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CASE NUMBER: 116752

No. 16-116752-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Carolyn Kane and Peggy Locklin,
Plaintiffs-Appellees

v.

Keith Locklin, Trustee of the
John W. Locklin and Ruth A. Locklin Revocable Trust Agreement,
Dated April 16, 1997,
and Allen Locklin,
Defendants-Appellants

BRIEF OF APPELLANTS

APPEAL FROM THE DISTRICT COURT OF JEFFERSON COUNTY, KANSAS
HONORABLE GARY L. NAFZIGER, JUDGE
DISTRICT COURT CASE NO. 2014 CV 4

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Oral Argument: 20 minutes

TABLE OF CONTENTS

NATURE OF THE CASE

The parties of this action are the adult children of John W. Locklin and Ruth A. Locklin, deceased. Mr. and Mrs. Locklin executed a Revocable Living Trust Agreement on April 16, 1997, apportioning the division of certain assets among their children, most significantly certain sections of agricultural real estate. At the time, the trust dictated in relevant part that its corpus should be split equally four ways between their children Allen, Keith, Carolyn, and Peggy Locklin.

Sadly, Ruth Locklin passed away shortly thereafter, on May 30, 1997.

On November 24, 2009, John Locklin, as trustee, and Keith Locklin, acting as substitute trustee, executed a "First Amendment" to the underlying trust agreement, granting large sections of farmland, equipment, and livestock to the Defendants herein, Allen and Keith Locklin, as consideration for their consistent involvement in the business and management of the farm itself in the intervening twelve years. Everything remaining in the trust, including a house, was left to the Plaintiffs. John Locklin subsequently passed away on January 8, 2013.

Plaintiffs Carolyn Kane and Peggy Locklin filed the underlying action challenging both the validity of the 2009 Amendment and the acts of Defendant Keith Locklin in his capacity as substitute trustee.

At the close of discovery and depositions, the District Court granted Summary Judgment to the Plaintiffs, finding as a matter of law that the original trust agreement became irrevocable upon the death of Ruth Locklin, rendering the 2009 First Amendment invalid and unenforceable. The Court went on to

deny the Defendants' Motion for an evidentiary hearing on the assets, liabilities, and administration of the Trust, and awarded attorneys' fees to the Plaintiffs.

ISSUES ON APPEAL

The following questions are now before the Court of Appeals:

1. Whether the district court erred in determining, as a matter of law, that the John W. Locklin and Ruth A. Locklin Revocable Trust was contractual, and therefore could not be amended following the death of one of the Settlors, when the question of whether a testamentary instrument is contractual is one of fact, there was evidence before the court that it was the intention of both its Settlors and scrivener that this Trust was to be capable of amendment by either surviving spouse, and the language of the document itself (to the extent that it is not ambiguous) supports this position?

2. Whether the District Court erred in awarding damages calculated in reference to the corpus of the trust without holding an evidentiary hearing regarding its value and administration in the years after the final settlor's passing, particularly in light of the ongoing agricultural nature of the enterprise it encompassed?

3. Whether the District Court's erred in its award of attorneys' fees to the Plaintiff-Appellees, when the underlying decision was itself reversible error and, even assuming the contrary, the Plaintiff-Appellees' recovery constituted a more than sufficient award from which to pay their own counsel?

STATEMENT OF FACTS

On April 16, 1997, John W. Locklin and Ruth A. Locklin, a married couple then residing in Horton, Kansas, executed a Revocable Trust Agreement (hereinafter referred to as "the Trust") as grantors and initial trustees. (ROA Volume 1, Pg. 1-2; Vol. 1, Pg. 42-59).

The Locklins chose attorney (now Judge) John L. Weingart to prepare the original Trust for them, along with other estate planning documents. (ROA Volume 3, Pg. 627-633).

