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CASE NUMBER: 116752

CASE NO. 16-116752-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CAROLYN KANE AND PEGGY LOCKLIN,
Plaintiffs/Appellees

V.

KEITH LOCKLIN, INDIVIDUALLY AND AS TRUSTEE
OF THE JOHN W. LOCKLIN AND RUTH A. LOCKLIN
REVOCABLE TRUST AGREEMENT, DATED APRIL 16, 1997,
And ALLEN LOCKLIN,
Defendants/Appellants

Appeal from the District Court of
Jefferson County, Kansas
The Honorable Gary L. Nafziger, Judge
District Court Case No. 2014-CV-4

BRIEF OF PLAINTIFFS-APPELLEES

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Oral Argument: None Requested

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NATURE OF THE CASE

Defendants/Appellants appeal the District Court's grant of summary judgment to the Plaintiffs/Appellees, in which the District Court found that a trust agreement became irrevocable upon the death of the first grantor, rendering a subsequent amendment by the surviving grantor of no force or effect. The parties are the four adult children of John W. Locklin and Ruth A. Locklin, deceased.

On April 16, 1997, John W. Locklin and Ruth A. Locklin entered into a Revocable Trust Agreement (the "Trust"). The Trust provides that upon the death of the last to die of them, the trustee shall distribute the trust estate to the four children, equally. Ruth A. Locklin died six weeks later, on May 30, 1997.

On November 24, 2009, John W. Locklin, as Trustee, and Keith Locklin, as "Substitute Trustee," executed an amendment (the "Trust Amendment") which, if effective, would have changed the distribution of the Trust estate upon the death of John W. Locklin from an equal distribution to a distribution substantially in favor of Defendants/Appellants.

John W. Locklin died on January 8, 2013. Nearly seven months later, Defendant/Appellant and Successor Trustee, Keith Locklin, for the first time told Plaintiffs/Appellees that the Trust had been amended. In September or October of 2013, Defendant/Appellant provided Plaintiffs/Appellees with a copy of the amendment.

On January 8, 2014, Plaintiffs/Appellees filed their Petition in the District Court of Jefferson County, Kansas. On May 18, 2016, the District Court granted Summary

Judgment in favor of Plaintiffs/Appellees, finding that the Trust became irrevocable upon the death of Ruth A. Locklin. The District Court also awarded to Plaintiffs/Appellees one-half of the amount requested for their attorney fees and expenses.

ISSUES ON APPEAL

4. Whether the Court erred by granting summary judgment in favor of Plaintiffs/Appellees upon finding that the Trust became irrevocable upon the death of Ruth A. Locklin.
5. Whether the Court erred by awarding damages without a further evidentiary hearing regarding the assets, liabilities and administration of the Trust.
6. Whether the Court's award of attorney fees was appropriate.

STATEMENT OF FACTS

On April 16, 1997, John W. Locklin and Ruth A. Locklin, as grantors and as the initial trustees, executed a Revocable Trust Agreement (the "Trust"). (R. I, 2, par. 8; I, 20, par. 2; I, 25, par. 4; I, 42-59)

The Trust provides, in pertinent part, that upon the death of the survivor of John W. Locklin and Ruth A. Locklin, the trust estate is to be distributed equally among Plaintiffs/Appellees and Defendants/Appellants:

> A. As of the date of the last of us to die, but after providing for the payments, if any, required by Article III of this instrument, the trustee shall distribute the remaining trust principal (including property to which the trustee may be entitled under our will or from any other source), to our children, Keith Locklin, Allen

> Locklin Peggy Welborn [Locklin], and Carolyn Kane, share and share alike. (R. I, 45)

Ruth A. Locklin died on May 30, 1997 at Topeka, Kansas. (R. I, 2, par. 12; I, 20, par. 2; I, 26, par. 7)

The language of the Trust regarding amendments is as follows: "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..." (R. I, 56)

On November 24, 2009, John W. Locklin, as Trustee, and Defendant/Appellant Keith Locklin, as "Substitute Trustee," executed a "First Amendment to the John W. Locklin and Ruth A. Locklin Revocable Trust Agreement, Dated April 16, 1997" (the "Trust Amendment") (R. I, 2, par. 15; I, 6-9; I, 20, par. 2; I, 26, par. 9)

The Trust provides that if John W. Locklin and Ruth A. Locklin cease to act as trustees, Defendant/Appellant, Keith Locklin, is named as successor Trustee. (R. I, 53)

The Trust provides that a "Substitute Trustee" is appointed by a resigning Trustee. The resigning Trustee is to then act as "advisor" to the Substitute Trustee. The advisor may resume the office of Trustee upon the resignation of the Substitute Trustee. (R. I, 54)

There is no evidence in the record that John W. Locklin ever resigned as Trustee at any time or appointed a Substitute Trustee for himself.

