State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

Court File No.: 27-CV-21-4767
Honorable Bridget A. Sullivan

In the Matter of the Appointment of a Trustee for the Next of Kin of Daunte Demetrius Wright,

Decedent.

Order for Distribution of Wrongful Death Proceeds

THIS MATTER came before the undersigned for an evidentiary hearing on October 7, 2022, on the Trustee's Petition for Distribution of Wrongful Death Proceeds; a motion to compel was also heard at that time. After the hearing, the Court ordered the attorneys for the Trustee and the Trustee to file and serve redacted versions of their time records. On October 28, 2022, the Court ordered that the attorney's fees and Trustee's time records be filed unredacted in camera. On December 15, 2022, the Court issued a second order clarifying its previous order regarding the filing of redacted and unredacted billing records. Thereupon, Court deemed the matter taken under advisement.

Appearances were as follows:

Eric Newmark, Esq., of Newmark Storms & Dworak for the Trustee.

William Skolnick, Esq., of Skolnick and Bardwell for the Objector Chyna Whitaker

SUMMARY OF THE FACTS

1. Daunte Wright's death and the Appointment of a Trustee for the Next of Kin

On April 10, 2021, twenty-year-old Daunte D. Wright ("Wright") was killed by then-Brooklyn Center Police Officer Kimberley Potter during a traffic stop. The reason for the stop, at least initially, was Wright's suspected crime of having expired registration tags on his car.[1] The rest of the traffic stop and the events immediately prior to Wright's death are well-known. A jury found Potter guilty of both first and second-degree manslaughter on December 23, 2021.

On April 20, 2021, ten days after Wright's death, his parents, Katie Bryant and Arbuey Wright ("Wright Sr."), filed a Petition for Appointment of Trustee pursuant to Minn. Stat. § 573 (the "first Petition") through their counsel, Jeff Storms, Esq., of Newmark Storms, Dworak LLC (the "NSD law firm"). In their memorandum in support of the first Petition, Bryant and Wright Sr. requested attorney Lisa Brabbit be appointed Trustee and stated that as Trustee, Brabbit intended to employ the NSD law firm, Ben Crump Law, and the Romanucci & Blandin, LLC law firm ("Petitioners' Counsel") "to serve as counsel for the trustee in this matter, *subject to appropriate motions for pro hac vice for the out-of-state firms."*[2] *See* Mem. in Supp. of Pet. to Appoint Trustee 3 (May 3, 2021) (emphasis added). The parents also filed waivers from all of Wright's next of kin except Chyna Whitaker ("Whitaker"), the mother and guardian of Wright's only child, Daunte Wright Jr. ("Daunte Jr."), who was approximately 1.5 years old at the time of his father's death. Wright's next of kin include Daunte Jr., his parents, three full siblings, and four half siblings. Wright's grandparents did not submit waivers and are not seeking any distribution.

[1] *See* https://www.nytimes.com/article/daunte-wright-death-minnesota.html

[2] Ben Crump never filed a petition to be admitted pro hac vice. And no one from the Romanucci firm filed such a petition until July 2022.

On May 20, 2021, Whitaker filed an objection to the Petition. She objected to the appointment of Lisa Brabbit as the sole trustee and to Ben Crump's proposed representation of the Trustee. Whitaker also filed her own petition to be a co-trustee with Brabbit. In her Objection, Whitaker stated attorney Ben Crump had originally represented her, but she ended his representation because she thought he was favoring the Wright family at the expense of her son. She thought this because Crump allegedly told her the wrongful death proceeds would be split 50/50 between Daunte Jr. and the rest of Wright's next of kin and because she thought Crump had a conflict of interest from his previous representation of her. She also accused Crump of offering her cash after she terminated his representation of her in order to persuade her to join Wright's next of kin in seeking to have Brabbit appointed as the trustee and the three law firms named above retained as counsel.[3] Finally, she objected to Brabbit as Wright's parents chosen trustee because of Brabbit's close (if not cozy) relationship with the NSD law firm from several previous instances when Brabbit served as a Trustee on Mr. Storm's wrongful death cases, including one case where Brabbit's husband was co-counsel with Mr. Storms. *See* Obj. to Appointment of Trustee (May 20, 2021).

There is profound animosity between Wright's family and Whitaker. Nothing in the record explains the origin of this animosity, but it is severe and has pitted the "two sides" against each other in this matter. In fact, Whitaker was physically assaulted by Wright's sister, Diamond Wright at the Hennepin County Government Center at the sentencing for Kimberley Potter. Diamond Wright was charged with assault on June 15, 2022, and later pled guilty to Fifth-Degree Assault.[4] Whitaker also alleges that on another occasion, Arbuey Wright attempted to forcibly remove

[3] She attached a text message from someone working for Ben Crump stating Al Sharpton was in Minneapolis and had a check for her. Exhibit 6 to her Objection.
[4] *See State v. Wright*, 27-CR-22-6787.

Daunte Jr. from her arms. Whitaker is currently pursuing Katie Bryant, Arbuey Wright, and Ben Crump for fraud and misrepresentation based upon statements they allegedly made in connection with the approximately one million dollars raised in the GoFundMe campaign Bryant, Wright Sr., and Crump set up immediately after Wright's death. Specifically, she alleges the GoFundMe page for Wright states the funds would be split 50/50 between Daunte Jr. and Wright's other family members, but she has not received any of the money.[5]

On May 24, 2021, the Court held a hearing on the appointment of the Trustee. Jeff Storms, Esq., appeared for Wright's parents and siblings and Thomas Bowers, Esq., appeared for Whitaker. After hearing arguments from counsel, the court stated on the record it was appointing Brabbit as the Trustee because of her credentials as an assistant dean of a law school and her previous experiences as a trustee. The court stated it was denying the co-petition of Whitaker for two reasons: (1) the high degree of animosity between Whitaker and the Wright family would make a co-trusteeship unmanageable; and (2) there was no need for additional lawyers on the case (the co-trustees would each have their own set of lawyers) to consume a portion of the wrongful death proceeds.

The Court issued its written order on May 25, 2021. Whitaker appealed the Court's denial of her petition to be co-trustee on July 23, 2021. The court notes here that the NSD law firm characterized the appeal as "just short of frivolous." *See* Newmark Aff., Ex. E (Sept. 30, 2022). The Court of Appeals, in a brief opinion, denied the appeal on March 29, 2022, and entered judgment on May 11, 2022. The relevance of the appeal's lack of merit is discussed below in the section on attorney's fees and costs.

[5] *See Whitaker v. Bryant*, 27-CV-22-14328.

2. The Trustee and the Legal Services Agreement

As stated above, the Petition requested Brabbit be appointed as a neutral trustee "with the understanding that Ms. Brabbit shall retain the law firms of Newmark Storms Dworak, LLC, Ben Crump Law, and Romanucci & Blandin LLC ("Romanucci law firm") to serve as counsel on this matter." *See* Mem. in Supp. of Pet. to Appoint Trustee 3.

On May 27, 2021, Brabbit signed a "Retainer Agreement" with the NSD law firm, Ben Crump Law, PLCC, and Romanucci & Blandin, LLC. The "Fee and Fee Splitting" paragraph of the Retainer Agreement provides that the three law firms will receive a 40% fee of the gross amount recovered from any settlement or trial, and the 40% fee will be split 1/3, 1/3, 1/3 between the three law firms. *See* Pet. for Distribution of Proceeds, Ex. B. The Retainer Agreement also provides that the three law firms will be paid for all their "out of pocket costs" in addition to the 40% fee. *Ibid*.

Brabbit never considered hiring a different law firm or negotiating a better fee for the next of kin. She testified she retained these three law firms because of their "significant experience in handling wrongful death cases, civil rights cases, and cases of this nature, and they had a track record of being quite successful in doing so." Evid. Hr'g Tr. 21:16–19 (Nov. 9, 2022). When questioned by the court whether she, as Trustee, and as an attorney had considered whether she could have negotiated a better fee agreement with the three law firms, she said she did not. Rather, she stated: "[T]hese cases are handled on a contingency fee and this is generally how the fee that generally lawyers have on a contingency fee. I thought about it in terms of contingency fee being the closest thing to public service in the private sector because it's an access issue." *See id.* at 100:10-14. She further stated she did not consider whether she could have negotiated a settlement

directly with the City of Brooklyn Center herself and thus saved the next of kin from having to pay 40% of any settlement proceeds with attorneys. *Id*. at 101:3–8.

Brabbit's failure to consider negotiating a better retainer agreement is concerning. She is a lawyer, a former personal injury attorney, and she knew or should have known that this case would settle without litigation as discussed further below. Thus, Brabbit should have been more protective of the best interests of the next of kin rather than passively accepting the Retainer Agreement and the 40% contingency fee that the Petitioners' Counsel presented to her.

The Romanucci law firm did not move to be admitted to practice in the State of Minnesota until July 1, 2022. Ben Crump never filed a pro hac vice motion to practice in Minnesota, and he withdrew from representation of the Trustee in the Spring of 2022 after Chyna Whitaker demanded that he withdraw based upon his previous representation of her. *See* Newmark Aff., Ex. G (Sept. 30, 2022). After he appeared in Minneapolis immediately after Wright's death, he seems to have disappeared from the case. Indeed, there are less than a handful of legal services billing entries from the other two law firms' billing records indicating any involvement by Ben Crump.

3. <u>The Work of the Trustee and the Three Law Firms</u>

Between the day Wright died, April 11, 2021, and May 11, 2022, the date upon which the Court of Appeals entered judgment on its decision affirming the appointment of Brabbit as the Trustee, the NSD law firm recorded approximately $253,285 worth of billable time.[6] Aside from a small amount of time devoted to settlement discussions with the attorney for the City of Brooklyn Center, most of the NSD firm's recorded time had only a tangential connection, if any at all, to the appointment of the Trustee, the appeal of this Court's Order appointing the Trustee, representation

[6] The firms recorded their work on this matter as they would a case in which they would bill a client by the hour.

of the Trustee in settlement discussions, legal research related to issues such as official immunity in wrongful death cases involving police killings, limits on liability for municipalities in Minnesota, or preparation of the Petition for Wrongful Death Proceeds.

These "billings" of the NSD law firm include attending Wright's funeral, arranging "transportation for family and counsel" to the funeral, preparing Katie Bryant for her multiple television appearances, telephone calls with U.S. Senator Amy Klobuchar and Representative Ilhan Omar, preparing for congressional phone calls and State House testimony, meeting with Attorney General Keith Ellison, preparing the family for meeting with Ellison, reviewing Al Jazeera news articles, helping Katie Bryant draft a letter to Governor Walz, attending to "public relations" and legal strategy of a potential lawsuit by Caleb Livingston against the estate of Daunte Wright, etc.[7] There are many other such entries. In sum, these entries reflect the NSD law firm, in addition to representing the Trustee, spent a significant amount of time acting as the personal attendants and public relations strategists for the Wright family, most primarily for Katie Bryant.

Regarding the "Livingston matter," the NSD law firm spent a significant number of hours attending to this matter.[8] The Livingston matter is an on-going legal action in Hennepin County Court against the Estate of Daunte Wright by the mother of Caleb Livingston. In her lawsuit, Livingston's mother alleges that on May 19, 2019, at a gas station on Lowry Ave. N. in Minneapolis, Wright shot Livingston in the head.[9] The gunshot left Livingston paralyzed and with "unresponsive wakefulness syndrome." Caleb Livingston died in October of 2022.[10] The NSD

[7] *See LeMay v. Estate of Wright*, Court File 27-CV-21-6193, filed May 4, 2021.
[8] In the NSD law firm billing records, this is referred to as the "Padden/Lemay filing," "Livingston," "Padden," and "Lemay."
[9] *See* Complaint in case # 27-CV-21-6193.
[10] *See* https://www.foxnews.com/us/daunte-wright-victim-dies-18-months-after-suspected-shooter-killed-police-involved-shooting-lawyer-saysnewpaper article

firm billed time conducting legal research and discussing whether the proceeds of any wrongful death action against the City of Brooklyn Center would be subject to a collectable judgment in the Livingston case despite clear law indicating that this could not happen.[11] Nevertheless, throughout the duration of this case, the NSD law firm devoted significant time conferring with Katie Bryant and each other about the "media strategy" and other issues related to the Livingston case and communicating with the attorney representing Livingston's mother.