John and Ruth Locklin's livelihood was farming, and the corpus of the Trust was composed in large part of agricultural land, trucks, equipment, stored grain and growing crops, but also included, bank accounts, certificates of deposit, and a residence in Nortonville, Kansas. (ROA Volume 1, Pg. 57-58).

The Trust as originally drafted provided that, after the settlors' death and any necessary payments, the remaining trust principal would be distributed to their four children, the parties herein, share and share alike. (ROA Volume 1, Pg. 45).

However, Judge Weingart subsequently testified to his belief that the Trust was a Revocable Trust, and that Mr. and Mrs. Locklin had been advised that they would have the flexibility to amend the same at any time by mutual consent, which was his understanding of their intent. (ROA Volume 3, Pg. 619-621, 627-633).

As scrivener, Judge Weingart was further of the opinion that the Trust at issue is and was a Joint Revocable Trust, but *not* in a contractual sense; nor was this his or the Locklins' intention, to his belief. (ROA Volume 3, Pg. 619-621, 627-633).

At the time of his deposition in this case, Judge Weingart also maintained that it was the intention and effect of the documents of the Trust that either

survivor of the Locklins had authority to amend the Trust at any time before they died. (ROA Volume 3, Pg. 627-633).

Appellant Keith Locklin similarly testified that, in conversation with his parents at around that time, it was clear to him that their intent was that they viewed the Trust as a starting point, believed it could be amended, and that they, as Settlors, intended to make amendments in the future. They made these statements without limitation or qualification. (ROA Volume 3, Pg. 619-621, 634-635).

Plaintiff-Appellees Carolyn Kane and Peggy Locklin were each provided copies of this Trust by their parents immediately after its execution in April of 1997, but asked no questions of their parents at the time and voiced no objections. (ROA Volume 3, Pg. 619-21 and Pg. 636-640).

Mrs. Locklin passed away shortly thereafter on May 30, 1997, at Topeka, Kansas. (ROA Volume 1, Pg. 2).

Some 12 years later, on November 24, 2009, John W. Locklin, as trustee, and Keith Locklin, as substitute trustee, executed the First Amendment to this Trust (hereinafter referred to as the "2009 Amendment") which provided in relevant part that all farm ground, livestock, and farm equipment were to be distributed to Appellants Keith and Allen Locklin "as consideration for their consistent involvement in the business management of my farmland, but also as part of that property which I wish to distribute to them in accordance with the terms of this agreement[.]" (ROA Volume 1, Pg. 6-7; Vol. 1, Pg. 60-63).

Everything remaining in the Trust, including various investments, accounts, and real property in the form of a residence in Nortonville, Kansas, was left to the Plaintiffs-Appellees, share and share alike. (ROA Volume 1, Pg. 61).

Mr. Locklin subsequently passed away on January 8, 2013, in Nortonville, Kansas. (ROA Volume 1, Pg. 2).

On or about November 12, 2013, at the request of Plaintiffs-Appellees, Keith Locklin, in his capacity as Trustee, transferred the residential property to the Appellees, who subsequently sold the home in December of 2013, and kept the proceeds thereof. (ROA Volume 1, Pg. 134-136; Vol. 3, Pg. 744).

Plaintiffs-Appellees, Carolyn Kane and Peggy Locklin, filed the underlying Petition in this matter on January 8, 2014. (ROA Volume 1, Pg. 1-9).

Each party moved for summary judgment shortly thereafter, but it was only following considerable wrangling and the close of discovery some two years later that the Court entered a "Letter Memorandum Decision Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment" (hereinafter referred to as the "Memorandum Decision") on April 7, 2016. (ROA Volume 1, Pg. 30, Vol. 1, Pg. 69, and Vol. 3, Pg. 736-48).

Consequently, a Journal Entry of Judgment was filed on May 18, 2016, which included an order to the trust administrator for the distribution of the trust estate to the Plaintiff-Appellees based on its value "as of the date of the death of John Locklin, January 8, 2013[.]" (ROA Volume 3, Pg. 743-8).

