the guardianship and conservatorship file.

² For the remainder of this opinion, we use "the personal representative" when referring to decedent's son.

³ In a later order, the district court explained the background of this homestead, saying:

Decedent's wife claimed she "has no recollection of having signed the deed, or for what purpose." The personal representative and the conservator later reached a settlement regarding the homestead. Among other terms, the personal representative and the conservator agreed to sell the homestead and that decedent's wife will receive 43.659% of the net proceeds.

On March 16, 2020, the personal representative filed an ex parte petition for an order authorizing release of decedent's Merrill Lynch account (release petition). The release petition stated decedent "owned an Account at Merrill Lynch, with his five children and step-children named as transfer on death beneficiaries of the account, each to receive an outright equal distributive share of the account." The release petition explained that for approximately nine months the personal representative had "repeatedly requested that the individual beneficiaries' shares be distributed to them" but that Merrill Lynch has a policy to "withhold the entire Account until written distribution instructions are received from all five beneficiaries." The release petition noted four of the beneficiaries, including the personal representative, were prepared to submit the required documentation but appellant could not be reached. The personal representative requested an order directing Merrill

[The personal representative] testified that [decedent] purchased the homestead in Plymouth, Minnesota with his funds and wanted it in his name consistent with the Will, but the deed mistakenly put the house into both [d]ecedent's and [decedent's wife]'s name as tenants in common. Upon realizing the error and with his attorney's advice, prior to [d]ecedent's death, [the personal representative], as [decedent]'s Attorney in Fact, asked [d]ecedent's wife [] to sign a deed to quit claim the home to [decedent], which she did on January 20, 2019.

Lynch to distribute the beneficiaries' individual shares and authorizing the personal representative to hold appellant's share until she could be located.

On May 25, 2020, appellant filed an objection to the release of funds and the probate petition. Appellant alleged that the personal representative failed to provide her with proper and timely notice of the January 6, 2020, hearing on the probate petition and engaged in other alleged misconduct. Appellant requested the district court hold an evidentiary hearing to determine whether she should be appointed as personal representative and whether to release the Merrill Lynch shares. Appellant also requested an order requiring the personal representative to prepare an inventory and final account for decedent's estate.

On September 11, 2020, appellant served Merrill Lynch with a subpoena, commanding Merrill Lynch to produce an expansive list of documents by September 21, 2020. Merrill Lynch objected to the subpoena, among other reasons, "on the grounds that it is overly broad and unduly burdensome because it seeks to impose an unreasonable burden and expense on [a] non-party." The personal representative also filed a motion to quash or modify the subpoena and for a protective order.

On January 5, 2021, the personal representative moved for summary judgment on the release petition itself and on the objection to the probate petition, which the district court granted on March 23, 2021. In its order granting summary judgment, the district court also denied the personal representative's previously filed motions in limine as moot "because there are no remaining issues for trial on the [r]elease [p]etition or objections to

the [r]elease [p]etition or to the [p]robate [p]etition, though the estate remains open.”⁴ The same day, the district court granted the personal representative’s motion to modify appellant’s subpoena to Merrill Lynch. The district court described appellant’s subpoena as “unreasonable or oppressive” and then “narrowed [its] excessively broad terms.”

The personal representative filed a final account and a petition to allow final account, settle and distribute estate. On April 22, 2022, the district court held a bench trial on the final account and petition to allow final account, settle and distribute estate. Important to this appeal, the personal representative testified how appellant’s objections caused a significant portion of his attorney fees.

On July 27, 2022, the district court filed its findings of fact, conclusions of law, and order. As relevant to this appeal, this order directed the parties to file motions for attorney fees, and to file any objections to the attorney-fees requests therein. Additionally, the district court found:

The Personal Representative credibly testified that the large [attorney] fees were largely necessitated by [appellant]’s numerous objections to Estate matters and by her refusal to cooperate in the wrapping up of the Estate. The court agrees that [appellant] has through her past objections and positions required a great deal of legal work as to this case. She filed an Objection to the Personal Representative’s Petition for Release of Funds, in which she objected to the release of non-probate assets to the named beneficiaries. . . . Four of the five named beneficiaries were ready for the release of the funds, but [appellant] refused. . . . [Appellant]’s position caused extensive filings and motion practice constituting over one

⁴ In anticipation of trial, the personal representative filed motions in limine requesting the district court “to preclude allegations or arguments by [appellant] that he should not be appointed as Personal Representative and to preclude references to her allegations concerning the Merrill Lynch account.”

year of litigation, from March 16, 2020 to March 24, 2021, and a total of 97 MNCIS index entries. . . . [Appellant] requested two continuances in the motion hearing date so she could do additional discovery and because she retained a new attorney. . . . [Appellant] was largely unsuccessful in her motion practice. The court did grant her requests as to her subpoena to Merrill Lynch, though the court narrowed the excessively broad terms.

