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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-448**

In the Matter of the Guardianship and Conservatorship of:
William D. Hohenauer, Ward.

**Filed February 2, 2010
Affirmed in part, reversed in part, and remanded
Minge, Judge**

Aitkin County District Court
File No. 01-P9-03-000584

Thomas C. Pearson, Gammello, Qualley & Pearson, PLLC, Baxter, MN (for appellants
Peterson)

Erik A. Christensen, Aitkin, MN (for respondent Hohenauer)

Considered and decided by Toussaint, Presiding Judge; Minge, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant guardians and conservators of ward William D. Hohenauer challenge the district court's order disallowing their accounts and certain fees and expenses paid to them out of the ward's estate. We affirm in part, reverse in part, and remand.

FACTS

On November 4, 2003, the district court in its capacity as the probate court¹ appointed appellants Paul and H. Frances Peterson as guardians and conservators of William Hohenauer. Hohenauer was not indigent. He was restored to capacity on December 1, 2006. Acting as conservators, appellants cancelled bank certificates of deposit totaling approximately \$250,000 and invested the proceeds in annuities with substantial sales commissions and charged various expenses to and paid their claimed fees out of Hohenauer's estate. Between 2003 and 2006, appellants filed three annual accounts with the district court administrator, detailing their fees and expenses. The fees and expenses in the three accounts totaled \$29,977.52 plus an additional \$4,232.72 for mileage. Initially, appellants did not move for approval of their accounts, and no action was taken.

In April 2008, the district court ordered appellants to show cause as to why the fees and the annual accounts should not be disallowed as excessive. In October 2008, a hearing was held on the order to show cause. At the outset of the hearing, the district court explained that the purpose of the hearing was to address the order to show cause. Appellants and their counsel were present at the hearing and testified. The ward and his counsel were also present.

In an order dated December 30, 2008, the district court entered extensive findings of fact, conclusions of law, and a detailed order. In its findings, the district court

¹ Because there is no longer a separate probate court system in Minnesota and district courts exercise all the functions of the probate court, the term "district court" will be used interchangeably for "probate court."

summarized portions of the Service Fee Policy for Guardians and Conservators adopted by Aitkin County Health and Human Services (Service Fee Policy) and of the Standards of Practice adopted by the Minnesota Association for Guardianship and Conservatorship (Standards of Practice). The district court also found that the billing records that appellants had submitted were “extremely disorganized and inaccurate,” refused to accept the three annual accounts, required appellants to submit accurate and proper annual accounts, directed appellants to repay \$15,000 in disallowed fees, and ordered appellants to provide specifics about certain annuity investments.² Although the district court provided detailed reasons for a portion of this determination, the district court disallowed a lump sum of \$11,750 as “excessive, unreasonable and unnecessary.”

The district court set March 15, 2009 as the date by which “accurate and proper” accounts had to be submitted and annuity purchases explained and the disallowed fees and expenses repaid.

No judgment has been entered. Appellants have not requested reconsideration or amended findings, filed or submitted a petition for allowance of modified accounts, or requested that the district court allow comment on or reopen the record to address matters contained in its December 30, 2008 order. This appeal followed.

² Because appellant does not appeal anything related to the annuities and the district court did not further address the annuities in its December 30 order, we do not consider them in this opinion.

DECISION

I.

At the outset, we address on our own initiative the question of whether the district court's order is appealable. Generally, appeals may only be taken from a final judgment. Minn. R. Civ. App. P. 103.3(a). However, the rules also permit appeals from orders or decisions that by statute are appealable. *Id.* at 103.3(j). The probate code provides that appeals may be taken from

(9) an order allowing, or refusing to allow, an account of a representative or any part of it when the amount in controversy exceeds \$100; . . . [or]

(15) an order made directing, or refusing to direct, the payment of representative's fees . . . , and in such case the representative . . . shall . . . be deemed an aggrieved party and entitled to appeal.

Minn. Stat. § 525.71(a) (2008). A guardian or conservator is a "representative." Minn. Stat. § 525.80 (2008).