On May 26, 2016, or just over a week later, the Plaintiff-Appellees filed a Motion for Additional Findings of Fact Regarding Attorney Fees and Expenses, requesting attorney fees of $47,178.00 through April 30, 2016, and expenses of $1,853.40, to be paid from what remained of the Defendant-Appellants' share of the trust. (ROA Volume 4, 749-789).

On October 12, 2016, at the conclusion of additional briefing and oral argument on the Motion, the District Court ruled that Carolyn Kane and Peggy Locklin were entitled to half of the amount requested. (ROA Volume 4, Pg. 817-18).

Defendant-Appellants have timely filed this appeal. (ROA Volume 4, Pg. 792).

ARGUMENTS & AUTHORITIES

I. Because Kansas courts have consistently held that whether or not a trust is contractual is a question of fact, the district court erred in granting summary judgment herein. A careful review of the instrument at issue in light of this Court's holdings in Mangels v. Cornell, 40 Kan. App. 2d. 110, 189 P. 3d 573 (2008) and more recently in Eggeson v. DeLuca, 45 Kan. App. 2d 435, 252 P.3d 128 (2011), reveals that the district court fundamentally erred in its interpretation of the Trust and application of the law. In the alternative, to the extent the Locklin Trust is not clearly drafted to allow amendment by either surviving settlor, its provisions and language are at least sufficiently ambiguous to justify the Court's invoking the rules of construction to determine its settlors' intent.

Standard of Appellate Review

Regardless of whether the Court of Appeals reviews the District Court's entry of summary judgment herein as contract interpretation or legal conclusion, the standard of Appellate review is de novo and unlimited.

See e.g. Unrau v. Kidron Bethel Retirement Services, Inc., 271 Kan. 743, 763, 27 P.3d 1 (2001); and Nicholas v. Nicholas, 277 Kan. 171, 177, 83 P.3d 214 (2004). In other words, because the District Court entered summary judgment based wholly on documents and stipulated facts, the Appellate Court is empowered to review the case anew. Ward v. Ward, 272 Kan. 12, 19, 30 P.3d 1001 (2001).

Analysis

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial Court is required to resolve all facts and inferences that may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." [Citations omitted.]" Nicholas, supra 277 Kan. at 176.

Despite the complexity of the litigation surrounding this Trust so far, the actual core question is a simple one: was the Trust executed by John and Ruth Locklin contractual? If the answer is "No," then the 2009 Amendment is effective as written, and the district court's decision should be reversed, with judgment

entered accordingly. If the answer is "Maybe," then there are necessarily questions of fact which preclude summary judgment. It is *only* if answer is an unequivocal and unambiguous "Yes," (and the law places the burden of proof on this issue squarely on the Appellees) that the Trust must be interpreted as a matter of law, by looking solely "within the four corners of the document."

It is a matter of well-settled law in Kansas that whether or not a will (and, by extension) a Trust, is contractual in nature is a question of fact. In re Estate of Chronister, 203 Kan. 366, 372, 454 P. 2d 438 (1969). As this Court has recently written,

> "Whether a will is contractual in nature presents a question of fact. The burden is on the party who asserts a contract to establish by direct or circumstantial evidence that mutual and contractual wills were made in consideration of each other. The contract must be established by full and satisfactory proof that cannot be supplied by a presumption arising from the fact that the wills were mutual. . . Moreover, a contract cannot be presumed because two people simultaneously make reciprocal testamentary dispositions. Nevertheless, the terms of the will may be circumstantial evidence of a contract and may show by implication, *along with other known circumstances such as family relations*, that execution of the will was the result of a preexisting agreement. Finally, the contract must be definite, certain, and unequivocal as to parties, subject matter, and consideration." Eggeson v. DeLuca, 45 Kan. App. 2d 435, 436, 252 P.3d 128 (2011) (emphasis added).