Another significant portion of the work of the NSD law firm's recorded time was observing every detail of the prosecution, conviction, and sentencing of Potter, and again, primarily in concert with Katie Bryant. The NSD law firm recorded tens of thousands of dollars of legal time on the Potter trial, including analysis of "witness issues" in the murder trial of Kim Potter, "analysis and attendance" at the murder trial including attending the voir dire of the jury pool for the trial, researching sentencing outcomes for Potter, and even attending to the Wright's family's seating arrangements at the trial. The court finds that very little of this work, if any, furthered the Trustee's legal position in pursuing a wrongful death claim against the City of Brooklyn Center or strengthened its negotiating position in settlement discussions with the City of Brooklyn Center. It is impossible to find otherwise because: (1) The NSD's meetings and communications with the state's attorneys prosecuting Kimberley Potter cannot have affected or influenced the state's trial strategy, the state's charging decision, or the outcome of the trial; (2) there are far more efficient ways to observe and study a criminal trial than attend the entire proceedings or watch the complete proceedings on video, e.g., reading transcripts of only the relevant portions of the trial; and (3) the

[11] *Compare* Minn. Stat. ch. 573 *with* Minn. Stat. ch. 524. These separate statutory frameworks for survivability of actions against a deceased person and for wrongful death actions by next of kin make clear that suits against a deceased person are filed against the estate of the deceased not against the next of kin and any creditor, such as a judgment creditor, only has an action against the legatees of the deceased.

City of Brooklyn Center made it very clear six week after Wright's death, if not earlier, and over six months before the Potter trial that it fully intended to settle the case without litigation.

The Romanucci law firm during this approximate timeframe, April 11, 2021, to April 30, 2022, recorded legal services of $39,375. For this time period, the Romanucci firm also included time entries that were tangential to the Trustee matter including attendance at Wright's visitation and funeral, secretarial tasks, communications with civil rights organizations in Minneapolis on policing resolutions and legislation, duplicate work that the NSD was performing (e.g., researching and monitoring the Kim Potter murder trial), telephone calls with U.S. Representative Ilhan Omar on proposed "no knock" search warrant legislation, and preparation of Katie Bryant for television appearances. Notably, there are no entries related to the petition for the appointment of the Trustee, which was made on May 25, 2021. The only legal work the Romanucci law firm performed which was related to the appointment of the Trustee was reviewing the appellate brief drafted by the NSD law firm, billing fifty-four minutes for this task.

The Romanucci firm also seeks out of pocket costs of $14,223 above and beyond the over one-half million in attorney's fees they request for alleged "litigation costs to preserve and collect evidence, engage court reporting services, engage and retain experts, pay for the creation of negotiation and demand materials, file essential court documents and handle the immediate needs of the litigation." *See* Romanucci Decl. (Nov. 14, 2022). Because the NSD firm did all the filing, as the NSD law firm was always the only law firm authorized to practice in Minnesota, the firm never filed any documents in court. Also, some of these costs are for secretarial tasks which should be included in the firm's overhead. Two of the bigger costs included were a $1000 fee for the retention of a "taser expert" and another $6000 retainer fee for an unspecified expert. It is not clear if these experts were ever consulted or if the $7000 for these expert retention fees was approved

by the Trustee. There is no information about whether any of the unused retainer fees were returned by these experts to the Romanucci firm.

In sum, both firms spent many, many hours on activities that did not advance the Trustee's position in a wrongful death or civil rights action against the City of Brooklyn Center. These were activities that an attorney who was being paid by the hour would never have billed to a client paying the high hourly rates charged here—$550 and $700 per hour—the two principal attorneys here charge.

4. The Settlement and Settlement Discussions

The City of Brooklyn Center wanted to settle this wrongful death suit immediately after a Trustee was appointed. In her Petition, [12] the Trustee writes:

> One of Petitioner's attorneys, Jeffrey Storms ("Storms"), learned that the City of Brooklyn Center was being represented by Jason Hiveley ("Hiveley") of Iverson Reuvers Law Firm. [Hiveley] conveyed that the City had only $2,000,000 in available insurance, that other claims had been made that implicated those policy limits, and that the City's ability to negotiate more than insurance policy limits was extremely limited given the small size and economic demographics of Brooklyn Center.
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> As Petitioner's counsel conducted its diligence in preparation for earnest settlement discussions with Brooklyn Center, Ms. Whitaker filed her appeal of this Court's May 25, 2021 Order appointing petitioner as trustee. Hiveley informed Storms that the City would not negotiate until the appeal of the May 25, 2021 Order was resolved.
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> Pet. for Distribution at ¶¶6–7.

[12] The Petition was undoubtedly written by the NSD law firm and not by the Trustee given the Petition's lack of objectivity in its characterization of the NSD law firm's work on issues related to the determination of the reasonableness of the attorney's fees. *See infra* at 46–47. Indeed, the NSD law firm's billing records show over thirty-five hours were spent "drafting petition" and revising it.

These statements are consistent with the time entries of the NSD law firm in June of 2021 which totaled between five to six hours of recorded time describing this work.[13]

On May 24, 2022, the case settled after one day of face-to-face meetings following an exchange of settlement communications and documents. The settlement happened in two parts. First, Brabbit, Jeff Storms, Katie Bryant and Arbuey Wright, and Antonio Romanucci met with the City of Brooklyn Center City Manager and Police Chief to discuss the non-economic terms of a "global resolution in an effort to provide for other forms of meaningful relief given the City's limited resources[.]" Pet. for Distribution at ¶9. After agreement was reached on the non-monetary aspects, the second part took place. In the second meeting, Brabbit, Storms, Romanucci, the representatives from the City of Brooklyn Center and Hively met without Wright's parents present to negotiate the monetary amount. *Id.* at ¶11. According to Brabbit, at the outset of the meeting, the City informed the others that it was not prepared to sell assets or limit vital city functions but was prepared to pay some amount of money in excess of the available insurance policy. *Id.* at ¶6. At the end of that same afternoon, the parties agreed to a monetary amount of $3,250,000, subject to approval by the Brooklyn Center City Council, to settle all claims that could have been brought by the next of kin.[14] The payments will consume most of the City's available insurance policy limits and the remainder will come from

[13] For example, on June 19, 2021, the NSD firm logged two entries: "Review and analyze Brooklyn Center's budgeting materials" and "research Brooklyn Center budget issues and analyze with team for purposes of settlement strategy." This comprised a total of 5.5 hours. On June 24, 2021, another entry relates to settlement: "reservation rights email with essurance (.2); email Hively (.1); email Bowers (.1); CWs with LB re: 408 and Bowers (1.0)." Bowers is Whitaker's attorney, and "408" refers to Rule 408 of the Rules of Evidence which concerns settlement discussions. On June 22, 2021, there is a time entry that explains why the case did not settle until after the Court of Appeals ruled on Whitaker's appeal of the appointment of Brabbit as Trustee: "Review Hiveley email declining to negotiate due to appeal and confer with team on same." On June 29, 2021, there is another entry: "Review insurance info from Hiveley with team (.3)." From August 10-20, 2021, there are again some settlement discussions with Hiveley, a letter from Ben Crump to the City offering settlement, and calls with Brabbit on these developments.

[14] On June 21, 2022, the Brooklyn Center City Council approved the financial settlement of $3,250,000 and the non-monetary terms.

the City's own funds. Pet. for Distribution at ¶12.

In the Petition for Distribution, Brabbit is careful to make it clear the non-economic terms were not a set-off of any part of what could have been a larger monetary settlement:

> It was clear from the outset between counsel for the Petitioner and Brooklyn Center that the qualitative measures did not have a tit-for-tat relationship with the monetary relief the City would ultimately be willing to pay to resolve the lawsuit. Put differently, neither party represented or negotiated in a manner to suggest that any agreed-upon qualitative relief would take away from the monetary damages awarded to Daunte's next of kin.

Pet. for Distribution at ¶10.

Brabbit gave most of the credit for achieving the non-monetary elements of the settlement to Katie Bryant:

> Wright became heavily involved in police reform advocacy in Brooklyn Center in Daunte's name and memory in an effort to prevent future deaths during law enforcement interaction. Ms. Wright played a key role in advocating for the passage of Brooklyn Center Resolution No. 2021-73, the Resolution Adopting the Daunte Wright and Kobe Dimock-Heisler Community Safety and Violence Prevention Act (the "Daunte and Kobe Act"), …Ms. Wright agreed to serve on and presently serves on the Implementation Committee for the Daunte and Kobe Act. Ms. Wright, other family members, and community members also came together to construct and maintain the Daunte Wright Memorial at the intersection where Daunte was killed

Id. at ¶8.

The non-monetary terms were included in the final settlement terms at the request of the City of Brooklyn Center:

> Due to Ms. Wright spearheading efforts in Brooklyn Center for police reform and preservation of Daunte's memorial, the City requested that these and all other qualitative relief items become a part of the settlement negotiations to reach a global resolution for all matters related to Daunte's death.

Id. at ¶9

The non-monetary terms presented to the City Council of Brooklyn Center are attached to the Petition for Distribution as Exhibit A.

5. The Trustee's Proposed Distribution to the Next of Kin

Wright was the son of Katie Bryant and Arbuey Wright who had two other children together: Diamond and Destinee, who were Wright's full siblings. Wright had two half-brothers, Dallas and Damik, who are also the sons of Katie Bryant. Wright had three half-siblings who are the children of Arbuey Wright: Monica, Marcus, and Micah. Wright lived with Diamond, Destinee, Damik, and Dallas almost their entire lives. He lived with Monica and Marcus until they moved to North Carolina when they were teenagers, but that the specific year was not provided to the court. Micah is the four-year-old son of Wright Sr., and he lives in Minneapolis.

After the settlement on May 24, 2022, Brabbit turned to the work to determine how to fairly and equitably divide the settlement money among Wright's next of kin (the amount left after she deducted her fee and the proposed attorneys' fees and costs). She did this by having phone calls or Zoom calls with each of the next of kin so she could "understand the relationship between that particular next of kin and Daunte."[15] Evid. Hr'g Tr. 27. More specifically, she testified:

> I did my best to become a student of that relationship, understanding the relationship through the prism of Jury Instruction 91.75 to give me some guidance on understanding of the unique pecuniary loss of each of the next of kin sustained as a result of the death of Daunte….
>
> *Id*. at 27:11–16.

Brabbit had one phone or Zoom call with each of the next of kin, usually no more than 30-60 minutes long, except for with Katie Bryant, with whom she had two calls of less than 60 minutes each, and with Damik, with whom the call may have been longer than 60 minutes. When asked whether each next of kin knew the purpose of her call and that it was in their best interest to portray their relationship with Wright as a robust one, she responded "yes." Tr. 111:8–11. In addition to

[15] The Court notes that according to the time records, the NSD law firm participated in every one of these calls.

these phone calls, Brabbit also learned about Wright's relationships with his next of kin by watching the "spark of life" testimony at the criminal trial of Kimberley Potter and the "witness impact testimony." She listened to the testimony of Whitaker, Damik Wright, Arbuey Wright, Katie Bryant, as well as some of the publicly available statements made under oath. *See* Tr. 37:22–38:4.

Brabbit did not speak with Whitaker, the mother of Daunte Jr., until August of 2022. *See* Tr. 51:16–22. Brabbit blames Whitaker for this:

> Petitioner (Brabbit) made repeated, documented efforts to communicate with the mother of Daunte's son, Chyna Whitaker ("Ms. Whitaker"), for purposes of receiving her input about all aspects of this case both prior to and after settlement. Ms. Whitaker declined each of these invitations. Given Petitioner's anticipation that Daunte's son, Daunte Wright Jr., was going to be the largest beneficiary of any settlement, Petitioner would have further included Ms. Whitaker in all aspects of this case but did not agree that it was necessary to add her attorney, Thomas Bowers.
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> Petition for Distribution at ¶14.

Ultimately, Brabbit proposed the following distribution of $2,152,332 (the amount left after Brabbit deducted attorney's fees and costs), Brabbit's trustee fees were included in the amount of attorney's fees deducted:

Daunte Wright Jr. (3)	$1,322,332	(child)
Katie Bryant	$290,000.00	(mother)
Arbuey Wright	$275,000.00	(father)
Damik Bryant (27)	$50,000.00	(half-brother)
Dallas Bryant (26)	$50,000.00	(half-brother)
Diamond Wright (20)	$50,000.00	(sister)
Destinee Wright (16)	$50,000.00	(sister)

Monica Wright (26)	$25,000.00	(half-sister)
Marcus Wright (24)	$25,000.00	(half-brother)
Micah Wright (5)	$15,000.00	(half-brother)

During the evidentiary hearing on October 7, 2022, Brabbit explained her reasoning behind this distribution:

Daunte Wright Jr., son, 61%

In the Petition for Distribution, Brabbit states that "Petitioner recognizes that Daunte Jr.'s loss is substantial." *See* Pet. for Distribution ¶40. She further states:

> Daunte Jr. is the only next of kin who [Wright] would have been required to support. While Ms. Whitaker has not shared information related to the support she received, Petitioner understands that Daunte always endeavored to financially support Daunte Jr. to the best of his abilities. Given this understanding, Petitioner recommends that Daunte Jr. received the largest recovery and believes he has the greatest pecuniary loss.

Id. at ¶7.

Brabbit testified as follows regarding Daunte Jr.'s relationship with his father:

> . . . Daunte Junior was the star of [Wright's] life. Daunte Junior was the center of [Wright's] world. That after Daunte Junior was born, there was a change in [Wright], and [Wright] knew that he, even though he was in many ways still a child, that he needed to quickly become an adult. And it is my opinion that [Wright] wanted to provide for Daunte Junior, that he loved him beyond any stretch of the imagination, and that he was just truly the absolute light of his life and center of his world.