Here, appellants had been serving as guardians and conservators. The district court unequivocally disallowed certain fees and charges in an amount exceeding \$100. These specifically include: a \$250-per-month base fee, a \$50-per-hour rate for guardian/conservator services, and an \$11,750 lump sum. Such action has a final-determination character. However, at the same time, the district court ordered appellants to resubmit their accounts, which arguably allowed the possibility that the district court's consideration of the accounts and fees would be reconsidered based on resubmitted accounts.

Based on the final nature of the district court rulings disallowing more than \$100 of certain of appellants' fees, we conclude that the district court's December 30, 2008 order is appealable. Accordingly, we proceed to consider the objections raised by appellants to this order. In engaging in this review, we recognize that the district court had not completed its consideration of significant aspects of the proceeding.³

II.

The second issue is whether the district court erred in considering sua sponte the Service Fee Policy setting the appropriate fees to be charged when a guardian represents an indigent ward in Aitkin County and the Standards of Practice promulgated by the Minnesota Association of Guardianship and Conservatorship. Generally, district courts do not gather their own evidence. *See Claesgens v. Animal Rescue League, Inc.*, 173 Minn. 61, 63, 216 N.W. 535, 536 (1927). But a district court may take judicial notice of adjudicative and legislative facts. Minn. R. Evid. 201. The rule provides that:

(a) **Scope of rule.** This rule governs only judicial notice of adjudicative facts in civil cases.⁴

³ We recognize that persons wishing to challenge certain probate determinations proceed at their risk if they do not appeal an order which they deem interim but which this court determines is appealable. In such situations, failure to timely appeal will result in loss of the right to obtain appellate review. *See In re Estate of LeBrun*, 458 N.W.2d 139, 143 (Minn. App. 1990) (refusing to consider the district court's interlocutory order for maintenance, an appealable order under Minn. Stat. § 525.71(6), because the time for appeal of that order had expired). We also recognize that this matter has been briefed by appellants and considered by this court and that further delay and expense in the consideration of the issues should be avoided. *See* Minn. R. Civ. App. P. 105.01 (allowing discretionary review in the interest of justice); *Gordon v. Microsoft Corp.*, 645 N.W.2d 393, 398 (Minn. 2002) (interpreting rule 105.01).

⁴ Probate proceedings are sufficiently "civil" in nature to be subject to the rules of evidence. *See Payne v. Lee*, 222 Minn. 269, 278, 24 N.W.2d 259, 265 (1946) (stating that "[w]here judicial functions are involved in probate proceedings, a probate judge, like

(b) **Kinds of facts.** A judicially noticed [adjudicative] fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When discretionary.** A court may take judicial notice, whether requested or not.

(d) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing jury.** The court shall instruct the jury to accept as conclusive any fact judicially noticed.

Id.

Although the rules do not define the phrase adjudicative facts, the committee comment does:

Adjudicative facts generally are the type of facts decided by juries. Facts about the parties, their activities, properties, motives, and intent, the facts that give rise to the controversy, are adjudicative facts.

Minn. R. Evid. 201 1989 comm. cmt.; *see also* Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 402 (1942) (defining adjudicative facts as “facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were”).

a judge in any other civil proceeding, is subject to disqualification”); *see also* Minn. R. Evid. 1101 (stating that the rules of evidence apply to “all actions and proceedings in the courts of this state” with certain exceptions that do not include probate proceedings).

The process for taking judicial notice of *legislative* facts is not addressed by rule, nor is the term defined. See Minn. R. Evid. 201 1989 comm. cmt. One court offered this definition: “Legislative facts . . . do not relate specifically to the activities or characteristics of the litigants. A court generally relies upon legislative facts when it purports to develop a particular law or policy and thus considers material wholly unrelated to the activities of the parties.” *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976); see also Davis, *supra*, at 403, 406 (defining legislative facts as those that inform a court’s judgment about matters of law and policy, and asserting that the restrictions on a court’s ability to take notice of adjudicative facts are “wholly inappropriate for legislative facts”). Unlike adjudicative facts, “[l]egislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally.” *Gould*, 536 F.2d at 220. Legislative facts are “generally confined to social and socioeconomic data on which courts may rely in considering expediency and public policy.” *Faribault-Martin-Watonwan Human Servs. ex rel. Jacobson v. Jacobson*, 363 N.W.2d 342, 345 (Minn. App. 1985).