The Trust Amendment, if effective, would have substantially changed the distribution of the trust estate upon the death of John W. Locklin in favor of Defendants/Appellants and to the detriment of Plaintiffs/Appellees. (R. IV, 757) The Trust Amendment would have given to Defendants/Appellants, all 364 acres of farm land, all

farm machinery and equipment, trucks, pickups, livestock and livestock equipment; and would have given to the Plaintiffs/Appellees, any remaining property not given to the Defendants/Appellants, consisting of Life Insurance, an IRA account and a residence. (R. I, 6-7)

Based upon the inventory provided by Defendant/Appellant Keith Locklin, under the Trust Amendment, Defendants/Appellants would each receive forty-four percent (44%) of the trust estate and Plaintiffs/Appellees would each receive six percent (6%). (R. IV, p.757)

John W. Locklin died on January 8, 2013 at Nortonville, Kansas. (R. I, 2, par. 13; I, 20, par. 2; I, 26, par. 7)

After the death of John W. Locklin, and until June 12, 2015, Defendant/Appellant, Keith Locklin, acted as the Successor Trustee of the Trust (R. I, 3, par. 17; I, 20, par. 2; I, 26, par. 11)

On August 3, 2013, nearly seven months after John W. Locklin's death, Defendant/Appellant and Successor Trustee, Keith Locklin, for the first time advised Plaintiffs/Appellees of the existence of the Trust Amendment. He provided Plaintiffs/Appellees with a copy of the amendment during September of 2013. (R. II, 364-365, 367-368)

On January 8, 2014, Plaintiffs/Appellees filed their Petition in the District Court of Jefferson County, Kansas, seeking (Count I) declaratory judgment with respect to whether the Trust became irrevocable upon the death of Ruth A. Locklin, rendering the Trust

Amendment of no force or effect; (Count II) an accounting; and (Count III) damages and attorney fees. (R. I, 1)

On June 12, 2015, the District Court granted Plaintiffs/Appellees' motion to remove Defendant/Appellant, Keith Locklin, as Successor Trustee, finding that Defendant/Appellant, Keith Locklin, (a) failed to provide an accounting as required by K.S.A. 58a-813(b)(5); (b) violated his duty of loyalty to all trust beneficiaries, as set forth in K.S.A. 58a-802, by using the Life Insurance proceeds and the IRA Account for his farming operations; and (c) failed to administer the trust in an impartial manner, as required by K.S.A. 58a-803, due to his pecuniary interest in both the operation of the assets of the corpus of the trust, as well as the outcome of the litigation. (R. III, p.586[1])

On June 16, 2014, Plaintiffs/Appellees filed a Motion for Partial Summary Judgment. (R. I, 30) Defendants/Appellants filed Motions for Summary Judgment on July 10, 2014. (R. I, 30, 245) The District Court heard arguments on the motions and denied the motions on January 9, 2015. (R. II, 417)

The parties completed discovery and on February 2, 2016, renewed their Motions for Summary Judgment. (R. III, 616, 641) On April 7, 2017, the District Court issued a Letter Memorandum Decision Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment. (R. III, 736) A Journal Entry of Judgment was entered on May 18, 2016. (R. III, 743)

[1] The ROA contains only the first page of the Court's Order Granting Plaintiffs' Motion to Remove Trustee, to Disqualify Successor Trustee, and to Appoint Independent Trustee. Plaintiffs/Appellees will file a Motion to Supplement the Record on Appeal to include all pages of the Order.

On May 26, 2016, Plaintiffs/Appellees filed a Motion for Additional Findings of Fact and Conclusions of Law Regarding Plaintiffs' Claim for an Award of Attorney Fees and Expenses, requesting the court to award $47,178.00 in fees and $1,853.40 in expenses. (R. IV, 749) On October 12, 2016, the District Court entered an order awarding Plaintiffs/Appellees one-half of the amount requested. (R. IV, 817)

ARGUMENTS AND AUTHORITIES

I. Summary judgment was proper because the Trust is unambiguous and the District Court applied the law properly in determining the Trust became irrevocable upon the death of Ruth Locklin.