Tr. 34:8–19.

With regard Wright's efforts to support his son financially, Brabbit stated:

> Well, I learned that [Wright] growing up was actually very frugal, but after Daunte Junior was born, that changed, and [Wright] wanted to provide for Daunte Junior. He wanted to give him every opportunity in life. And I also learned that even though he didn't have his GED, he did enroll in Summit Academy to try and better himself so that he could better provide for Daunte Junior….

> [H]e had some part-time seasonal positions with hotels, restaurants, fast food, Taco Bell, Golden Corral, Famous Footwear. And so through those places of employment he was earning some funds, and whatever he could give to Daunte Junior, he would do that. He bought Daunte Junior shoes, diapers, basic necessities.
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> Tr. 34:20–35:16.

Regarding Daunte Jr.'s non-monetary pecuniary loss, Brabbit testified:

> . . . [Wright] wanted to do everything he could to make sure he was available for his son, gave him good guidance, . . . got him on the right path, supported him, and wasn't just there financially but was there –was there emotionally and for that fatherly figure. . . . I have no doubt in my mind that was very important to him.
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> Tr. 35:21–36:6.

Brabbit further testified that Wright lived with his mother and Daunte Jr. spent a lot of time at the Wrights' home. In this regard, she testified:

> . . . The family did things together as a unit. And I also know that as unit that family loved nothing more than watching [Wright] as a father, watching him interact with his son; that brought them great joy to see that.
>
> Tr. 36:7–13.

In concluding, Brabbit testified she took all this into consideration as well as the fact that there is "really a unique relationship between a parent and a son," and that the relationship with his son was the most important relationship for Wright at the time of his death. Tr. 36–37.

When asked if she used a formula to apportion pecuniary loss in terms of monetary and non-monetary loss, she said she was not aware of a formula. Tr. 29. When asked if she prepared an economic damage analysis, she said "no." Tr. 71. While Brabbit acknowledged Daunte Jr. was the only person Wright supported economically, she did not calculate Daunte Jr.'s economic loss

"in the way the *Rath* case" directs "because the *Rath* case involved a different fact pattern."[16] Tr. 71:9–72:5. When asked by counsel for Whitaker about the amount she proposed to distribute to Daunte Jr. and if she assigned a certain amount to economic loss, she testified:

> I did not break it out between economic and non-economic. I made the evaluation in relationship to all the next of kin in trying to assign a proportionate recovery for each. The only person I considered for an economic evaluation was Daunte Jr. which is why I concluded that he should receive the percentage that he did.
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> Tr. 82:5–16.

Brabbit readily admitted she performed no economic analysis of damages to Daunte Jr. for the loss of his father and did not hire an economic damages expert, but said, "I went through an economic evaluation in my decision-making." *Id*. at 72:6–13. When pressed by counsel for Whitaker if she calculated what economic support Wright had provided and would have provided his son, she said she did not look at any of Wright's past earnings or future earning capacity or prospects for obtaining a GED. Nor did she calculate or consider the cost to Whitaker of raising Daunte Jr. Tr. 76:3–23.

> Wright's Other Family Members
>
> As regards the rest of the next of kin, Brabbit stated the following in her Petition:
>
> In assessing pecuniary loss, Petitioner also takes into account the closeness of the relationships [Wright] had with all of his next of kin. Based upon the information available to her about the relationships, shared experiences, and acts of assistance, advice and protection provided in the past and/or likely to be provided in the future, Petitioner also believes that the following individuals sustained pecuniary loss and should be afforded varying degrees of distribution: [Katie Bryant], Arbuey Wright, Damik Bryant, Dallas Bryant, Diamond Wright, Destinee Wright, Monica Wright, Marcus Wright, and Micah Wright.
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> *See* Pet. for Distribution ¶48.

[16] *See infra* for discussion of the *Rath* case.

Katie Bryant, mother, 13.5%

The Petition for Distribution does not describe Wright's relationship with his mother, but at the evidentiary hearing, Brabbit testified:

> Katie and Daunte had a very close relationship. In fact there was sort of a joke that Daunte was the favorite and Daunte could do no wrong. . . . It is said that Daunte told Katie everything and that Katie – Daunte worked really hard to make his parents proud but especially Katie proud, and they lived together with the exception of one year, and Daunte lived with his parents. He – in fact when this incident occurred, and when he was shot, the first person he called was his mom, and he reached out to her as the first point of contact. And so I understand that while not perfect, Daunte helped Katie with things around the house. Katie helped Daunte with big life questions and issues and it is my opinion that it was a relationship of trust.
>
> Tr. 38:16–39:7.

Regarding the monetary loss to Katie Bryant as a result of Wright's death, Brabbit said there was none, that her loss was one of "emotional loss, support, comfort, and things like that." Tr. 39:16–22. When asked why she proposed that Katie Bryant receive $290,000 rather than a different amount, she responded:

> Well, that's how much weight I gave that pecuniary loss. So I went back to the statute which says "proportionate" right? …. And so I tried as best I could to undertake the very difficult task of doing a proportionate share of the resources that were available for distribution.
>
> Tr. 78:16–79:2.

Arbuey Wright, father, 12.8%

Brabbit did not include any description about the relationship between Wright and his father in the Petition. However, during the evidentiary hearing, she testified:

> . . . Daunte's relationship with Arbuey was different than Katie but still – he still lived definitely in that relationship with Arbuey. Arbuey took on more of a guidance counselor role for what I would call "life lessons." For example, both of them worked at Famous Footwear. It was very important to Arbuey that there was some mentoring, some professional development counseling, . . . a little bit of I'll use the work almost a "paternalistic" support, if you will there.

> And I think it was day six or seven of the "spark of life" testimony they showed a picture of Arbuey and Daunte with their arms around each other, and that photo was taken within weeks of his death . . . and it was evidence to me that they indeed have a relationship.

Tr. 39:23–40:18.

Regarding pecuniary loss, Brabbit did not identify any monetary loss to Arbuey, but identified his losses as loss of companionship, aid, comfort, society, etc. *See* Tr. 40:21–22.

Damik and Dallas, brothers, 2.3% each

Wright and his two half-brothers grew up in the same house. The three brothers "were as thick as thieves." Tr. 43:18–19. According to Brabbit's testimony at the evidentiary hearing, Damik was Wright's "better half." Tr. 43:5. They had a "close relationship" and there "was a sense of protection there.'' *Id*. at 43:6–7, 15–16. Dallas and Daunte lived together in 2019, and even after Daunte moved back to his mother's house, their relationship remained strong. Tr. 44. Accordingly, Brabbit concluded that Damik and Dallas both had a non-monetary loss as a result of Wright's death.

Diamond and Destinee, sisters, 2.3% each

Diamond and Destinee are Wright's sisters and lived with him almost their entire lives. The petition says nothing specific about Wright's relationship with his sisters. They are included in the general statement that Wright's family members sustained a pecuniary loss based upon "the relationships, shared experiences, acts of assistance, advice and protection provided in the past and/or likely to be provided in the future" with Wright. *See* Pet. for Distribution ¶48. In her testimony, Brabbit stated Wright was a "support person for Diamond. And . . . when issues of life challenges or 'anxiety difficulties,' Daunte served as a counselor to her." Tr. 45:3–6. She stated further that there was a strong relationship of "trust, companionship and aid and comfort and society." *Id*. at 45:10–13. Brabbit said the same was

true of Wright's relationship with his youngest sister, Destinee. *Id*. at 45:17–22.

Monica, Marcus, and Micah, half-siblings, 1.15%

Monica and Marcus live in North Carolina. In the Petition, Brabbit stated they lived with Wright until they moved to North Carolina when they were teens, *see* Pet. at ¶43, but she testified at the hearing that they did not grow up with Wright, Tr. 46, and his relationship with them was not as close as with his siblings in Minnesota. Nevertheless, she concluded they had a non-economic loss. Tr. 46. She testified Wright attended Monica's graduation some years ago. *Id.* at 46–47. She further testified that Wright had a relationship with Marcus and he may have had more contact with Marcus than Monica. *Id*. at 47. Finally, regarding four-year-old Micah, Brabbit stated she "thought long and hard on this one" but decided given the life expectancy of Wright and Micah she decided to include Micah in the distribution. Tr. 48. She admitted this was something Wright Sr. wanted her to do. *Id*.

When asked on cross-examination how she calculated the non-monetary damages for each of the next of kin, she testified:

> You know, it was a very reflective process of incorporating the information I had gathered, the data I had gathered from conversations, and . . . I wish there was a grid or something you could plug it into and be much more objective. I can't offer you that. So I did the best I could in acknowledging the pecuniary loss that each next of kin sustained.
>
> Tr. 78:9–15.

6. The Trustee's Proposed Payment to the Attorneys

In her Petition for Distribution, the Trustee proposes a 33 1/3% contingency fee to be split between the NSD law firm and the R&B law firm. She argues the following:

- The work performed by NSD and R&B was substantial and includes litigating the heavily contested trustee appointment proceeding, retaining and conferring with expert witnesses, legal research and analysis including issues pertaining to tort caps, the availability of civil

> rights claims, and the potential application of qualified immunity, assisting next of kin with law enforcement interviews, engaging in substantial, national and local press and public relations efforts, assisting next of kin in their preparation for Ms. Potter's criminal trial, attending, monitoring, and analyzing Ms. Potter's criminal trial, analyzing the impacts of Ms. Potter's conviction with respect to indemnification ramifications and other risk/litigation merits, negotiating qualitative and quantitative relief, and working with Petitioner and next of kin to assess pecuniary loss and distribution in preparation for presenting this Petition.

Pet. for Distribution ¶24.[17]

- The relief obtained here includes significant nonmonetary relief that not only serves Daunte's next of kin but all residents of Brooklyn Center. And the "nonmonetary relief here likely exceeds what would have been obtainable through means of litigation."[18]

Id. at ¶21

- No City outside of Minneapolis has ever paid as much or more than the $3,250,000 monetary settlement here for an officer involved shooting wrongful death case in Minnesota.[19]

Id.

Although, the NSD law firm and R&B law firms are reducing the contingency fee from 40% to 33 1/3%, they are both requesting a larger percentage of the fee than what they originally agreed to and expected in the Retainer Agreement. As she explained in her Petition:

> Under the original three-way split of the 40% contingency fee, NSD and R&B were each entitled to a respective 13.33% contingency fee. Under the current proposed fee split, the two remaining firms will each receive a respective 16.13% contingency fee. Petitioner believes this modest fee increase is appropriate given that it was NSD and R&B that completed the case against Brooklyn Center to resolution and because it still represents a reduction of the original total fee earned by the attorneys.

[17] The court disagrees with this characterization of the legal work here as "substantial," *see* supra at 6–9; that the appeal was "heavily contested," see infra at 54; that the attorneys should be credited with the non-monetary relief achieved, *see* supra at 10–11; or that any of the work related to assisting the family with the Potter trial or attending the Potter trial was necessary or strengthened the claims of the Trustee. *See infra* at 53–55.

[18] See fn.17 re: attorney's responsibility for the non-monetary relief obtained.

[19] Under the circumstances of this case, the court finds it difficult to attribute the attorney's work as the critical factor in obtaining the settlement amount obtained. *See infra* at 54–55.

Id. at ¶30.

The NSD law firm and the Romanucci law firm agreed to include the proposed $35,000 trustee fee in this matter as a portion of the 33 1/3% contingency fee. *Id*. at ¶30. This results in a total proposed attorneys' fee in the amount of $1,048,333.33, which Petitioner proposes be distributed in the amount of $524,166.67 to the Romanucci law firm and $524,166.66 to the NSD law firm. Additionally, the Romanucci law firm is seeking reimbursement of costs in the amount of $14,334.06, including $7000 in expert retainer fees. The NSD law firm is not seeking reimbursement of costs.

7. Whitaker's Objection to the Proposed Distribution and Payment of Fees

Whitaker objects to Brabbit's proposed distribution, the amount of attorneys' fees to be paid, and her decision not to consider the over one million dollars raised by Wright's parents through a "GoFundMe" campaign online which has not been shared with Whitaker for the benefit of Daunte Jr.

First, Whitaker objects to the fact that Brabbit, while recognizing Daunte Jr. is the *only* next of kin Wright would have been legally required to support, proposes a plan for distribution without "critical information" as to the needs of the child, who was born prematurely. *See* Obj. to Pet. 2 (Sept. 23, 2022). Second, she objects to Brabbit's proposed distribution to Wright's half-siblings who live in North Carolina and to whom it can be presumed Wright did not provide financial support and with whom there is no evidence that he had much of a relationship. Third, Whitaker objects that in her Petition, Brabbit implies Whitaker has refused to participate or did not cooperate with Brabbit's attempts to gather information from her. Whitaker attributes her reluctance to meet with Brabbit to "the Wright family's violent and threatening behavior" toward her; Brabbit's decision to associate with Ben Crump Law and the NSD law firm after Whitaker

terminated Ben Crump; and Brabbit's decision not to allow Whitaker to participate with her counsel involved. Therefore, she argues, she was prejudiced and Daunte Jr.'s economic needs and other pecuniary needs were not considered properly by Brabbit. *Id*. She did, however, admit during the October 7, 2022, hearing, that when she finally met with Brabbit, Brabbit give her the opportunity to tell her everything she wanted to tell her. Tr. 150.