It is an everyday practice of courts to take notice of legal materials such as statutes, caselaw, regulations, ordinances, treatises, and law review articles. Indeed, judicial notice must be taken of certain types of rules or regulations, such as those that were created pursuant to an agency’s statutory authority. See *Bunten v. E. Minn. Power Co.*, 178 Minn. 604, 612, 228 N.W. 332, 335 (1929) (ruling that it was “the duty of the court to take judicial notice of” rules and regulations adopted by a state railroad and warehouse commission pursuant to its statutory authority).

A. *Service Fee Policy*

Here, the district court order included findings that summarized provisions of the Service Fee Policy and the Standards of Practice. Although the district court took notice of these provisions after the hearing, the actual documents do not appear in the record. Appellants assert that they were not aware of the district court's consideration of these materials until they received its decision. The Service Fee Policy represents a position taken by Aitkin County regarding the appropriate fees to be charged when a guardian represents an *indigent* ward, and the policy is referenced in the statutes. Minn. Stat. § 524.5-502 (2008). The statutory reference is significant because it puts parties on notice that such a policy exists and because the policy is the official action of a governmental body adopted incident to statute. As an official governmental policy, we conclude that it was not error for the district court to take notice of the Service Fee Policy.

However, as stated previously, the Service Fee Policy applies to conservators and guardians of *indigent* wards. Because the record indicates that Hohenauer was not indigent, automatic application of the Service Fee Policy to fees for Hohenauer's estate would be error. It is not clear whether the district court concluded that the Service Fee Policy governed appellants' fees or was simply persuasive. Regardless, the Service Fee Policy was prominently summarized, and its \$35-per-hour cap on fees was imposed. We conclude that it was error for the district court not to give appellants the opportunity to

comment on the appropriateness of applying the policy for indigent wards to fees for a non-indigent ward and not to specify its significance to the decision.⁵

B. Standards of Practice

In contrast to the Service Fee Policy, the Standards of Practice are published by a not-for-profit organization with members from three states—Minnesota, North Dakota, and Wisconsin.⁶ When industry custom or practice is in dispute, in the absence of evidence, it should not be the subject of judicial notice. *Nadherny v. Roseland Prop. Co.*, 390 F.3d 44, 51-52 (1st Cir. 2004). Although the existence of the Standards of Practice does not appear to be subject to any reasonable question, its function in setting standards for compensation, recordkeeping, and billing for guardians and conservators directly bears on the ultimate factual issue in this proceeding. Because they are not uniquely applicable to this case, the Standards of Practice are not appropriately classified as adjudicative facts under rule 201. Furthermore, because they do not constitute established truths or data or establish part of the larger framework for judicial decision-making in our society, they are not legislative facts. Finally, because they are akin to an expert opinion by a non-official organization about the Standards of Practice, it was error to take judicial notice of them.

Additionally, regardless of the characterization of the Standards of Practice, the Standards should have been made part of the record and appellants should have been

⁵ It does not appear that appellants requested that the district court afford them an opportunity to challenge the Service Fee Policy. We do not reach the question of whether such a request is a prerequisite to raising this claim of error on appeal.

⁶ The Minnesota Association for Guardianship and Conservatorship (MAGiC), <http://www.minnesotaguardianship.org/> (last visited January 15, 2010).

afforded the opportunity to address them as they were central to the district court's decision. *See State v. Friberg*, 435 N.W.2d 509, 514 (Minn. 1989) (stating that, while the district court's judicial notice that its calendar was crowded was not erroneous because it was supported by the record and unchallenged by either party, "it would have been a better practice for the [district] court to specifically state its intention to take judicial notice of certain facts"); 2 Richard J. Pierce, Jr., *Administrative Law Treatise* §10.6, at 959 (5th ed. 2010) (stating that more procedural protection is needed for "facts that importantly affect the decision than for critical or background facts"). It was error for the district court to consider the Standards of Practice in the manner that it did.