A. The Trust Agreement is unambiguous.

Whether a written instrument is ambiguous is a question of law. *Zukel v. Great West Managers, LLC*, 31 Kan. App. 2d 1098, 1101, 78 P.3d 480 (2003), *rev. denied,* 277 Kan. 928 (2004). The interpretation and legal effect of written instruments are matters of law, and an appellate court exercises unlimited review. *McGinley v. Bank of America, N.A.*, 279 Kan. 426, 431, 109 P.3d 1146 (2005) "Whether a written instrument is ambiguous is a question of law which we review de novo." *Zukel v. Great West Managers, LLC,* 31 Kan. App. 2d 1098 at 1101. See also, *Boucek v. Boucek*, 297 Kan. 865, 874, 305 P.3d 597 (2013).

In this case, Defendants/Appellants repeatedly and consistently represented that the Trust is unambiguous. (Brief of Defendants/Appellants, 12; R. I, p.137; VII, Transcript 4;

R. III, 745) The Journal Entry of Judgment provides, "The parties agreed, and the Court finds, that the Trust and the Trust Amendment are unambiguous." (R. III, 745)

The legal conclusion reached by the District Court, that the Trust is unambiguous and required the consent of both grantors to amend, was proper because the language at issue is susceptible of only one meaning that is consistent with the intent of the grantors and does not require the insertion of additional words. To reach the interpretation urged by Defendants/Appellants, one would have to add, "or either of them" to the Trust language. "Words cannot be written into a contract which import an intent wholly unexpressed when it was executed." *Duffin v. Patrick*, 212 Kan. 772, 778, 512 P.2d 442 (1973).

The legal conclusion reached by the District Court is also consistent with *Mangels v. Cornell*, 40 Kan. App. 2d 110, 189 P.3d 573, 2008 Kan. App.LEXIS 123 (2008), which had strikingly similar facts. In that case, Bud and Thelma Helwig, husband and wife, executed a revocable trust agreement ("The Helwig Revocable Trust") in March of 1996. The trust provided that net income would be distributed to Bud and Thelma, or to the survivor of them, and thereafter in equal shares to each of their adopted children. Upon the death of the children, their shares were to be paid per stirpes to their children (Bud and Thelma's grandchildren). *Mangels*, 40 Kan. App. 2d at 112. Bud died in March of 2004; in September of 2004 and again in December of 2004, Thelma amended the trust to change trustees and to change the dispositive provisions.

The Helwig Revocable Trust provided as follows with respect to revocability:

> A. 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.

Mangels, 40 Kan. App. 2d at 113 (emphasis original). The court concluded that the language meant that the grantors together could amend the trust, but not individually:

> Examining the language of paragraph 13, we note that "alone" refers to "they," which refers to "grantors" in the plural. Although not precisely drafted, we believe the language was intended to mean that grantors *collectively* may amend or revoke the trust and that *they* may do so acting *alone* as grantors or in conjunction with others such as guardians or conservators. If the intent had been for *either* of the grantors to have the power to amend or revoke *individually*, the preferred language would have employed such terms or would have expressly permitted *each* of the grantors, whether acting *alone*, with the other grantor, or with others, to amend or revoke the trust. Cornell's argument, as adopted by the district court, requires the term "*alone*" to be construed in an isolated manner rather than in its context; here, we must ask: who is it that may "alone" amend or revoke? Clearly, it is the grantors (plural)-and they alone who may do so.
>
> We conclude that the language of paragraph 13 clearly and unambiguously permits amendment and revocation by *both* grantors.

Mangels, 40 Kan. App. 2d at 114 (emphasis original).

The revocability provision in the Trust in this case ("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...") is even more clear than in *Mangels* that amendment of the trust required the action of both grantors of the Trust. The phrase, "We reserve the right...during our lives..." (emphasis added) differs from the language in *Mangels* because it does not say, "...whether alone or in conjunction with others..." Rather, the language is unequivocally stated in the plural, allowing amendment during the lives of both grantors.

As the court stated in *Mangels*, if the intent had been to allow either of the grantors to amend the Trust, the language should have referred to "either" grantor having the power to amend. "If the intent had been for either of the grantors to have the power to amend or revoke individually, the preferred language would have employed such terms or would have expressly permitted each of the grantors, whether acting alone, with the other grantor, or with others, to amend or revoke the trust." *Mangels*, 40 Kan. App. 2d at 114.

Furthermore, since a deceased grantor obviously could not amend the trust, by including the phrase "during our lives" it is clear that any amendment of the Trust required both grantors acting together.