Finally, Whitaker objects to the fact that Brabbit did not gather any information related to any fundraising efforts by any next of kin. Brabbit states in the Petition for Distribution that she did not consider this large amount of money, in excess of $1,000,000, because she believed it was outside the scope of her authority and should not be considered in assessing the pecuniary loss to the next of kin. Pet. for Distribution ¶39. But Whitaker argues Minnesota courts have declined to consider funds from life insurance proceeds, social security, and no-fault survivor benefits, only because the statute does not require it, thus, "a court is not prohibited from considering these sources in making a distribution of a wrongful death recovery." She argues:

> *Daniels*[20] and *Hagman*[21] were decided long before the emergence of online fundraising tools which have rose in prevalence as an avenue to crowdsource support for grieving families, especially families who have lost a loved one due to an interaction with law enforcement.
>
> Obj. to Pet. 7.

Thus, Whitaker argues it is appropriate for the Court to consider the funds raised through The Daunte Wright Sr. Memorial Fund via GoFundMe. She points out that the donations have been substantial: as of September 15, 2022, the GoFundMe campaign had raised $1,039,160. And because none of the money has been transferred from the fund for supporting Daunte Jr., the receipt of over one-million dollars must impact the financial needs of Wright's next of kin and the support

[20] *Daniels v. Brown,* No. 86-CV-13-4026, 2015 WL 5775936, at *7 (Minn. Dist. Ct. Aug. 27, 2015).
[21] *Hagman v. Schmitz*, No. A11-62, 2011 WL2672355 (Minn. Ct. App. July 11, 2011).

available to them as compared to Daunte Jr.'s financial needs. She stated that despite representations to her and those who donated to the campaign that Daunte Jr. would receive a share of the GoFundMe donations, she has not received any money from the fund for supporting Daunte Jr. *See* Obj. 7–8.

During the evidentiary hearing on October 7, 2022, Whitaker testified. She was twenty-three years old at that time. She testified she and Wright began dating when she was in high school and dated "off and on" for two years before she became pregnant with Daunte Jr. She was 20 when Daunte Jr. was born. After she graduated from high school in 2017, she completed a 6–8-month program through Summit Academy to become a nursing assistant and is currently enrolled in an online program in health and human services. She is currently renting an apartment and hopes someday she will be able to buy a home for herself and Daunte Jr. *See* Tr. 146–48. She hopes Daunte Jr. will receive the best education possible. *Id*. at 148.

Regarding his relationship with his son, Whitaker testified Wright spent a lot of time with him, but the two parents never lived together. Wright would watch kids' television shows with Daunte Jr., bathe him, and do his hair. Wright contributed diapers, food, and other necessities for Daunte Jr., although Whitaker did not quantify these. Whitaker testified Daunte Jr. knows his father, that is, he points to him when he sees pictures of him. Tr. 147. She testified that sometimes Daunte Jr. calls out to him randomly and sometimes does not sleep well: "But he knows for a fact that his dad's not around. It definitely made a serious difference." *Id*. at 147:18–19. Whitaker wants to make sure what happened to his father does not interfere with Daunte Jr. growing up with good mental health. She realizes what happened could affect him as he gets older, and if needed, she wants him to be able to have counseling. *Id.* at 148. When asked what the loss for Daunte Jr. has been of aid, advice, etc., from his father, Whitaker responded:

> To be honest, it's kind of really indescribable and unexplainable because it's so great. Honestly, every day, you know, it's been very hard for me to try to just do all these things by myself, really. So the damages are exceedingly great. You know, I don't have help from a man to help me with their child, you know, temper tantrums, just everyday things that you go through as a parent."

Tr. 149:25–150:7.

8. The Objector's Expert on Daunte Jr.'s Loss

During the evidentiary hearing on October 7, 2022, Whitaker called an expert witness, Stan V. Smith, Ph.D., of Smith Economics Group,[22] to testify regarding his analysis of the financial damages, loss of household and family services, and loss of society and relationship suffered by Daunte Jr. as a result of his father's death. Smith has a doctoral degree from the University of Chicago in Economics; has performed many of thousands of economic analyses in personal injury and wrongful death case as well as other legal matters requiring valuation of damages, wrote the first textbook on Forensic Economic Damages, and has authored a book and written or co-authored a few dozen articles on "hedonic" damages. *See* Skolnick Aff., Ex. F (Oct. 6, 2022).

Smith defines "financial loss" as that portion of what Wright would have earned as income during his lifetime that he would have passed on to Daunte Jr. after his own personal consumption. *See* Skolnick Aff., Ex. E, Smith Expert Report ("Smith Report") 5. According to Smith, household and family services are tangible services such as advice, counsel, guidance, instruction and training household members provide each other that are in addition to physical housekeeping chores. *See id*. at 6 & citations therein. Smith values these services as if they were provided by a person unknown to the household. *Id.* at 6. Smith defines "loss of love and companionship" as the "measure of preserving the ability to live a normal life." *Id*. at 11.

Regarding the financial loss to Daunte Jr., Smith discusses the academic analyses

[22] Smith's curriculum vitae and report are Exhibit F and E to the October 6, 2022, Affidavit of William Skolnick.

supporting his opinion for this loss in his report. *See* Smith Report 11–12. Smith based his calculations on Wright's employment history, past national wage growth statistics, interest rates, and consumer prices as well as studies on the value of the loss of a relationship of a family member.[23] *See id*. at 23. Based upon Wright's life expectancy at the time of his death—he was 20.5 years old and would have lived an additional 56.6 years—Smith offered his opinions based upon his calculation of the financial loss to Daunte Jr. under four different scenarios using different assumptions about Wright's educational attainment:

Education Level	Wage Loss Net of Personal Consumption.
10^{th} -12^{th} Grade Edu to Age 67	$1,002,111
GED to age 67	$1,231,606
Some college to age 67	$1,858,945
Bachelor's to age 67	$3,191,633

These are the amounts that Smith estimates Wright would have been able to provide to his son until Wright reached the age of 67. If Wright only provided financially to Daunte Jr. until his son was 21 years old and assuming Wright would not have furthered his education, Smith estimated that Wright would have provided $667,000 to his son. Tr. 135; *see also* Smith Report Table 9.

Regarding Daunte Jr.'s loss of household/family guidance services, Smith identifies two types of losses: (1) Loss of the "advice, counsel, guidance, instruction and training services" Daunte Jr. cannot expect to receive from him because of his death; and (2) "loss of the accompaniment services" Wright would have provided to Daunte Jr. but for his death. Smith Report 1. Smith describes loss of advice and counsel as a tangible economic loss "beyond the physical housekeeping chores." Smith Report 14. Smith calculated Daunte Jr.'s loss of

[23] Smith also included a calculation of the value of life, but this, at least as the Court reads Smith's report, is the loss that Wright suffered. *See* Smith Report 10–11.

household/family guidance services was $464,317, and his loss of household/family accompaniment services as $617,453. *Id*. at 23.

In order to arrive at these numbers, Smith first interviewed Daunte Jr.'s mother to obtain information about Wright's past conduct as a parent:

> . . . Miss Whitaker reported that [Wright] was a very hands-on dad. So the interview indicated lots of advice, counsel, teaching numbers and letters and colors and things like that. Also, she believes he would have been very hands-on helping in the future with homework and friendships and relationships. . . . But given that she indicated that she believed that he would have spent at least a half-hour a day, is generally below the average of what many parents say they do, providing advice and counsel, guidance, training, to his son. . . . they saw each other on weekends in terms of time spent, so that's a large -- that's a big value, spending time with someone. . . . it's a value that parents provide to children and the children provide to parents. And so they -- for all the social time they would have spent together, she believes it would have been on average a couple hours a day.
>
> Tr. at pgs. 128:17–129:19.

Smith then explained the next step in his methodology for quantifying these losses:

> Taking all that into account I used the statistically average value of people who do provide advice and counsel, such as parents, . . . Now, that advice and counsel at hourly rates of people who do provide, such as coaches, clergy, a handful of other professions of people who provide advice, . . . school teachers, et cetera, I ultimately show that hourly rate at about $30 an hour for advice that can be provided by others that some people say the school of life is the best college in the world. . . . So, ultimately, I calculated the value of that advice through Daunte Senior's lifetime at $464,000, approximately, and the value of time spent which we really value with the -- like a home -- home companion cost at $617,000, the value of time spent with the son.
>
> *Id*. at 129:19–130:19.

Smith did not calculate what loss of "household/family guidance services and loss of household/family accompaniment services" was to any of Wright's other next of kin.

Finally, Smith estimated Daunte Jr.'s loss of "society and relationship" to be $4,035,000. *See* Smith Report 12. He testified that this was based on his interview with Whitaker, specifically, "the attentiveness and the belief that [Whitaker] believe would have persisted . . . and the loss that

he will sustain from not having that love and affection." Tr. 132:1–6. He explained his methodology for calculating this loss:

> . . . The value of the loss of society or relationship by family members with the injured can be based on a measure of the value of preserving the ability to live a normal life. This is discussed in the article, "The Relevance of Willingness-To-Pay Estimates of the Value of a Statistical Life in Determining Wrongful Death Awards," Journal of Forensic Economics, Vol. 3, No. 3, Fall 1990, pp. 75-89, by L. G. Chestnut and D. M. Violette. It is also discussed in "The Value of Life to Close Family Members: Calculating the Loss of Society and Companionship," The New Hedonics Primer for Economists and Attorneys, Second Edition, Edited by Thomas R. Ireland and John 0.Ward, Lawyers & Judges Publishing Co., 1997,pp. 377-384, by Stan V. Smith, and republished in "The Value of Life to Close Family Members: Calculating the Loss of Society and Companionship, American Rehabilitation Economics Association 1997 Monograph, pp. 10-16.
>
> Smith Report 11–12.

Finally, Smith opined: "Based on a benchmark loss of 50 percent for [Daunte Jr.] . . . the loss of relationship as a result of the death of [Wright] is thus $4,035,978[.]" Smith Report 12. Smith did not calculate what the "loss of society and relationship" was to any of Wright's other next of kin.

ANALYSIS

I. LEGAL FRAMEWORK

A. Distribution of Wrongful Death Proceeds

In Minnesota, following a determination of the amount of recovery in a wrongful-death action, "the court…determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly." Minn. Stat. § 573.02, subd. 1 (2021). Under section 573.02, subd. 1, the trial judge has authority to determine the "proportionate pecuniary loss of the persons entitled to the recovery." The court determines the ultimate distribution of the proceeds to the next of kin and is free to make independent findings of

how the proceeds should be distributed proportionally according to the pecuniary loss of the survivors. *Bond v. Roos*, 358 N.W.2d 654, 657 (Minn. 1984) (affirming trial court's rejection of stipulation of distribution of proceeds by the next of kin).

The "persons entitled to the recovery" are defined as the decedent's "surviving spouse and next of kin." *Id*. at 656. "'Next of kin'" 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) (citing *Martz v. Revier*, 170 N.W.2d 83, 87 (Minn. 1969)). "Pecuniary loss" refers not just to loss of income; it also includes 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 (Minn. 1985) (quoting *Gravley v. Sea Gull Marine, Inc.*, 269 N.W.2d 896, 901 (Minn. 1978)). "[T]he loss of aid, comfort, and society of the decedent is compensable *where there is evidence of particular acts of service* which contribute to the comfort, health, and well-being of the survivor". *Fussner v. Andert*, 113 N.W.2d 355, 362 (Minn. 1961) (emphasis added).

Minnesota law is not exactly clear on how a court should compare direct and measurable financial loss to one survivor to the intangible losses of aid, advice, comfort, assistance, etc., to another survivor in order to make a proportional distribution. An examination of the development of Minnesota's law on what types of damages may be compensated in wrongful death cases supplies some guidance.

In *Fussner v. Andert*, the Minnesota Supreme Court reversed a trial court for not properly calculating the damages suffered by the father for the death of his nineteen-year-old daughter. Mr. Fussner's daughter was nineteen years old when she died in a car accident. She had performed most of the housework during the time her mother had been ill and for years after her mother's

death. The specific issue on review was whether the trial court instructed the jury correctly when it instructed that any award of damages must be limited to monetary loss the father proved "by virtue of being deprived in the future of either financial contributions or services on the part of the daughter." *Id*. at 357.