C. Conclusion

We remand with instructions that the district court: (1) include the Standards of Practice and Service Fee Policy in the record; (2) afford appellants an opportunity to challenge the persuasiveness of the Standards of Practice and the Service Fee Policy and to introduce other relevant evidence of Standards of Practice and fees; and (3) in its discretion, otherwise reopen the record.

III.

The final issue raised in this appeal is whether the district court improperly disallowed certain claims for compensation and expenses. Because we are reversing and remanding on the judicial-notice issue, appellants will have an opportunity to address the application of the Service Fee Policy and the Standards of Practice to the various accounts, fees, and expenses disallowed. Although we do not prejudge the final determination of the district court regarding these matters on remand, we recognize that

the district court has provided a detailed determination and that appellants have briefed and argued and that this court has considered certain specifics in this appeal. Accordingly, we will generally address certain charges and disallowance determinations.

As previously stated, the allowance of fees is a matter of discretion for the district court. *Baumgartner*, 274 Minn. at 346, 144 N.W.2d at 580. The district court's findings will not be disturbed unless this court, after reviewing the evidence, "is left with the definite and firm conviction that a mistake has been committed." *In re Estate of Congdon*, 309 N.W.2d 261, 266 n.7 (Minn. 1981) (quotation omitted). A district court's decision as to the reasonable value of a conservator's or guardian's services is a question of fact that will not be set aside unless clearly erroneous. *In re Conservatorship of Mansur*, 367 N.W.2d 550, 552 (Minn. App. 1985), *review denied* (Minn. July 11, 1985).

Regardless of the factors, the allowance of fees depends on the district court's determination that the guardians/conservators rendered necessary services or incurred necessary expenses for the benefit of the ward. Minn. Stat. § 524.5-502(c). The burden of providing evidence to support fee requests lies with the guardian/conservator. *See Butt v. Schmidt*, 747 N.W.2d 566, 576 (Minn. 2008) (stating that a party in exclusive possession of evidence has the burden to produce that evidence). In determining the reasonableness and documentation of fees for guardians and conservators, we note that the district court's task is difficult. Other than such material as the Service Fee Policy and Standards of Practice, there apparently is a paucity of guidance on this question in this state.

However, the district court's task here is similar to ruling on attorney fees in estate matters. In that setting, the probate statutes set forth the basic rule that fees must be "just and reasonable" and establish a five-factor guide:

- (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) (2008).

A. Generally

Appellants contend that the district court abused its discretion in refusing to allow a large portion of their fees. The grounds for the district court's determinations and appellants' challenges are primarily lack of organization, inaccuracies, lack of specificity, errors, irregularities, unacceptable hourly rates and monthly flat fees, accounting errors, and generally excessive fees. After reviewing the record, including appellants' accounts and billing statements, we agree with the district court that appellants' billings contain numerous irregularities and vague and imprecise billing entries. There are numerous entries with little or no explanation in the "Purpose" heading, as well as entries where there are charges for mileage but there are no miles listed under the "Miles" heading. There are three charges that are almost identical in two different months. There is a July 20, 2005, entry that is charged twice. In some billing statements, charges for hours or mileage are calculated at rates other than those stated in the statements. Furthermore, appellants charged for the creation of a special needs trust, but there is no evidence that

such a trust was ever created. If after hearing further from appellants regarding the Standards of Practice, Service Fee Policy, and such other matters as the district court deems timely and relevant, the district court determines that the accounts are inaccurate and disorganized and fees improper, we conclude that it would not be an abuse of discretion for the district court to disallow such fees and accounts.

B. Monthly Fee

Appellants also argue that the district court abused its discretion in disallowing appellants' monthly "base fees." Appellants billed Hohenauer's estate \$250 per month for 13 months for what appellants described as "de minimis charges." At appellants' varying charges of \$35 and \$50 per hour, these "base fees" represent several hours per month of work for tasks that appellants characterize as too small to itemize. The district court noted that there are several entries with small charges, in addition to the \$250 base fee for small charges.