The court has observed in the course of this litigation that [appellant] is litigious and has caused substantial delays in the handling of this estate. An example was her subpoena on Merrill Lynch, which required substantial motion practice, but as to which she apparently never followed through on and now again raises that issue in the Final Account proceedings. It is no wonder that the Personal Representative's attorney fees are high. The attorneys for the Personal Representative have done good quality work and have been strong advocates for their client.

The order also instructed the personal representative to file an amended final account addressing any recent changes in the account and several listed issues.

Between July 2022 and December 2022, the district court received submissions from the personal representative and appellant regarding attorney fees. In an order for written submissions, the district court noted, "The parties stipulated to this matter being considered by the Court without a hearing."

On December 19, 2022, the district court filed its order regarding attorney fees. In partially granting the personal representative's request for attorney fees under Minn. Stat. § 525.515 (2022), Minn. Stat. § 524.3-720 (2022), and relevant caselaw, the district court found the personal representative's actions benefitted the estate. The district court also determined the personal representative's requested attorney fees were fair and reasonable after considering the five factors listed in Minn. Stat. § 525.515(b). However, the district

court limited the requested attorney fees due to the insufficiency of non-exempt assets available to pay for the balance of legal services rendered for the estate.⁵

In denying appellant's request for attorney fees, the district court determined appellant's filings and objections did not benefit the estate. Instead, the district court found appellant "was actively delaying the closing of the Estate" and that she "hindered the Estate from closing."

On November 28, 2022, appellant filed a notice of appeal challenging the district court's July 27, 2022, order (A22-1683). But, on January 17, 2023, this court dismissed appellant's challenge because appellant did not serve respondent's counsel the notice of appeal within the required time period.

On February 21, 2023, appellant filed the current appeal challenging the district court's December 19, 2022, order (A23-0289). The following day, this court issued an order clarifying, "This appeal is limited to the district court's order on attorney fees and costs." The order elaborated, "Issues addressed in the district court's order of July 27, 2022, which were the subject of the dismissed appeal in A22-1683, will not be considered in this file."

⁵ The district court noted, and the record supports, that the personal representative "incurred \$89,634.52 in attorneys' fees and \$1,736.82 in costs between October 2019 and November 2022." However, the district court found the estate only had \$24,232.11 remaining in non-exempt assets, \$16,917.50 of which could be paid to the personal representative's attorneys.

DECISION

Appellant argues the district court erred when it: (1) granted, in part, the personal representative's motion for attorney fees, (2) found the fees claimed by the personal representative's attorney were fair and reasonable, and (3) denied appellant's motion for attorney fees.⁶

We review a district court's award or denial of attorney fees for an abuse-of-discretion. *In re Est. & Tr. of Anderson*, 654 N.W.2d 682, 688 (Minn. App. 2002), *rev. denied* (Minn. Feb. 26, 2003). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record." *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022) (quoting *Bender v. Bernhard*, 971 N.W.2d 257, 262 (Minn. 2022)).

The reasonableness of the hours expended by counsel and the attorney fees imposed on a request for an award of attorney fees raise questions of fact, which we review for clear error. *Kaeding v. Auleciems*, 886 N.W.2d 658, 668 (Minn. App. 2016). "We will not conclude that a fact[-]finder clearly erred unless, on the entire evidence, we are left with a

⁶ Appellant also argues the district court abused its discretion when it did not hold a hearing to address the motions for attorney fees. However, appellant did not raise this argument before the district court. Instead, the parties, including appellant, "stipulated to [the attorney fees issue] being considered by the Court without a hearing." Thus, we decline to address this argument. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also Doe 175 ex rel. Doe 175 v. Columbia Heights Sch. Dist., ISD No. 13*, 842 N.W.2d 38, 42 (Minn. App. 2014) ("It is an elementary principle of appellate procedure that a party may not raise an issue or argument for the first time on appeal and thereby seek appellate relief on an issue that was not litigated in the district court.").

definite and firm conviction that a mistake has been committed.” *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (quotation omitted).

I.

Appellant argues the district court abused its discretion when it granted, in part, the personal representative’s motion for attorney fees.

The district court granted the personal representative attorney fees under Minn. Stat. § 525.515 and Minn. Stat. § 524.3-720. Minn. Stat. § 525.515(a) indicates, “an attorney performing services for the estate at the instance of the personal representative . . . shall have such compensation therefor out of the estate as shall be just and reasonable.” Caselaw interpreting section 525.515(a) “requires *proof of a benefit to an estate* before an attorney may be paid for providing ‘services’ for the estate at the request of a personal representative.” *In re Est. of Evenson*, 505 N.W.2d 90, 92 (Minn. App. 1993) (emphasis added). However, Minn. Stat. § 524.3-720 states, in part, “Any personal representative . . . *who defends or prosecutes any proceeding in good faith, whether successful or not* . . . is entitled to receive from the estate necessary expenses and disbursements including reasonable attorneys’ fees incurred.” (Emphasis added.) Unlike Minn. Stat. § 525.515, Minn. Stat. § 524.3-720 does not require proof of a benefit when a personal representative is seeking expenses and disbursements. *Evenson*, 505 N.W.2d at 92.