A brief review of the Journal Entry granting Summary Judgment demonstrates the Trial Court's misapplication of this guidence on this point:

> "C. The parties agreed, and the Court finds, that the Trust and the First Amendment are unambiguous. Because the Trust is unambiguous and can be carried out as written, rules of construction are not necessary. *Eggeson v. Deluca*, 45 Kan. App. 2d 435, 443, 252 P.3d 128, 2011 Kan. App. LEXIS 21 (2011); *Mangels v. Cornell*, 40 Kan. App. 2d 110, 113, 189 P.3d 573, 2008 Kan. App. LEXIS 123 (2008); *City of Arkansas City v. Bruton*, 284 Kan. 815, 829, 166 P.3d 992 (2007)." (ROA Volume 3, Pg. 745).

To the extent that the parties previously stipulated to the Trust's language as being unambiguous, each did so while advancing arguments in support of diametrically opposed interpretations thereof. Viewed from the outside, the bare fact that this instrument has taken three years of vigorous litigation by both parties and their counsels to even reach an initial decision should itself say something as to its purported clarity of expression. Regardless, the Appellate Court reviews the case de novo, and so is not bound by any such stipulation.

The Journal Entry continues:

> "D. In order to interpret the provisions of the Trust, the Court should look within the four corners of the document to determine its interpretation as a matter of law.
> E. *Eggeson v. DeLuca*, 45 Kan. App. 2d at 443, sets forth the factors to be considered in determining whether a trust is joint, mutual and contractual. The same factors were applied in Mangels v. Cornell, supra. The Court finds these cases are on point and controlling." Vol. 3, Pg. 745

It bears mention at this juncture that it was the Mangels case, decided by this Court in 2008, that set forth the relevant factors. Mangels v. Cornell, 40 Kan. App. 2d. 110, 189 P. 3d 573 (2008). Eggeson was decided afterward, in 2011, and analyzed the Mangels factors in the context of a mutual will. Eggeson v. DeLuca, 45 Kan. App. 2d 435, 252 P.3d 128 (2011). Although the district court was correct that these are the governing cases, it erred in its application of those holdings here, as well as in treating the two as effectively identical for purposes of its decision. A critical distinction between them is that the court in Eggeson actually spoke to the question of whether a testamentary instrument was contractual (even though the parties there had were in agreement that this was

the case), whereas the Mangels court treated the existence of a contract as a fait accompli, and proceeded directly to its interpretation of the terms thereof. Eggeson at 436. A careful review of the language of these cases, as well the seven factor test described by each, will demonstrate the flaws in the District Court's reasoning.

The first issue the court in Mangels considered was the language of the revocability provision in the trust, which read:

> "REVOCABILITY. This trust shall be revocable, and the Grantors expressly acknowledges that they shall have the right or power, whether alone or in conjunction with others, and in whatever capacity, to alter, amend, revoke, or terminate this trust, or any of the terms of this Agreement, in whole or in part." Id. at 113. Briefly, the Mangels court construed this provision such that the word "alone" actually meant "together" (in the context of the grantors acting as a unit). Id. at 114.

After then observing that the language was "not precisely drafted," the court reasoned that if the instrument's intent had been to allow either grantor to amend it individually, it would have explicitly said so. Id. The language considered by the Eggeson court was even more explicit on this point:

> "The two Instruments are intended to be, and shall be construed as Joint Wills. Neither of us may modify or revoke our Will during, or after the lifetime of the other, unless consented to by the non-modifying or non-revoking spouse." Eggeson at 438.

By contrast, the analogous provision of the Trust now before this court reads, in relevant part: "We reserve the right from time to time during our lives, by written instrument delivered to the trustee, to amend or revoke this instrument in whole or in part[.]" Vol. 1, Pg. 56.