The Court began by examining its precedents in the development of the law of damages for wrongful death. It concluded: "[J]uries in the exercise of their judgment and experience have not conformed to the limited pecuniary-loss test," and had often "circumvented the test in order to provide substantial recoveries which they feel are equitable under the circumstances." *Id*. at 362. Such juries were affirmed by the Court when they did so. *Id*. The Court then observed:

> . . . It appears from a review of our authorities that damages are awarded not only on the basis of contributions and such services as the evidence may establish but for those additional elements of loss within the broad definition of society and companionship which include aid, advice, comfort, and protection which the survivor might reasonably expect from the decedent and which, while not having an easily determined market value, are fully justified since they are elements of loss for which money can supply a practical substitute.
>
> It is true that we have always prefaced our holdings in these cases by a statement adhering to the strict pecuniary-loss standard. Nevertheless, it should be conceded that *there is threaded through these cases . . . the secondary consideration that damages may be recovered for elements of loss which may not ordinarily be considered as economic in character* but which are, nevertheless, real.
>
> *Id*. at 362 (emphasis added).

Thus, the Court concluded that if such verdicts were approved by courts under a "policy of judicial tolerance," and such verdicts include damages for elements of loss which are not ordinarily equated in dollar value, jurors should be instructed as follows:

> . . . The jurors should be told that where the evidence warrants recovery the survivor may be compensated not only for actual pecuniary loss of contributions and services but should be compensated as well for loss of advice, comfort, assistance, and protection which the jury might find to be of pecuniary value and which the survivor could reasonably have expected if the decedent had lived.

Id. at 363.

Accordingly, the Court reversed the trial court and ordered a new trial limited to the issue of damages only. *Id*. at 364.

Twenty years later, in *Rath*, our Supreme Court adopted the "support years formula" for distribution of funds recovered in a wrongful death action. *Rath* involved the death of Mr. Laird Simpson who left a wife and two minor children, one of which he fathered with an ex-wife. Simpson's divorce decree required him to pay $200 a month to the child of his first marriage. In distributing the funds recovered from the wrongful death suit, the trial court set the recovery the child from Simpson's first marriage received to what was required of him by the divorce decree. The issue before the Supreme Court was whether the district court erred in limiting this child's portion of the distribution of the proceeds to the $200 per month in child support.

The Court began by stating "the term 'pecuniary' is not limited to strictly to the loss of income." *Id*. at 284 (quoting *Gravley*, 269 N.W.2d at 896 (citing *Fussner*, 113 N.W.2d 355)). The Court then quoted a 19th-century case which was decided before the word "pecuniary loss" was added to Section 573.02 by 1951 Minn. Laws, ch. 697, s.1:

> . . . The value of the services of the head of a family in a pecuniary sense cannot be limited to the amount of his daily wages earned for their support. His constant daily services, attention, and care in their behalf, in the relation which he sustained to them, may be considered as well * * *.

Id. at 285 (quoting *Bolinger v. St. Paul & Duluth R.R. Co.*, 31 N.W. 856, 857 (Minn. 1887).

After dispensing with the issue of the irrelevance of child support orders in wrongful death cases, the Court observed "it has consistently held that non-dependent relatives may recover, e.g., the parents of a child beyond majority who has married; or a wife who has remarried." *Id*. at 285 (citations omitted).

In a case the *Rath* decision cited, *Moore v. Palen*, 36 N.W.2d 540 (Minn. 1949), the Court held the parents of a deceased son and daughter-in-law, both of whom had reached the age of majority, could recover for likely future support of the parents in running the parents' restaurant. *Id*. at 543. In *Moore,* the Court noted that at the time, Minnesota law required children to support poor and indigent parents. Minn. Stat. § 261.01 (repealed 1973). Second, the Court reviewed its precedents and concluded:

> Our decisions make it clear that in actions for wrongful death damages for the potential support of children can be awarded to the parent beneficiaries, even though the children be adults and have been separated from the parents in terms of aid or benefit to the parents at the time of the wrongful death.
>
> *Id*. at 543 (citations omitted).

Third, the Court found the facts of the case compelling enough to support an award to the parents of the deceased adult children:

> On the facts before us, this is a strong case to sustain the damages awarded by the jury. Frederick and Frances were contributing to the operation of the grocery store and were to be partners in the new restaurant. Frances's mother had only periodic employment and might have become dependent on the young people, since she had no husband. The evidence shows that both were still minors and closely connected with the home. Under the circumstances of this case, the marriage had not cut off the parent-child relationship. There was still an economic interdependence between the parents and the young people. *Probable contributions are a substantial element in computing damages to parents for loss of children.*
>
> *Id*. at 543-44 (emphasis added) (citing Annotations, 48 L.R.A., N.S., 687; Ann. App. 1916B, 533).

Referring to the outcome in *Moore*, where the Court held that "probable contributions" of the economic type must be included in computing damages, the *Rath* Court reasoned, "[i]f persons who are not monetarily dependent on the decedent are able to recover their losses, it would seem that the child here should be able to recover for her loss above and beyond her actual monetary dependence." *Rath*, 292 N.W.2d at 285. It then concluded the district court erred in setting the

child's loss at the $200 per month required by child support "since that only includes actual monetary loss" and held the child from the first marriage should be able to recover "for her loss above and beyond her actual monetary dependence. *Ibid.*

The Court cited the "support years" formula set forth by Judge Hatfield of the Third Judicial District as follows:

> Unless there is a showing that a child will suffer a pecuniary loss by the death of his parent after he reaches the age of 21, it is my suggestion and practice to determine the number of support years that the surviving spouse and each next of kin have lost by reason of the death and divide the funds for distribution proportionately.
>
> *Id*. at 285 (citing Hatfield, J., *Distribution of Funds Recovered in a Wrongful Death Action*, Bench & Bar 5, 7–8 (Mar. 1966)).

And then the Court stated: "It appears to us that the support years formula provides a *satisfactory starting point* for the distribution of the proceeds of wrongful death cases." *Ibid*. (emphasis added). But then the Court identified other monetary related losses:

> However, the formula should not be taken to restrict the ability of district courts to consider other relevant factors in allocating awards of settlements. Such factors might include 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.
>
> *Id*. at 285–86.

In sum, Minnesota case authorities appear to indicate that in the typical case, the monetary loss to the next of kin should be given first consideration based upon economic contributions that had been made and would probably have been made in the future, and then the other non-monetary pecuniary losses identified should be identified. *Rath* and *Fussner* indicate the primacy of monetary lost in distributing the proceeds of a wrongful death suit. The *Rath* court described monetary damages as the "starting point" for distribution of proceeds and recommended a

mathematical formula for determining the amounts each dependent next of kin should receive. *Id.* at 286. And the *Fussner* court described non-economic elements of loss as "secondary considerations". *Fussner*, 113 N.W.2d at 362.

The court concludes Minnesota law directs that in determining the proportional distribution of the proceeds of a wrongful death case or settlement, greater weight to the direct monetary losses of the next of kin, and if possible, the formula in *Rath* should be employed, than to the other types of pecuniary losses allowed. Unfortunately, Minnesota appellate courts have not provided a formula or process for weighing the monetary losses to another next of kin with non-monetary losses to other next of kin beyond these qualitative statements. Nor have Minnesota appellate cases had the instant factual pattern presented to them: A case in which only the decedent's minor child has suffered a monetary loss, a loss for which the decedent had a legal obligation.

Accordingly, in reviewing the Trustee's proposed distribution of the settlement proceeds, the court examined whether she first considered and given greater weight to Daunte Jr.'s monetary loss. Not only did Wright provide material support for him, but he was also legally required to do so. Then the court considered the other factors identified in *Rath*: 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. The court considered these factors for all the next of kin, including Daunte Jr., based upon the testimony and statements of the Trustee regarding Wright's relationships with the next of kin, and divided the proceeds among them. The court readily acknowledges that this distribution is at based upon a very rough, difficult comparison between losses that themselves cannot be measured.

The court made its own proportional distribution because the wrongful death statute authorizes the court to do so and because the Trustee erred in not making any attempt to quantify

the monetary loss to Daunte Jr. Thus, the Trustee's proposed distribution is suspect because without an adequate weighing of this loss, Daunte Jr.'s loss cannot be properly weighed against the losses of the rest of the next of kin. While the Trustee agreed that Daunte Jr. was the only next of kin to sustain a monetary loss, she did no economic damage analysis despite knowing that Wright had a work history, a legal obligation to support his child, and had made his best efforts to support the child. She testified: "I went through an economic evaluation in my decision-making." Tr. 72:6-10. But Brabbit provided no support or explanation except to state that, based upon this evaluation, she concluded that Daunte Jr. should receive the percentage of the proceeds she proposed. Tr. 82. This is not an adequate explanation given all the information presented to her or that she should have obtained, e.g., Wright's income and work history, his material support of Daunte Jr., etc., and made a more considered and evidence-based calculation.

B. <u>Expert Opinion on Wrongful Death Proceeds</u>

Minnesota Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

Minn. R. Evid. 702.

"As with all expert testimony, the evidence . . . must be relevant, helpful to the trier of fact, and given by a witness qualified as an expert." *State v. MacLennan*, 702 N.W.2d 219, 230 (Minn. 2005) (citing *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000)). Testimony is inadmissible as not being helpful to the jury "[i]f the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's

ability to reach conclusions about that subject." *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980). If the testimony will confuse the jury, the Court may exclude the testimony. *Ibid.*

"[E]xperts must base their opinions on facts sufficient to form an adequate foundation for the opinion and should not be allowed to speculate." *Kwapien v. Starr*, 400 N.W.2d 179, 183 (Minn. Ct. App. 1987) (citing *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 154–55 (Minn. 1982)). "[A]n opinion based on speculation and conjecture has no evidentiary value." *Whitney v. Buttrick*, 376 N.W.2d 274, 277 (Minn. Ct. App. 1985) (quoting *Gerster v. Wedin*, 199 N.W.2d 633, 636 (Minn. 1972)). "An expert need not be provided with every possible fact but must have enough facts to form a reasonable opinion that is not based on speculation or conjecture." *Gianotti v. Indep. Sch. Dist. 152*, 889 N.W.2d 796, 802 (Minn. 2017) (citing *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374, 381 (Minn. 1978)).

Foundational reliability under Rule 702 must be assessed on a case-by-case basis, considering three factors. *Doe v. Archdiocese of St. Paul & Mpls.*, 817 N.W.2d 150, 167–68 (Minn. 2012). First, the Court "must analyze the proffered testimony in light of the purpose for which it is being offered."' *Id.* at 168 (citing *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 518, 529 (Minn. 2007)) Second, the Court "must consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying." *Ibid.* (citing *Jacobson*, 728 N.W.2d at 529). Third, "the proponent of evidence about a given subject must show that it is reliable in that particular case." *Ibid.* (citing *Jacobson*, 728 N.W.2d at 529). Additionally, the proponent of novel scientific evidence must show two additional elements: (1) That the "science 'is generally accepted in the relevant scientific community"' and (2) that the particular scientific evidence has foundational reliability. *Id.* at 165 (quoting *Goeb*, 615 N.W.2d at 814). In *Doe*, the Minnesota Supreme Court explained the *Frye-Mack* foundational reliability prong is essentially the same as

the foundational reliability prong of Rule 702. *Id.* at 168. Thus, if an expert's opinion lacks foundational reliability, it is inadmissible under Rule 702, regardless of whether or not it is a novel scientific theory. *Id.*

The objector, Chyna Whitaker, has offered the expert opinion of Dr. Stan Smith on three categories of damages to Daunte Jr.: (1) Loss of financial support; (2) loss of family/household and accompaniment services; and (3) loss of society and relationship, otherwise known as "hedonic damages." The Petitioner did not object to any of these opinions and did not move to exclude any of them. But a court has a gate-keeping role in determining whether to allow expert opinions, and here, the court is required to make an independent evaluation of the proposed distribution of proceeds, thus it is incumbent on the court to determine if the opinions of Dr. Smith satisfy Rule 702.

Smith's Opinions on Direct Financial Loss

Smith's method for calculating the direct financial loss to Daunte Jr. are consistent with the Minnesota Pattern Civil Jury Instructions on calculation of loss of future earning capacity. That instruction, in relevant part states:

> Consider what the person is able to earn in the future. Consider whether *(name)*'s future earning capacity has been destroyed or reduced. You may decide damages for this loss or reduction of future earning capacity.
>
> Factors to consider
>
> In determining the amount of future damages for loss of earning capacity, you should consider:
>
> 1. Age
> 2. Health
> 3. Skill
> 4. Training
> 5. Experience
> 6. Work habits
> 7. Length of loss of earning capacity *(temporary or permanent)*

8. Years of earning expectancy compared to *(name)*'s life expectancy.

Minn. Civil Pattern Jury Instr. 91.75.

Smith included almost all these factors in calculating what Wright would have earned and then passed onto Daunte Jr. after Wright's personal consumption. He considered his age, his life expectancy, years of lost earning capacity, education, work habits and experience, and possible educational attainment. *See* Smith Report 3–5. He also relied upon national statistical data for wage growth rates. After calculating what Wright's future income from the time of his death until Daunte Jr. reaches 21 years of age and to when Wright would have reached 67 years of age, he calculated how much of this amount would be used to pay for Wright's personal consumption from a study based upon U.S. Department of Labor, Bureau of Labor Statistics data. *See id.* at 5. The difference is what Daunte Jr. would have received from Wright as a direct monetary amount.