Given appellants' failure to demonstrate that their "base fees" represent any work they performed for Hohenauer or that such work cannot be properly itemized, we conclude that the district court's refusal to allow these fees is not necessarily an abuse of discretion. However, we also note that the Service Fee Policy estimates that only one or two hours per month is appropriate for indigent wards. To the extent that the reasonableness of this disallowance is affected by matters submitted and arguments made on remand, the district court shall modify its determination.

C. Hourly Fee

Next, appellants challenge the district court's determination that they could not charge more than \$35 per hour for their services, rather than the increased rate of \$50 per hour that they claimed for part of their services. A district court's finding as to the reasonable value of a conservator's or guardian's services is a factual determination that will not be set aside unless clearly erroneous. *Mansur*, 367 N.W.2d at 552. Clear error exists when the district court's findings are not supported by the evidence. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 102 (Minn. 1999). As previously discussed, the statute provides that "[i]n determining compensation for a guardian or conservator of an *indigent* person, the court shall consider a fee schedule recommended by the Board of County Commissioners." Minn. Stat. § 524.5-502(c) (emphasis added).

In determining appellants' reasonable rate to be \$35, the district court appears to have relied on the Service Fee Policy for indigent wards. Hohenauer was not indigent and the relevance of the policy is an issue on remand. In addition, we recognize that appellants' compensation should include consideration of their expertise and knowledge and the difficulty of the work involved. *See* Minn. Stat. § 525.515(b). We note that not all services provided to the ward are necessarily of the same character. Some services may require more expertise than others, and the district court has discretion to make that determination. After consideration of the record and arguments on remand, the district court has discretion to redetermine the proper rate(s) of compensation.

D. Flat Sum

Appellants further argue that the district court erred in disallowing a flat sum of \$11,750. The findings and conclusions of a district court must be “detailed, specific and sufficient enough to enable meaningful review by this court.” *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). Appellants assert that this generalized reduction prevents them from determining what precisely was rejected and preparing revised final accounts that would be sufficient. In disallowing this amount, the district court stated only that it found “numerous billing entries” to be “excessive, unreasonable, and unnecessary for services and expenses as described in the above Findings of Fact.”⁷

As described above, appellants’ accounts and billing statements contain numerous irregularities. We do not conclude that those shortcomings do not justify the \$11,750 reduction. But the district court does not state specifically which of appellants’ charges it is disallowing, and it is not certain from the record which of appellants’ entries comprise this \$11,750 amount. While the district court found appellants’ billings to be “extremely disorganized and inaccurate,” it is not possible for this reviewing court to determine whether the district court could reasonably be more specific based on the record before it

⁷ We previously noted the district court’s criticism of appellants’ decision to transfer approximately \$250,000 of the ward’s money from Certificates of Deposit to Equity Index Annuities. It observed that the 12.5% sales commission would reduce the ward’s estate by \$30,000 and that given the ward’s age and health the investment may not have been prudent. It is not clear from the record if the district court considered this transaction when disallowing the lump sum from appellants’ accounts. While we do not comment on the prudence of disallowing portions of the accounts based on these transfers, we note that upon remand any reliance on these investments as improper should be clarified by the district court.

or whether a generalized adjustment was the only practical way for the district court to proceed. We therefore reverse and remand on this \$11,750 disallowance with instructions to clarify the relationship of this adjustment to other disallowed or criticized charges and otherwise allocate the disallowance fees or to make findings that such specificity is not possible.

On remand, the district court may, in its discretion, reopen the record for additional evidence regarding appellants' fees, services, and accounting. In addition, the district court shall complete its work in receiving and acting on such accounts as it orders refiled and order such additional accountings and such repayment of fees and expenses as it determines proper.⁸

In closing, this reviewing court observes that the district court in this proceeding carefully reviewed accounts and fees to insure that the estate of an incapacitated person was not improperly depleted. We commend the district court for its diligent work and appreciate the significant time it spent reviewing accounts and billing statements.

Affirmed in part, reversed in part, and remanded.

Dated:

⁸ As previously discussed, at the time of this appeal, the district court had not completed its consideration of significant aspects of this proceeding. The record does not disclose any motion by appellant to obtain district court consideration of the issues raised on appeal. Possibly such a request of the district court would have resolved issues that were raised in this appeal.