The phrase "our lives" is problematic. While it could arguably support the district court's interpretation (that it required both grantors to be alive and in

agreement to revoke or amend the Trust), it could just as easily be read to authorize either grantor to amend the instrument during the course of their individual life, particularly where one has survived the other. At minimum, it begs the question: if the intent had been to require both grantors' agreement, why does the provision not simply say so? Ultimately, the instrument in Mangels was imprecisely drafted, but at least contained adequate clues from which the court could infer the grantors' intent. Mangels v. Cornell, 40 Kan. App. 2d. 110, 189 P. 3d 573 (2008). The language here is simply insufficient to support a similar inference.

Having considered the proper construction of that trust's "Revocability" provision, the Court in Mangels proceeded to emphasize the requirement that it "not rely exclusively on the isolated language of the disputed paragraph, however, but rather examine the instrument as a whole. Id. at 114-15.

The first such paragraph the Mangels Court considered significant to its ultimate determination was a clause which explicitly provided that funding the trust was "in consideration of the foregoing and *mutual covenants and agreements hereinafter contained.*" Id. (emphasis in original). The Court there stressed that this language was evidence of joinder and consent. Id. at 115. No such language, nor anything resembling an analog thereof, exists in the Trust at issue here. In fact, neither the word "consideration" nor the phrase "mutual covenants" makes a single appearance in the instrument now before the Court.

The second paragraph the Mangels Court found persuasive was a provision that carefully guarded against the unilateral decisions of either settlor, requiring in relevant part that;

"[a]ll decisions of the Trustees shall be taken unanimously[,]" reasoning that this provision "demonstrates both mutuality and clear agreement that decisions regarding the trust were to be made by *both* [settlors]." Id. at 115.

Again, the document now before the Court has no such requirements. To the extent that the District Court's decision reflects such a reading in the absence of any language to that effect, it only speaks to the ambiguity of the document itself.

While the district court's Memorandum Decision struggles to interpret the Trust by looking solely within the four corners of the document, the practical difficulties of separating a testamentary instrument entirely from the circumstances surrounding its execution soon become apparent. For example, in attempting to apply two of the factors outlined in Mangels v. Cornell, 40 Kan. App. 2d. 110, 189 P. 3d 573 (2008), the Court writes: "4) Joinder and consent language. This was a joint trust entered into *consensually* by John and Ruth Locklin[,]" and "6) Consideration. Each party acted *in consideration* of the other party's action." (ROA Volume 3, Pg. 738 (emphases added)).

In the first instance, the state of mind of the settlor, or any individual, can hardly be considered a purely legal question. As Kansas courts have consistently recognized,

"A court should be cautious in granting a motion for summary judgment when the resolution of the dispositive issue necessitates a determination of the state of mind of one or more of the parties." Credit Union of America v. Myers, 234 Kan. 773, 780 (1984).

In point of fact, John Locklin's later execution of the disputed 2009 Amendment itself raises serious questions as to his knowledge and understanding of the original Trust. Even granting that "consent" may be used as a legal term of art, under what circumstances would someone who knowingly and willingly entered into a binding contractual trust subsequently attempt to breach the same? Neither party has alleged that their father acted maliciously in executing the 2009 Amendment, nor does the record disclose any evidence of the same. Regardless, what matters is that his mental state is material to begin with. Similarly, to conclude that each party acted "in consideration of the other party's action[,]" without more, necessarily infers to some extent their motive, state of mind, and understanding of the Trust. At a minimum, each point raises material questions of fact as to the intent and knowledge of the settlors that cannot be answered solely by reference to the document itself.

Furthermore, the scrivener of the original Trust, Judge Weingart, has given the opinion that it was capable of amendment by either surviving Settlor. Judge Weingart's testimony reflects that he would have advised the settlors in the alternative that they had the option of drafting a trust instrument which could *not* be amended, and that John and Ruth Locklin chose not to draft their Trust in such a fashion.

In fact, the various testimony of the parties themselves as to their communications with the settlors (or lack thereof) regarding this Trust, and whether it could be amended, raise questions of fact and credibility. The Appellees herein have both indicated that they had no discussion with the

settlors as to whether the Trust was or could be amended. They simply surmised that, since the Trust was drafted in a certain form, it was therefore the intention of their mother that it could not be amended. Even ignoring the obvious implication of their father's subsequent amendment of the Trust, this contention is without support.