Having concluded that the Trust is joint and contractual, the District Court, applying the law set forth in *Mangels*, correctly concluded that as a matter of law, only the grantors collectively, together, could amend the Trust, and the "Trust Amendment" is void and unenforceable. (R. III, 746).

B. Defendants/Appellants should be estopped from denying the Trust is unambiguous.

In this appeal, Defendants/Appellants have taken an inconsistent position and, without saying so directly, now suggest the Trust is ambiguous and the District Court erred by failing to consider the testimony of Judge Weingart and the testimony of Defendant/Appellant, Keith Locklin as to the intent of John and Ruth Locklin in considering the motion for summary judgment. (Brief of Defendants/Appellants, 16-19).

The Defendants/Appellants' Brief is replete with veiled suggestions that the Trust is ambiguous and therefore, parol evidence should be considered. For example,

Defendants/Appellants argue that the absence of a provision requiring the agreement of both Trustees in making decisions, along with the District Court's conclusion, "...only speaks to the *ambiguity* of the document itself." (Brief of Defendants/Appellants, 15; emphasis added); and, "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..." (Brief of Defendants/Appellants, 13-14); and, "... the state of mind of the settlor, or any individual, can hardly be considered a purely legal question." (Brief of Defendants/Appellants, 15); and, citing *Credit Union of America v. Myers*, 234 Kan. 773, 780 (1984), Defendants/Appellants argue that the District Court should be "cautious" in granting summary judgment when the resolution of the dispositive issue necessitates a determination of the state of mind of one or more of the parties; and, John W. Locklin's execution of the Trust Amendment, "...raises serious questions as to his knowledge and understanding of the original Trust." (Brief of Defendants/Appellants, 16).

Defendants/Appellants attempt to explain their inconsistent position by suggesting that, "Regardless, the Appellate Court reviews the case de novo, and so is not bound by any such stipulation." [cite]. Plaintiffs/Appellees do not disagree with the standard of review; however, this was not a mere stipulation of the parties; the District Court made a finding of law with respect to ambiguity of the Trust, based, in part, upon Defendants/Appellants' representations to the court. (R. III, 745). Even if the standard of review is unlimited, Defendants/Appellants cannot be heard on appeal to argue a position

diametrically opposed to the position taken in the court below. *Hartford Underwriters Ins. Co., v. State, Dept. of Human Resources*, 272 Kan. 265, 276, 32 P.3d 1146 (2001)

C. Because the Trust is unambiguous, consideration of parol evidence would be improper.

The standard of review of evidentiary rulings of a District Court is set forth *in City of Wichita v. Denton*, 296 Kan. 244, syl. 15, 294 P.3d 207(2013): "An appellate court's review of a district court's admission or exclusion of evidence, including its determination of whether the evidence was relevant, is guided by the character of the question considered; thus, an appellate court may review a district court's evidentiary determination under an abuse of discretion or as a matter of law, and when the issue involves the adequacy of the legal basis for the district court's decision, the issue is reviewed using a de novo standard."

The District Court properly found that if the Trust is unambiguous and can be carried out as written, resort to rules of construction is not necessary, citing *Eggeson v. Deluca*, 45 Kan. App. 2d at 443; *Mangels v. Cornell*, 40 Kan. App. 2d 110 at 113, and *City of Arkansas City v. Bruton*, 284 Kan. 815, 829, 166 P.3d 992 (2007). (R. III, 745) If the Trust is unambiguous, resort to parol evidence is improper. "As a general rule, when a contract is complete and unambiguous and free from uncertainty, parol evidence of prior or contemporaneous agreements or understandings tending to vary the terms of the contract evidenced by the writing is inadmissible." *Quenzer v. Quenzer*, 225 Kan. 83, 85, 587 P.2d 880 (1978), citing *Hird v. Williams*, 224 Kan. 14, 15, 577 P.2d 1173 (1978).

Defendants/Appellants place great emphasis on the testimony of (now Judge) John L. Weingart, the scrivener of the Trust. However, Judge Weingart was clear that he had

no recollection of John or Ruth Locklin, nor of any discussions with them regarding the Trust, nor of any discussions with them regarding their rights to amend the Trust. (R. III, 688-689) His testimony, which Defendants/Appellants now contend establishes material issues of fact, was entirely based upon his "usual practice" and not upon any memory of John and Ruth Locklin. (R. III, 688-689) And, significantly, Judge Weingart admitted that at least one substantive provision of the Trust deviated from his "usual practice." (R. III, 690-692) Thus, reliance upon his usual practice would have been misplaced.