The court concludes that Smith's opinion on the direct financial loss to Daunte Jr. is helpful, relevant, reliable and based upon a well-established methodology for calculating loss of future income and the amount of money that would have passed to Daunte Jr. after Wright's personal consumption. Second, it is established on accurate data: Wright's work history as a part-time worker in retail and national labor statistics from the U.S. Department of Labor. Thus, the court considers Smith's opinion that Wright would have provided Daunte Jr. between $667,000 and $1,002,111, i.e., the range of monetary support Wright would have provided to Daunte Jr. until Daunte Jr. is 21 years old ($667,000) to when Wright would have been 67 years old ($1,002,111).

Smith's Opinion on Loss of Household/Family Services.

Pecuniary loss includes loss for contributions and services as well as "for those additional elements of loss within the broad definition of society and companionship which include aid, advice, comfort, and protection which the survivor might reasonably expect from the defendant."

Fussner, 13 N.W.2d at 362. The Minnesota Civil Jury Instruction Guide 91.75-Measure of Damages-Wrongful Death instructs the jury to consider, among other categories, "[t]he counsel, guidance, and aid he would have given claimants" and "[t]he advice, comfort, assistance, companionship, and protection that he would have given if he had lived." As to the first prong of the Rule 702 analysis, Whitaker seeks to admit this evidence to persuade the court how to determine the value of the household services Wright would have provided to his surviving family members. In his report and in his testimony, Smith stated he obtained the number of hours that Wright performed such services from Whitaker. Thus, Smith's hours estimations are based on the facts from this particular case.

Based upon his interview with Daunte Jr.'s mother, Smith estimated Wright would have spent half an hour a day giving advice and counsel to his son; and would have spent "a couple of hours" everyday spending time with him. To derive his estimate of the value of these two kinds of "services," Smith first calculated how much it would cost Daunte Jr. if these services were provided by someone unknown to the household. He considered the earnings of "educational, vocational, and school counselors; marriage and family therapists; child, family and school social workers; social and human service assistants; clergy; directors of religious activities and education; coaches; elementary school teachers; and personal financial advisors." Smith Report 5. He calculated the mean hourly earnings in those occupations to be about $30 using U.S. Bureau of Labor Statistics data. *Ibid*. He then multiplied this number by the number of hours at 0.5 per hours per week over Wright's lifetime he would have spent providing advice, counsel, guidance, instruction, and training to Daunte, and arrived at a figure of $464,317.

Regarding the loss of "accompaniment services," Smith first estimated Wright would have spent 14 hours per week with Daunte Jr. until Daunte reached 22, and then he would spend 7 hours a

week thereafter. Smith Report 9. Because these services are "akin to those provided by a mere acquaintance with whom one might attend a movie, play cards, or take a stroll," these are services that could be provided by a home health aide or "adult sitter." *See* Smith Report 8. He calculated the hourly wage for such services as $14.46, added a non-wage component and based upon his estimate of the number of hours Wright would provide "accompaniment services to Daunte Jr. over his lifetime, he calculated Daunte's loss to be $617,453.

The court will not consider Smith's opinion for several reasons: (1) Smith did not calculate what the loss of "household/family services" and "accompaniment services" is to Wright's other next of kin his opinion his not helpful to the court in weighing this specific loss for Daunte Jr. with this specific loss of the other next of kin. That is, it will not add precision or depth to the court's analysis. *See Helterbridle*, 301 N.W.2d at 547; (2) Smith's assumption that these services are similar enough to the services of an adult sitter or home health aide is made without any reliable data and appears erroneous on its face as these "services" provided by family members are unique and not do not seem readily comparable to the services of an adult sitter or home health aide; and (3) in the court's view, Smith's definition of "household/family services" and "accompaniment services" is more akin to loss of society and companionship. In short, these opinions are not helpful to the fact finder as Rule 702 requires and lack foundational reliability.

Smith's Opinions on Loss of Society and Relationship

Smith estimates Daunte Jr.'s loss of Wright's society and relationship to be $4,035,978. His opinion is based on a methodology found in economic journals and a chapter in the book "The Value of Life to Close Family Members," in *The New Hedonics Primer for Economists and Attorneys, 2nd Edition. See* Smith Report 11. In those articles, Smith describes the methodology for calculating the value of the average life. Three types of financial decisions are used to

determine the average value of life: First, consumer behavior and purchases of safety devices, wage risk premiums to workers, and government regulations. But it is error to assume the average consumer is aware of the likelihood that a particular safety device will prevent his death. Thus, a consumer's spending decisions do not accurately reflect a consumer's thoughts on the value of his life. These calculations assume there are only three factors that affect a person's decision to buy a safety device: The price of the item, the likelihood the device will prevent the buyer's death, and the buyer's valuation of his life. There are many other variables which could affect spending decisions such as advertising and marketing or government-mandated safety requirements.

Second, wage risk premium studies are unreliable for the value of life for the same reason: It is error to assume the average employee is aware of the likelihood that a more dangerous job will prematurely cause his death. This methodology also fails to account for the fact that employees often take jobs for reasons unrelated to money, such as location, a sense of civic duty, personal fulfillment, or other job-related benefits. The failure to account for the other variables that affect spending behaviors renders these calculations as to the value of the average human life unreliable and inaccurate.

Lastly, government regulations are often affected by considerations other than the value of life, such as budgetary concerns and the popularity of the regulation among constituents. For all these reasons, Smith's opinion as to the "average value of life" as it relates to losses incurred by Daunte Jr. lack foundational reliability and are not excluded.

C. The Court's Analysis of the Next of Kin's Loss

1. The Monetary Loss to Daunte Jr.

It is undisputed that Daunte Jr. is the only next of kin to incur monetary loss. And while the court agrees with the Trustee that the facts here are different in *Rath* where the Court

recommended a formula for calculating monetary losses to the next of kin, the court is also of the view that *Rath* formula could still be applied here. And if the court is correct about application of the *Rath* formula to the facts here, it would result in the entire proceeds being distributed to Daunte Jr. The court has decided against doing that given the lack of precedential authorities applying the *Rath* formula to different factual scenarios and the availability of an expert opinion about the actual monetary loss to Daunte Jr.

The Objector, unlike the Trustee, provided an economically and theoretically sound calculation of the monetary loss to Daunte Jr. based upon Wright's work history, job growth rates, interest rates and wage growth models. And based upon four different assumptions of Wright's educational attainment, he calculated what monetary amount would have flowed to Daunte Jr. after Wright's personal consumption.

The court is persuaded that given Wright's lack of high school diploma and Whitaker's testimony she did not know what plans Wright had to acquire a GED, there is insufficient evidence for the court to conclude he would have furthered his education beyond what he had attained at the time of his death. Nor is there evidence to conclude he would have sought or attained any higher education level. Thus, the range of the monetary loss to Daunte Jr. due to Wright's death is in the range of $667, 000 to $1,002,111. That is, the range of monetary support Wright would have provided to Daunte Jr. until Daunte Jr. is 21 ($667,000) to when Wright was 67 ($1,002,111).

The court finds Wright would have supported Daunte Jr. beyond his son's 21st birthday and most likely into Daunte Jr.'s third decade. This is consistent with national data regarding how long parents provide some financial support to their adult children.[24] Thus, the court finds the amount beyond $667,000 which Wright would have likely provided Daunte Jr. at least $111,700,

[24] https://www.pewresearch.org/social-trends/2019/10/23/majority-of-americans-say-parents-are-doing-too-much-for-their-young-adult-children/.

that is, one-third of the difference between $667,000 and $1,002,111. Accordingly, the total direct monetary loss to Daunte Jr. is $775,000.

2. The Proportional Losses Amongst the Next of Kin

After subtracting the amount of attorney's fees and costs, $487,500 to the NSD law firm and $56,233 to the Romanucci law firm and the Trustee's fee, $35,000 to Lisa Brabbit, the amount left for distribution is $2,671267.[25] In determining the distribution of the proceeds, the court first considers the $775,000 in monetary loss to Daunte Jr., and then considers for each of the next of kin, including Daunte Jr., 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. *See Rath*, 292 N.W.2d at 286.

a. Daunte Jr.

Regarding Daunte Jr., his loss of his father is a grievous and consequential loss Daunte Jr. will experience for the remainder of his life. He lost a parent when he was 1.5 years old. This is a permanent and existential injury to him. The manner of Wright's death and the fact that Daunte is his namesake will further complicate the difficulty Daunte Jr. will have growing up and living his life without his father. Here, there is evidence that Wright would have been a significant presence in Daunte Jr.'s life—both Whitaker and Trustee testified to this. This is the Trustee's testimony:

> Daunte Junior was the start of [Wright's] life. Daunte Junior was the center of his world. After Daunte Junior was born, there was a change in [Wright], and [Wright] knew that he, even though in many ways still a child, that he needed to become very quickly an adult. And it is my opinion that [Wright] wanted to provide for Daunte Junior, that he loved him beyond any stretch of the imagination, and that he was just absolutely the light of his life and center of his world.

[25] The court's award of attorney's fees and costs is different than that of Brabbit's and is discussed below on pages 46–58.

Tr. 34:10–19.

b. The Loss to Katie Bryant

Bryant has no direct monetary losses from the death of her son. The Trustee did not provide any specifics of what types of things beyond the usual household chores that Wright did for his mother. Much more importantly, Bryant incurred profound loss of society and relationship due to her son's death. The relationship of a parent and a child is unique and profound. As Brabbit testified, Bryant and Wright were very close; in fact, it was Bryant who Wright called when he was stopped by Kimberly Potter on April 11, 2021. After Daunte Jr., Bryant was the most important next of kin for Wright, and she is awarded the second highest award of damages.

3. Arbuey Wright

According to Brabbit, the relationship between the two was not as close as that between Wright and his mother. Wright Sr. saw his role as a parent to offer mentorship and guidance to Wright. There is no evidence Wright provided his father with any household services. As with Bryant, Wright Sr. has incurred the tragic loss of his child and his damages are the third highest the court awards.

4. Damik, Dallas, Diamond, and Destinee

These siblings lived with Daunte for most of their lives and have suffered a profound loss of their brother. There is some evidence Wright provided solace and advice to his younger siblings. These siblings lost a brother with whom they had close contact on a nearly day-to-day basis for most of their lives. Their losses are included in the court's weighing of the proportional losses of the next of kin.

5. Marcus and Monica

These half siblings moved away from Minnesota, by the court's estimate, approximately seven to ten years ago. There is no evidence Wright provided them with any household or family services. There is no evidence as to how frequently they had communication with Wright. Accordingly, their loss is a fraction of that incurred by Wright's Minneapolis-based siblings.

6. Micah Wright

There is no evidence Wright had any relationship with his half-brother Micah who was approximately 2-years old when he died. Thus, the court cannot find any loss to Micah.

Summary and Conclusions

Weighing all these losses in the context of their past relationship with Wright, the court concludes Daunte Jr.'s non-monetary losses far exceed those of the remaining next of kin. His loss is profound. The court also recognizes Wright had a strong and somewhat unique relationship with his mother, Katie Bryant. There is almost no evidence about the relationship between Wright and his father, but given the parent-child relationship, the court is compelled to find this was an important relationship and a significant loss. And, of course as the Trustee described, Wright had close relationships with his siblings here in Minnesota, but much less so with those in North Carolina.

Therefore, the court will first distribute the monetary loss of $775,000 to Daunte Jr., and then approximately 65% of the amount remaining in the proceeds, $1,896,267,[26] to Daunte Jr. and will distribute the remaining 35% amongst Wright's other family members according to the strength and intimacy of their relationships. The distribution for this second category is:

[26] The total amount available after the court deducts the attorney's fees and the Trustee's fee is $2,671,267.

Daunte Wright Jr.(3)	$1,246,267.00	(child)
Katie Bryant	$255,000.00	(mother)
Arbuey Wright	$155,000.00	(father)
Damik Bryant (27)	$50,000.00	(half-brother)
Dallas Bryant (26)	$50,000.00	(half-brother)
Diamond Wright (20)	$50,000.00	(sister)
Destinee Wright (16)	$50,000.00	(sister)
Monica Wright (26)	$20,000.00	(half-sister)
Marcus Wright (24)	$20,000.00	(half -brother)
Micah Wright (5)	--0--	(half-brother)

Thus, the total distributed to Daunte Jr. is $2,021,267, which includes both direct monetary loss and other pecuniary losses. The amounts distributed to the other next of kin total $650,000 in the specific amounts listed above.