In contrast, Appellant Keith Locklin has unequivocally stated that from conversation with his parents it was clear to him that their intent was that the Trust could be amended, and that they, as Settlors, had plans to make such amendments in the future. They made these statements without limitation or qualification. Similarly, although the Trust's scrivener, Judge Weingart had no independent recollection of the Locklins' Trust, he testified as to his practices in general in drafting testamentary instruments and advising clients regarding their terms, and that he would have advised the Locklins that this particular instrument could be amended by both unanimously during their lives, and by either surviving spouse individually.

To look further into the Trust at issue, it speaks to the settlors' intent that the instrument first provides for Appellant Keith Locklin as successor trustee, followed by Appellant Allen Locklin as second successor trustee. At only one point in the Trust are their sisters, the Appellees, granted any discretion whatsoever in its administration: as beneficiaries, they could *potentially* vote for a successor trustee in the event that Ruth, John, Keith, and Allen Locklin have all ceased to act in this capacity. It is not hard to infer from the plain language

of the Trust which of their children the settlors intended to oversee its administration.

The language of the Trust also reflects the settlors' concerns about the operation of their farm, empowering the trustee "[t]o retain any farm property, even though that property may constitute all or a large portion of the trust principal, and to acquire other farm property, to engage in farm operations and the production, harvesting, and marketing of farm products, including livestock breeding and feeding, poultry farming, and dairy farming, whether by operating directly with hired labor, by retaining farm managers or management agencies (including any such agency which is in any way affiliated with the corporate trustee), or by renting on shares or for cash; to enter into farm programs; to purchase or rent farm machinery and equipment; to purchase livestock, poultry, fertilizer, seed, and feed; to improve the farm property and to repair, improve, and construct farm buildings, fences, irrigation systems and drainage facilities; to develop, lease, or otherwise dispose of any mineral, oil, or gas property or rights; to borrow money for any of the purposes described in this subparagraph; and in general to do all things customary or desirable in farm operations." (ROA Volume 1, Pg. 51-2).

As the Trust language reflects, farming is by its very nature an ongoing endeavor, and one subject to the whims of both climate and the marketplace. The settlors clearly attached such importance to the enterprise that they vested the trustee with broad discretion in operating the farm. Farming is a career in which a person can do everything exactly right and still fail. So it should go

without saying that neglecting to maintain and care for the land, crops, equipment, and livestock that constitute the enterprise invariably leads to waste, if not total failure.

The settlors' confidence in the Appellants proved well founded; for the 12 years after Ruth Locklin's passing, both Allen and Keith took responsibility in assisting their father in the day-to-day operation of the family farm. Even the language of the contested 2009 Amendment makes specific reference to their efforts along these lines in explaining John Locklin's decision to amend.

In addition to the considerations discussed above, both Mangels and Eggeson list seven factors to assist courts in determining whether a testamentary instrument is contractual or not. Although Appellants maintain that a fair reading of the instrument itself, particularly in light of the facts surrounding it, is more than sufficient to justify overturning the entry of summary judgment, it may nevertheless be helpful to address these factors briefly:

1. A provision in the instrument for a distribution of property on the death of the survivor;

Appellees and the district court both rely heavily on a provision of this Trust purportedly analogous to those of the instruments in Mangels and Eggeson: "As of the date of the last of us to die . . . the trustee shall distribute the remaining trust principal . . . to our children . . . share and share alike." (Trust, Article IV, Para. A). However, the provision as drawn bears as much resemblance to any other simple testamentary gift as to a clause drafted in

contemplation or support of a contractual trust. Without more, it can hardly be relied upon to prove the existence of a contract.