Here, whether applying Minn. Stat. § 525.515 or Minn. Stat. § 524.3-720, the record demonstrates the district court did not abuse its discretion in awarding the personal representative attorney fees. As noted by the district court, the personal representative’s

attorney “settled controversies and prosecuted matters in order to move the Estate forward towards its final account and distribution.” Additionally, the personal representative’s attorney “defended the Estate against multiple motions and objections from [appellant].” The record is replete with examples of the personal representative and his attorney acting in good faith to benefit the estate, including resolving the homestead issue with decedent’s wife and pursuing the distribution of the Merrill Lynch account.

For these reasons, the district court did not abuse its discretion in partially granting the personal representative’s request for attorney fees.

II.

Appellant argues the district court clearly erred when it found the fees claimed by the personal representative’s attorney were fair and reasonable.

When there is no prior agreement in writing by the testator concerning attorney fees, as is the case here, the district court shall consider

the following factors in determining what is a fair and reasonable attorney’s fee:

- (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). The district court thoroughly explored each of these factors in determining the personal representative’s requested attorney fees were reasonable. As noted by the district court, this matter had been pending for three years, and the personal representative submitted a variety of motions which all required “gathering evidence, legal

research, and analysis, drafting the necessary pleadings, preparing for the hearing, and the hearing itself.” Additionally, the district court observed, and the record supports the conclusion that, the personal representative’s attorney likely counseled him on general matters, including “how to properly administer and manage the Estate, the resolution of a claim to the homestead by Decedent’s wife, . . . and the Merrill Lynch transfer on death accounts.” The extensive and complex nature of this litigation required the personal representative, and his attorney, to assume a significant amount of responsibility.

After careful review, nothing in the record leaves us “with a definite and firm conviction that a mistake has been committed.” *Kenney*, 963 N.W.2d at 221. Thus, the district court did not clearly err when it found the fees claimed by the personal representative’s attorney were fair and reasonable.

III.

Appellant argues the district court abused its discretion when it denied appellant’s motion for attorney fees.

To evaluate appellant’s argument, we must return to Minn. Stat. § 524.3-720. The latter part of Minn. Stat. § 524.3-720 states:

When . . . a claim is made against the personal representative on behalf of the estate and any interested person shall then by a separate attorney prosecute or pursue and recover such fund or asset *for the benefit of the estate*, or when, and to the extent that, the services of an attorney for any interested person contribute *to the benefit of the estate*, as such, as distinguished from the personal benefit of such person, such attorney shall be paid such compensation from the estate as the court shall deem just and reasonable and commensurate *with the benefit to the estate* from the recovery so made or from such services.

(Emphasis added.) The public policy underlying this statute “recognize[s] that an estate as an entity is benefited when *genuine controversies* as to the validity or construction of a will are litigated and finally determined.” *In re Est. of Torgersen*, 711 N.W.2d 545, 555 (Minn. App. 2006) (emphasis added) (quotation omitted), *rev. denied* (Minn. June 20, 2006). But the actions of an interested person for their own personal benefit, not the benefit of the estate, do not warrant attorney fees. *See Anderson*, 654 N.W.2d at 689 (affirming the denial of attorney fees to a beneficiary because her legal actions “would have been to her personal benefit as a beneficiary, for which section 524.3-720 does not allow reimbursement”).

Here, the record amply supports the district court’s determination that appellant’s actions did not benefit the estate. Of the beneficiaries, only appellant withheld consent to the Merrill Lynch account’s distribution and opposed the personal representative being appointed. As summarized by the district court, appellant’s stance “caused extensive filings and motion practice constituting over one year of litigation, from March 16, 2020, to March 24, 2021, and a total of 97 MNCIS index entries.” Appellant’s objections “largely necessitated” the significant attorney fees now awarded to the personal representative. Indeed, appellant’s conduct bear several indicia of frivolousness. For example, appellant filed a subpoena with “excessively broad terms,” which required “substantial motion practice.” Furthermore, appellant failed even to prosecute the subpoena after the district court narrowed its scope to relevant documents. Appellant’s conduct supports the district court’s finding that she “is litigious and . . . caused substantial delays in the handling of this estate.”

While “genuine controversies” may benefit an estate, *Torgersen*, 711 N.W.2d at 555, the undue delay seen here did not benefit the estate. For these reasons, the district court did not abuse its discretion when it denied appellant’s motion for attorney fees.

Affirmed.