D. <u>LEGAL FRAMEWORK: Attorney's Fees and Costs</u>

"[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." *Hagman v. Schmitz*, 2011 WL 2672355, *3 (Minn. Ct. App. July 11, 2011) (quoting Minn. Gen. R. Prac. 143); *see also* David. F. Herr, 3A Minn. Prac., Gen. Rules of Prac. Ann. R. § 143.2, at 307 (2022 ed.) (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)).

a. Reasonableness of Attorney's Fees and Costs

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. Ct. App. 2004) (citing *Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54, 60 (Minn. 1993)). But even a customary contingent fee may be invalid if it is excessive. *Holt v. Swenson,* 90 N.W.2d 724, 727–28 (Minn. 1958) (citing *Hollister v. Ulvi*, 271 N.W. 493, 497 (Minn. 1937)). In *Hagman,* the Court of Appeals affirmed a district court's reduction of $28,000, one-third of the settlement as set forth in the Trustee's contingency fee agreement, to $15,000. *Hagman*, 2011 WL 2672355 at *4. The trial court found the fee excessive because the attorney's work included only taking one deposition, exchanging discovery, preparing a demand letter, and settling without any contested hearing or trial. *Ibid*. The Court of Appeals held the district court did not abuse its discretion in reducing the fee and wrote: "[A]lthough the attorney obtained a favorable settlement, the issues in the case were not novel or complex," and the attorney's defense of the trustee's appointment "as against a good-faith, competing proposal was not an element of time necessarily expended to obtain the settlement. *Ibid*.

In this case the original fee arrangement was a 40% contingency fee, but the two remaining law firms "have agreed to accept 33.33%," i.e., one third, of the $3,250,00 in settlement proceeds. The one-third fee here, on its face, appears reasonable given the prevalence of one-third contingency fees in tort actions. However, this case was not complex, no legal action was ever initiated, no depositions were taken, and discovery requests were ever served. In addition, the City of Brooklyn Center clearly indicated it wanted to settle the case less than two months after Wright's death and a week after Brabbit was appointed as Trustee; the attorneys spent relatively few hours studying the legal issues which would have arisen in litigation; and the attorneys spent very little

time, perhaps as few as fifteen hours, in communicating with the City of Brooklyn Center's attorney, preparing for settlement discussions, and engaging in direct face-to-face negotiations. The case settled after only one day of settlement negotiations and only half that time was spent on the monetary part of the settlement, and the non-monetary terms of the settlement were obtained almost entirely by the next of kin. Under such circumstances, a contingency fee of 40%, or even 33 1/3%, is unreasonable. *See Hagman* at *4.

The court rejects the characterization of the attorney's work in the Petition for Distribution as "substantial and includes litigating the heavily contested trustee appointment proceeding…" in support of her proposed attorney's fee payment. The challenge to the petition to the appointment of the trustee and the appeal of that appointment was not a serious one, and in fact the NSD law firm itself described the appeal as "nearly frivolous." The only thing about the appointment of the Trustee that was substantial was the delay the appeal caused in the final appointment of the Trustee. And as stated above, neither law firm spent "substantial" amounts of time on researching the issues relevant to a civil rights claim or negotiating the "qualitative," i.e., non-monetary terms of the settlement.

b. <u>The Retainer Agreement is Unenforceable.</u>

The rules governing the professional conduct of lawyers specifically address fee splitting between lawyers of different law firms:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.
>
> Minn. R. Prof. Conduct 1.5(e).

The Comments to the Professional Rules of Conduct state: "A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist." Prof. R. of Conduct 1.05(e), cmt. 7. Certainly that was not the case here where three different law firms all claim to be specialists in wrongful death civil rights cases demanded an equal share of 40% contingency fee.

In *Christensen v. Eggen*, the Minnesota Supreme Court set forth the reason for Rule 1.05:

> Prior to the adoption of the Minnesota Rules of Professional Conduct, this court held that "[a] legitimate basis for division of fees between attorneys should be either a division of labor or responsibility." *Anderson v. Grimes*, 237 N.W. 9, 10 (Minn. 1931). Therefore, it is clear that this court has always limited the splitting of fees between attorneys. Legal commentators have noted reasons why fee-splitting agreements often require a division of labor or responsibility to be consistent with public policy:
>
> An agreement to pay a referral fee is often viewed as unenforceable as against public policy. It is thought likely to increase the overall fee charged, to ignore the rights of the client to choose his own lawyer, and to encourage neglect and unethical conduct in the referring attorney, besides being unfair to the one who has done all the work. Carroll J. Miller, Annotation, Validity and Enforceability of Referral Fee Agreement Between Attorneys, 28 A.L.R.4th 665, 667 (1984) (citations omitted).
>
> 577 N.W.2d 221, 225 (Minn. 1998).

While acknowledging "public policy requires that freedom of contract remain inviolate" except in cases where a contract violates some greater principle, the Court further cautioned:

> [T]here are specific and identifiable reasons why fee-splitting contracts may be detrimental to the general public, many of which are set forth above and which support a determination that fee-splitting agreements must be monitored closely and the rules must be enforced. . . . In enforcing these rules, the court considers the best interests of the client and Minn. R. Prof. Conduct 1.5(e) provides the client with some measure of protection.
>
> *Ibid*.

In sum, fee-splitting agreements likely increase the overall fee charged to the client as well as deprive the client of the right to choose their own attorney, thus courts, as this court does below, must scrutinize such agreements carefully.

Attorneys who are party to an unenforceable fee-splitting agreement may recover in quantum meruit. *See Soderberg & Vail, LLC v. Meshbesher & Spence, Ltd.*, 2016 WL 22251, *2 & *6 (Minn. Ct. App. Jan. 4, 2016); *Alderson v. Homolka*, 2007 WL 968740 *4–*5 (Minn. Ct. App. Apr. 3, 2007).

In addressing the first requirement of Rule 1.5 (e), the court examines the following paragraph of the Retainer Agreement:

> [The trustee] hereby retains and employs Newmark Storms Dworak LLC, Ben Crump Law PLLC, and Romanucci and Blandin LLC (the ATTORNEYS) to represent me as trustee for [Wright's] next of kin in the handling, presentation, and settlement of any and all claims arising under the Federal Rights Act or under applicable state law as to the April 11, 2021 death of [Wright] in Brooklyn Center, Minnesota.
>
> *See* Pet. for Distribution, Ex. B (emphasis added).

In the first Petition, it stated that Brabbit intended to employ the law firms of NSD law firm, Ben Crump Law, and the Romanucci & Blandin, LLC law firm ("Petitioner's Counsel") "to serve as counsel for the trustee in this matter, subject to appropriate motions for pro hac vice for the out-of-state firms."

Under the "Fee and Fee Splitting" paragraph, the Retainer Agreement states:

> I retain the Attorneys to institute any and all litigation necessary in connection therewith, to supervise and generally handle the same, and do hereby agree to an ATTORNEYS' FEE in the amount of 40% of the gross recovery….I understand that this fee shall be split on an equal 1/3, 1/3, 1/3 basis between the three law firms.
>
> *Id*. (Emphasis added).

The Retainer Agreement says nothing about the division of fees being connected to the proportion of work performed by each firm, one of the two ways in which Paragraph 1 of Rule 1.5(e) can be satisfied. Clearly this is not the case. The NSD did almost all the work on this case. Just in terms of hourly billing logged to the Trustee's case, the NSD firm logged $359,310.50 in attorney time and the Romanucci firm logged $56,232.50; that is, 86.5% of the billing was done by the NSD firm and only 13.5% of the billing was done by the Romanucci firm. Ben Crump Law did almost no work on the file, withdrew from representation, and did not submit any billing records or any request for fees.[27] Accordingly, the court concludes the fee-splitting agreement does not meet the first way that Paragraph 1 of Rule 1.5(e) can be satisfied. For the reasons explained in the next section, the agreement also did not meet the second way that the rule can be satisfied.

c. The Romanucci Law Firm Was Not Authorized to Practice Law in Minnesota

Turning to the second way Rule 1.5(e)(1) can be satisfied, the court must decide whether the Retainer Agreement can reasonably be interpreted such that all three law firms assumed "joint responsibility for the representation." The court begins this analysis by inquiring whether the Romanucci and Ben Crump firms subjected themselves to the jurisdiction of the rules and responsibilities of attorneys licensed to practice law in Minnesota. Because, if they did not, the court cannot conclude they ever had joint responsibility for litigation of the case as they would not have been admitted to practice law in Minnesota.

Rule 5.5(b) and (c) of the Minnesota Professional Rules of Conduct state:

> (b) A lawyer who is not admitted to practice in Minnesota shall *not*:
>
> (1) except as authorized by these rules or other law, *establish an office or other systematic and continuous presence in this jurisdiction* for the practice of Minnesota law: or

[27] There were no more than 2–3 billing records to indicate the Ben Crump Law firm was involved in in the case.

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Minnesota law.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, *may provide legal services on a temporary basis* in this jurisdiction which:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;
(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c)(2) or (c)(3) and involve the representation of a family member or arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Such reasonably related services include services that are within the lawyer's recognized expertise in an area of law, developed through the regular practice of law in that area in a jurisdiction in which the lawyer is licensed to practice law.

Minn. R. Prof. Conduct 5.5(b), (c) (emphasis added).

The Minnesota Supreme Court interprets the rule restricting the unauthorized practice of law strictly. In the case, *In re Disciplinary Action Against Harmon*, 972 N.W.2d 880 (Minn. 2022), the Supreme Court affirmed the Director of the Office of Lawyers Professional Responsibility's petition for disciplinary action against Thomas E. V. Harmon after the United States District Court for the District of South Dakota issued an order on October 7, 2021, prohibiting Harmon from filing for admission to the bar of that court until June 1, 2024. The federal court entered its order after Harmon engaged in the unauthorized practice of law in that court when, after his provisional admission to that court expired, he continued to practice there for a period of approximately 20 months. Harmon's conduct violated Minn. R. Prof. Conduct 5.5(a) and 8.4(d).

In another case, *In re Charges of Unprofessional Conduct in Panel No. 39302*, 884 N.W.2d

661 (Minn. 2016), the Supreme Court affirmed a disciplinary action against a Colorado lawyer who, via email, represented to a Minnesota lawyer he was representing his in-laws who had a judgment against them by the client of the Minnesota lawyer. The Colorado lawyer never associated with local counsel and of course never became admitted pro hac vice in Minnesota. Over the course of approximately 24 emails, the Colorado lawyer attempted to negotiate a settlement in the case. The Colorado lawyer's practice in Colorado consisted of environmental law, personal injury, and debt collection. When he received a private admonishment by the Minnesota Office of Professional Responsibility for a violation of Rule 5.5(a), he appealed the finding to the Minnesota Supreme Court.

First, the Supreme Court held that the Colorado lawyer actions constituted the practice of law in Minnesota. The Court cited with approval a California case which considered "whether the 'lawyer had sufficient contact with the California client to render the nature of the legal services a clear legal representation' and whether the lawyers' contact with California was merely 'fortuitous or attenuated'' in deciding the same issue. *See id.* at 666 (quoting *Birbrower, Montalbano, Condon & Frank, P.C., v. Superior Court*, 949 P.2d. 1, 5–6 (Cal. 4th 1998)). Then the court held:

> . . . By multiple emails sent over several months, appellant advised Minnesota clients on Minnesota law in connection with a Minnesota legal dispute and attempted to negotiate a resolution of that dispute with a Minnesota attorney. Appellant had a clear, on-going attorney-client relationship with his Minnesota clients, and his contacts were not fortuitous or attenuated.
>
> *Ibid*.

Turning to the question of whether the Colorado lawyer's conduct was permitted under one of the exceptions to Rule 5.5(c)(2), the Colorado lawyer stated he believed he would associate with local counsel and because his in-laws reached out to him for his "expertise" on such matters, the matter "arose out of [Appellant's] law practice." *Id.* at 667. The Court rejected these arguments

because both exceptions under Rule 5.5(c)(2) only allow for an out of state lawyer to provide legal services: (1) On a *temporary basis*, *ibid*.; or (2) in anticipation of a proceeding or hearing in which the lawyer expects to be admitted pro hac vice. *Ibid*. (citing Minn. R. Prof. Conduct 5.5(c)(2), cmts. 10 & 3. The lawyer's client's claims did not involve any connection to a body of federal or nationally uniform law but instead were Minnesota clients with a Minnesota judgment held by another Minnesota resident and governed by Minnesota law. *Id.* at 668–69 (citing Minn. R. Prof. Conduct 5.5, cmt. 14)

The court concludes that Antonio Romanucci very likely violated Minnesota Rule of Professional Conduct 5.5(b)(1) by his long, systematic, and continuous presence in this jurisdiction. Certainly, his presence was not temporary, he did not file a proc hac vice motion until thirteen months after he signed on to the case. His presence here was continuous and systematic: He signed a Retainer Agreement guaranteeing him a 13.33% share of what was certainly going to be a settlement figure in the several millions in exchange for his work "to institute any and all litigation necessary in connection therewith, to supervise and generally handle the same[]" on May 26, 2021. He cannot have made this agreement if he did not commit himself to having a systematic and continuous presence in Minnesota. And indeed, he did have such a presence: He retained experts at considerable cost to his clients, he appeared remotely at court hearings via Zoom, he made telephone calls with the state prosecutors on the Kimberley Potter trial, he travelled to Minneapolis for the case several times, and he represented the Trustee during final settlement negotiations with the City of Brooklyn Center

If Thomas Harmon was found not to have been licensed to practice in South Dakota because his provisional admission had been expired for over 20 months, this court cannot conclude Antonio Romanucci was authorized to practice law in Minnesota until July 9, 2022, over six weeks

after the case settled. Concluding he accepted joint responsibility of the case when he signed the Retainer Agreement requires the court to ignore his likely violation of Rule 5.5(b). This is particularly so when viewed in the context of the huge disparity between the amount of work performed by the two law firms. Thus, the Retainer Agreement violates the Rule 1.5(e) and is unenforceable. *See Christensen,* 577 N.W.2d at 225; *see also Harmon Parker, P.A. v. Santek Mgmt., LLC*, 311 So. 3d 224, 228 (Fla. 2d. Dist. Ct. App. 2020) (interpreting Rules Regulating the Florida Bar, Rule 4-1.5(f)(4)(D) and holding fee-splitting agreement unenforceable).