Appellees' counsel below made much of the argument that, if John Locklin had died first, Ruth Locklin would have been obligated by the same agreement. However, this argument presupposes that the two settlors were somehow opposed to one another in their intent as to the purported contractual Trust. No such evidence is before the Court. In fact, as Appellant Keith Locklin has testified from his conversations with his parents at around the time, the evidence before the Court is that *both* settlors intended for this Trust to be merely a starting point for future estate planning. Particularly when viewed alongside the testimony of the scrivener that no such contractual trust was intended, at minimum it raises questions of fact.

2. A carefully drawn provision for the disposition of any share in the case of a lapsed residuary bequest;

As the Memorandum Decision concludes, "[t]his is present in the document." However, such a provision would be present in any well-drafted testamentary document, and is equally consistent with a non-contractual Trust. Again, the burden of proving the existence of a contractual testamentary instrument is squarely on those asserting it.

3. The use of plural pronouns;

Per the District Court, "Plaintiffs' counsel cites some 50 references in the trust to plural pronouns, i.e. the use of "we" throughout the trust agreement." While the underlying rationale of the factor is reasonable, were a simple word

count sufficient to determine the issue, all other considerations applied by courts on this issue would be superfluous. As it stands, the use of such pronouns is equally consistent with a non-contractual testamentary instrument executed by two people. At best, their use is ambiguous in the context of the document as a whole.

Interestingly, despite the Trust using plural pronouns as described, when it refers to the trustee, it does so almost exclusively in the *singular*. In point of fact, the word "trustees" occurs in its plural form a total of four (4) times in this instrument. In light of the broad powers granted the trustee therein, this at least raises questions as to the intent of the settlors and the clarity of the Trust.

4. Joinder and consent language;

Apart from the periodic use of the words "we" and "our", as enumerated by appellees, no actual language of joinder or consent exists. As noted above, the Trust at issue is distinct from those considered in Mangels and Eggeson, in that it does not contain any explicit language regarding "consideration" or "mutual covenants", nor does it explicitly require the consent of both grantors, which were critical factors in their respective holdings. Mangels at 115 and Eggeson at 438.

5. The identical distribution of property upon the death of the survivor;

Again, such a distribution is entirely consistent with the settlors' stated intent to revise and amend the Trust in the future.

6. **Joint revocation of former wills**;

To the extent this factor could be considered relevant in the context of a Trust, it bears mention that no such joint revocation is present in the instrument now before the Court.

7. **Consideration, such as mutual promises.**

As previously observed, in stark contrast to the District Court's finding, there is a total dearth of evidence or reference to consideration or mutual promises in this Trust. Much like this Court observed in Eggeson, "a contract cannot be presumed because two people simultaneously make reciprocal testamentary dispositions." Id. at 435.

Ultimately, the Appellees have failed in their burden of presenting facts to demonstrate the intent or belief of the Settlors or their scrivener that the Trust be contractual. Furthermore, both Appellees and the District Court overlooked that it was their burden of proof to show by clear and convincing evidence that the Trust was contractual in nature and incapable of amendment. Eggeson at 435. If Appellee failed in their burden of proof the Trust was not contractual and the amendment must stand and the Plaintiff's Motion For summary Judgment must fail.

II. **In light of the fact that the majority of the disputed trust assets are elements of the Locklin family's ongoing farming operations, even assuming arguendo that Plaintiff-Appellees were entitled to summary judgment on the underlying claim, the District Court erred in denying Defendants an evidentiary hearing regarding the assets, liabilities and administration of the Trust before awarding damages.**

Standard of Appellate Review

Since the Court granted Summary Judgment on the issue of damages this Court has an unlimited Standard of Review of the Trial Court's actions. Nicholas v Nicholas, 277 Kan. 171, 83 P3d 201 (2004).

Analysis

"When reviewing a remedy the trial court has fashioned to make the injured party whole, the test on appellate review is not whether the remedy is the best remedy that could have been devised, but whether the remedy so fashioned is erroneous as a matter of law or constitutes an abuse of trial court discretion. But while damage awards are discretionary, there must be some reasonable basis for computation which will enable the trier of fact to arrive at an approximate estimate thereof." Peterson v. Ferrell, 3302 Kan. 99 (2015).