The court is referring this Order to the Minnesota Board of Lawyers Responsibility for a formal determination of whether Antonio Romanucci violated the Rules of Professional Conduct.

d. Difficulty of the Legal Issues

The only legal issue which arose here was the challenge to the appointment of Brabbit as the Trustee. Whitaker filed an objection and a separate petition to become a co-trustee. Whitaker's petition was not a serious challenge to the petition of Brabbit. The Court dismissed it at the end of the hearing and the Minnesota Court of Appeals dispatched her appeal of that dismissal with equal haste. The NSD law firm characterized the appeal as "just short of frivolous." *See* Newmark Aff., Ex. E (Sept. 30, 2022). A "nonissue" issue which arose here was whether there should be any formal discovery of the Trustee, another issue raised by Whitaker after she changed attorneys and Brabbit filed the Petition for Distribution. This went nowhere and was denied orally by the Court.

During the evidentiary hearing on the Petition, counsel for the Trustee inquired as to whether this case presented complex legal issues. The Trustee gave a general answer; that "no case is without legal risk." That is faint praise. In the Petition for Distribution, she identifies numerous legal issues that allegedly made this case "complex," but as described above, very little of the lawyers' time was spent on these issues. In reviewing the billing records, there are less than fifteen

hours logged related to the issue of whether the City of Brooklyn Center could be found legally liable for the actions of Kim Potter that caused Wright's death.

e. Results Obtained

As stated above, the Trustee settled the case with the City of Brooklyn Center for $3,250,000 after a half of a day of negotiations devoted to the monetary terms of settlement.[28] The Trustee suggests the court compare it to other civil rights settlements in Minnesota involving the killing of an innocent person by police. The mother of Philando Castille settled for three million dollars from the City of Saint Anthony shortly after the policeman who killed her son was acquitted of second-degree manslaughter. At the time of the settlement, she had not yet filed a wrongful death action. This comparison is not helpful given the lack of information as to the size of these two cities' tax bases, the lack of information about the size of the City of Brooklyn Center's budget, its insurance coverage, or how it will pay for its share of the settlement. More importantly, the City of Saint Anthony settled after the police officer who killed Philando Castille was acquitted unlike Kimberley Potter who was convicted in criminal court. In sum, the court has no context for measuring the results obtained.

The court does recognize that the amount of the settlement, as it will be distributed, will guarantee Wright's only child will be financially provided for until he is well into adulthood. That is a good result.

f. Counsel's Expertise

The Court has no doubt the NSD and the Romanucci law firms are skilled trial attorneys who have had success in several areas of law including civil rights actions against police officers. Because there was no litigation here, except for the issue of the appointment of a trustee, the court

[28] The City has also agreed to non-monetary terms related to policies, procedures, training, the public safety resolution, and a memorial—terms the Trustee gives Wright's mother the credit for achieving.

is unable to evaluate further counsel's expertise.

g. Time reasonably expended to secure result and Counsel's responsibility for secured result.

As described above in the summary of the facts section, the City of Brooklyn Center and the Trustee's counsel were in settlement discussions within less than a month after Wright was killed and again within days after the Trustee was appointed. There was no litigation here: The Trustee never filed a wrongful death action, the City of Brooklyn Center indicated its desire to settle the case from the beginning, and settlement discussions were very brief.

Given the very few hours the Trustee's counsel recorded for settlement discussions, that no wrongful death case was ever filed, no litigation occurred, and the City's willingness to settle immediately after the Trustee was appointed. The Court finds that counsel here expended only a small amount of its recorded time on settlement and instead recorded significant amounts of time on issues which did not advance the Trustee's wrongful death claim. Thus, the court cannot find the results obtained here can be credited in large part to the Trustee's counsel. Certainly, the Trustee gives almost sole credit for the non-monetary results to Katie Bryant.

Summary

There is precedent for reducing a 33.33% contingency fee to a 15% fee in cases where no litigation occurred. *See, e.g.*, *Hagman*. More importantly, it is proper for a district court to reduce an attorney's fee to preserve recovery for their client. *See Dixon v. Johnson*, 430 N.W.2d 253, 256 (Minn. Ct. App. 1988) (citing *Jadwin v. Kasal*, 318 N.W.2d 844, 848 (Minn. 1982) (factor to be considered in making attorney fee award is result obtained for client)).

As stated above, the court concludes that the contingency fee agreement in this case is unreasonable. In addition, because the fee-splitting agreement in the Retainer Agreement violates Rule of Professional Conduct 1.5(e). Accordingly, the court awards attorney's fees on a quantum

meruit basis only[29] to the Romanucci law firm of $56,233.00, and denies its requested costs because the court finds, for the reasons stated above, the costs sought are unreasonable. The court awards a 15% fee of $487,500 to the NSD law firm because the firm, unlike the other two law firms, accepted full responsibility for the case during its duration and devoted substantial time to the case. That the NSD law firm performed many services for Katie Bryant and other next of kin which were not related to the legalities of a bringing a successful federal civil rights case against the City of Brooklyn Center does not undermine the court's finding that the NSD law firm was fully committed to this case. The court awards the Trustee her requested $35,000.00 fee.

E. Evidentiary and Discovery Issues Related to the Petition for Distribution

1. Discovery Issues

The Wrongful Death Statute requires that upon petition by a surviving spouse or next of kin, the court "shall appoint a suitable and competent person as trustee to commence or continue such action and obtain recovery of damages thereon." Minn. Stat. § 573.02, subd. 3. Following either the trial or settlement of a wrongful death action, "[t]he court then determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly." Minn. Stat. § 573.02, subd. 1; *see also* Minn. Gen. R. Prac. 144.05. Rule 144.05 further provides that "[t]he petition for distribution will be heard upon notice, given in form and manner and upon such persons as may be determined by the court, unless waived by all next of kin listed in the petition for distribution or unless the court determines that such notice is not required." Neither Minnesota Statute Section 573.02, subd. 1 nor Rule of General Practice 144.05 prescribe how the reviewing court must conduct its hearing on a distribution of the proceeds.

[29] *See e.g., Soderberg & Vail, LLC v. Meshbesher & Spence, Ltd.*, 2016 WL 22251, *2 & *6 (Minn. App. Jan. 4, 2016).

On July 28, 2022, counsel for Whitaker served subpoenas for depositions and documents on Katie Bryant and Arbuey Wright primarily seeking information regarding retention of attorneys in the wrongful death matter and information about the "GoFundMe" account they set up with the Ben Crump Law Firm. The NSD law firm responded with a motion to quash and for a protective order. Counsel for Whitaker also filed a motion to compel. The court heard the discovery motions during the evidentiary hearing and denied the motion to compel. That order rendered moot the Trustee's motions. The court's review of Minnesota cases on the relevance of external sources of payments to the next of kin indicated such funds are not considered by courts in determining the proportional distribution of proceeds available for the next of kin. *See, e.g.*, *Daniels v. Brown,* No. 86-CV-13-4026, 2015 WL 5775936 *7 (Minn. Dist. Ct. Aug. 27, 2015); *Hagman v. Schmitz*, No. A11-62, 2011 WL2672355 (Minn. Ct. App. July 11, 2011).

The court was also of the view that the Wrongful Death Statute creates a specific vehicle for the distribution of proceeds that is intended to be efficient, fair, and summary in contrast to the regular course of litigation and that intrusive or burdensome discovery on the next of kin was inconsistent with that intent. For these two reasons, the court denies the motion for discovery.

2. The Evidentiary Issues Raised at the October 7, 2022, Hearing

"[F]or the purpose of the wrongful death statute, 'next of kin' means blood relatives who are members of the class from which beneficiaries are chosen under the intestacy statute." *Wynkoop,* 574 N.W.2d at 427. This includes children, grandchildren, parents, siblings, grandparents, aunts, and uncles. Minn. Stat. § 524.2-103; *see also Wynkoop,* 574 N.W.2d at 427–28. "[T]he statute provides no preferences among next of kin . . . ." *In re Larsen's Heirs,* 237 N.W.2d 371, 374 (Minn. 1975). "Thus, the court may not pick and choose among eligible members of the class entitled to present evidence of pecuniary damages, although it may decide whether a

blood relative comes within the parameters of the class." *Wynkoop,* 574 N.W.2d at 427.

Two days before the Hearing, all the next of kin except for Whitaker as guardian of Daunte Jr. signed and filed a "A Consent and Waiver of Proceedings" which stated:

> Pursuant to Minn. Stat.§ 358.116 and 28 U.S.C. § 1746, I hereby declare under the penalty of perjury as follows: (1) I received the Notice of Hearing, Petition for Distribution of Proceeds, Proposed Order on Distribution of Proceeds, Consent and Waiver Regarding Distribution of Wrongful Death Proceeds; (2) I consent to the distribution in the Petition; (3) I waive all right to object to the Petition; and (4) I waive all right to a hearing on the Petition.

See Consent and Waivers filed October 6, 2022.

As stated above, Chyna Whitaker, mother of Daunte Jr., testified at the Hearing and called an expert witness who also testified. At the hearing, Eric Newmark, an attorney at the NSD law firm, represented the Trustee. At the end of the hearing, Newmark argued the following:

> . . . Our understanding of the hearing was that Court only wanted to hear from the trustee and objectors. And so, if the Court is leaning towards or intending on taking away any of the next of kin as opposed to coming from somewhere else, we would ask the Court for opportunity to continue this hearing so the next of kin can come and testify.
>
> It was our understanding, based on the phone call with the Court as well as the time allotted here, that each individual next of kin would not have the opportunity to, in their own words, describe pecuniary loss. So, if the Court is intending on changing the recommended distribution as it relates to the next of kin we'd ask the Court the opportunity to allow these individuals, if they choose to, to testify as to their pecuniary loss.
>
> Tr. 152:7–23.

The court declined to leave the record open and give the next of kin an opportunity to testify regarding their pecuniary losses. The court stated its reasons: (1) The Trustee "very ably presented" the case for the next of kin and her testimony was probative of the pecuniary losses of the next of kin; (2) all parties were on notice that Whitaker, as the Objector, would testify and call witnesses; (3) Whitaker's testimony about Daunte Jr.'s losses was essentially the same as what the

Trustee testified they were; and (4) all the next of kin except Whitaker waived their appearance at the Hearing.

CONCLUSION

This was a hard case. It stemmed from the death of one person and involved the attendant personal losses connected to that death. The undersigned took a long time to research and consider the issues this case presented. These issues were quite serious for Daunte Jr. and the rest of Wright's next of kin, Chyna Whitaker, the attorneys, the community affected by Wright's manner of death, and for district courts as the final arbiters of what are fair outcomes in wrongful death cases. The court declines to suggest what further conclusions can be drawn here. Accordingly,

Based upon the foregoing **IT IS HEREBY ORDERED** that:

ORDER

1. Distribution of the $3,250,000 in settlement proceeds with the City of Brooklyn Center shall be as follows:

Daunte Wright Jr.(3)	$2,021,267.00	(child)
Katie Bryant	$255,000.00	(mother)
Arbuey Wright	$155,000.00	(father)
Damik Bryant (27)	$50,000.00	(half-brother)
Dallas Bryant (26)	$50,000.00	(half-brother)
Diamond Wright (20)	$50,000.00	(sister)
Destinee Wright (16)	$50,000.00	(sister)
Monica Wright (26)	$20,000.00	(half-sister)
Marcus Wright (24)	$20,000.00	(half-brother)
Micah Wright (5)	--0--	(half-brother)

2. Attorneys' fees and Trustee's fees are awarded as follows:

    a. The Newmark Storms Dworak law firm is awarded $487,500.00

    b. The Romanucci & Blandin law firm is awarded $56,233.00

    c. The Trustee Lisa Brabbit is awarded $35,000.00

3. The Motion to Compel Discovery is **DENIED.**

4. Counsel for the Trustee and for the Objector Chyna Whitaker shall submit proposals for the distribution of the funds to Daunte Jr. within 30 days. Specifically, counsel shall propose a payout under a structured settlement document which will be provided to the court or propose a trust be established for the benefit of Daunte Jr., which will receive the settlement funds.

Let judgment be entered accordingly.

Date: March 15, 2023

By the Court:

Bridget A. Sullivan
Judge of District Court