Assuming, for the sake of argument, that the Appellees were entitled to summary judgment below, the District Court's calculation of damages based solely upon Appellants' valuation of the Trust assets at the time of John Locklin's passing (with no opportunity to present further evidence on the issue) was plain error.

In its Journal Entry of Judgment, the District Court wrote in relevant part: "Based upon Keith Locklin's accounting, the value of the trust estate as of the death of John Locklin, January 8, 2013, was $1,262,221.54. That valuation included $66,500.00 for the residence at 320 Elm Street, Nortonville, Kansas." While there is an appealing simplicity to this method of calculating damages, it fails to account for the fact that the disputed Trust assets are composed

primarily of farmland, crops, and equipment, the value of which can fluctuate drastically based on a variety of factors both within and beyond the control of the individuals operating the farm. Keith Locklin's accounting of the estate's value was accurate at the time, but there are nevertheless critical questions regarding its administration and any change in value, whether caused by the parties herein or by forces outside their control.

Particularly in light of the ongoing nature of farming operations which made up the majority of the Trust's res, at a minimum the Court should have held an evidentiary hearing regarding any changes in its value, as well as the value of investments or steps taken by the Appellants in operating the farm.

In awarding damages, the Court chose to weigh the facts. On a Motion for Summary Judgment the Court cannot weigh evidence. See Inter-Americas Insurance Corporation Inc. v Imaging Solutions, 39 Kan App 2d 875 185 P3d 963 (2008).

III. The award of attorneys' fees was inappropriate as Appellees recovered an ample sum from which to pay their own counsel. Any further award in their favor is both inequitable and unsupported by law.

Standard of Appellate Review

Pursuant to K.S.A. 58a-1004, the District Court has discretion over an award of attorney fees, and the Appellate Court reviews its order using an abuse of discretion standard. Shriners Hospitals for Children v. Firstar Bank, N.A. (In re Estate of Somers), 277 Kan. 761, 773, (2004). Judicial discretion is abused when no reasonable person would adopt the position taken by the district court.

Id. citing Varney Business Services, Inc. v. Pottroff, 275 Kan. 20, 44, 59 P.3d 1003 (2002).

Analysis

The Court may award fees and costs in a judicial proceeding involving administration of a Trust as equity and justice requires under K.S.A. 58a-1004. The award of fees should arise where the party actually did something to benefit the estate. The Appellees herein should not be subsidized via the courts for their costs against Appellants or their share of the Trust corpus. From a legal standpoint, the Court's choice to award fees in this situation is questionable; from an equitable standpoint, it is indefensible.

The plain fact of the matter is that neither Appellee contested or even inquired about the Trust until after learning that their father had amended it in favor of their brothers. Prior to this, Appellees were even willing to accept the proceeds of the sale of the house in Nortonville that was reserved for them in the 2009 Amendment, despite the fact that they would only have been entitled to its full value if the 2009 Amendment is enforced. If the Court's decision on this matter is upheld, the result will be to subsidize the Appellees' efforts to interfere with the administration of a Trust in defiance of both the language of the document itself and the settlors' intents as reflected in evidence now before the Court.

Conclusion

Defendants respectfully request that this Court (1) reverse the District Court's entry of summary judgment in favor of the Plaintiffs below and either

enter judgment in favor of the Defendants or at minimum remand the matter for trial; (2) order an evidentiary hearing regarding the value of the Trust corpus; and (3) reverse the award of attorneys' fees and costs to the Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original of the above and foregoing BRIEF OF APPELLANT was served, all after having exercised due care in the premises, on the 31st day of March, 2017 addressed to:

CLERK OF THE APPELLATE COURT
VIA E-FILE

with a copy sent by Unites States Mail and email to attorney for Plaintiff/Appellee:

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