"A party seeking reversal because of exclusion of evidence has the burden of showing prejudice as well as error in the ruling excluding such evidence." Shepard v. Dick, 203 Kan. 164, 170, 453 P.2d 134, 139 (1969) There was no error in excluding the testimony cited by Defendants/Appellants as parol evidence, and no demonstrated prejudice in any event.

D. The Trial Court correctly considered and applied the seven factors in *Mangels* and *Eggeson* in finding the Trust was joint and contractual.

The District Court correctly examined and applied the seven factors established by *Eggeson v. Deluca*, 45 Kan. App. 2d 435 at 443 and *Mangels v. Cornell*, 40 Kan. App. 2d 110 at 113, to determine whether the Trust is joint, mutual and contractual (R. III, 745):

(1) A provision in the will for a distribution of property on the death of the survivor;
(2) A carefully drawn provision for the disposition of any share in case of a lapsed residuary bequest;
(3) The use of plural pronouns;
(4) Joinder and consent language;
(5) The identical distribution of property upon the death of the survivor;
(6) Joint revocation of former wills; and
(7) Consideration, such as mutual promises.

The District Court made findings of fact and conclusions of law to support each of the court's findings:

> 1. Is there a provision for distribution of property on the death of the survivor? The original Trust provided, "Following both of our deaths, the trustee shall pay out of the trust principal all (a) legally enforceable debts...(b) expenses of our last illness and funeral..." (Trust, Exhibit A, ARTICLE II) And, "As of the date of the last of us to die...the trustee shall distribute the remaining trust principal...to our children, Keith Locklin, Allen Locklin, Peggy Welborn and Carolyn Kane, share and share alike." (Trust, Exhibit A, ARTICLE IV, A.) The Court finds the Trust contained a provision for distribution of property on the death of the survivor.

(R. III, 745-746)

The significance of this provision cannot be overstated. The agreement was written to bind both parties until the death of the last to die. When Ruth Locklin died approximately five weeks after signing the Trust, the agreement was that upon John Locklin's death, the trust estate would be equally divided among their four children. If John Locklin had died first, Ruth Locklin would have been obligated by the same agreement.

> 2. Was there a carefully drawn provision for the disposition of any share in the event of a lapsed residuary request? The Trust provided that the trust estate was to be distributed to all four of the Locklins' children, "share and share alike." If a share lapsed due to the death of one child, the remaining children would share equally in the trust estate. In re Randall's Will, 185 Kan. 92, syl. 2, 340 P.2d 885 (1959) Thus, the Court finds that the Trust did contain a provision for the disposition of a share in case of a lapsed residuary bequest.

(R. III, 746)

In *Mangels*, this factor was absent. *Mangels*, 40 Kan. App. 2d at 116. In this case, Defendants/Appellants apparently concede that the provision is present, but argue that such a provision is common in testamentary documents. (Brief of Defendants/Appellants, 20). Defendants/Appellants' argument might go to the weight of the factor, but does not diminish the fact that the provision is present in this case.

> 3. Did the Trust use plural pronouns? The Trust includes at least 50 plural references to the grantors and zero references to either grantor individually. The dispositive language starts with the phrase, "As of the date of the last of us to die...," indicating an agreement between John and Ruth Locklin. Likewise, the provision for payment of debts and expenses starts with the phrase, "Following both of our deaths..." (Exhibit A, page 2, Article III) The Court finds that the Trust is replete with plural pronouns.

(R. III, 746)

The Defendants/Appellants suggest that the number of plural references is not relevant and the use of such pronouns is equally consistent with a non-contractual testamentary instrument. (Brief of Defendants/Appellants, 20-21). However, in *Mangels*, the court found the number of plural pronouns used in the Trust was significant. "As to the third factor, we note that the trust generally employs the plural in referring to 'Grantors.' We count 10 such plural references in the trust and only 2 mentions of 'Grantor' in the singular." *Mangels*, 40 Kan. App. 2d at 116.

> 4. Did the Trust include joinder and consent language? The Court finds that John and Ruth Locklin joined in a common trust, as evidenced by the first word in the Trust: "We." Virtually every provision in the Trust thereafter is stated in plural language, demonstrating both joinder and consent. Additionally, the dispositive paragraph illustrates the joinder of John and Ruth Locklin in the covenant to distribute the

> "remaining trust principal" to their children in equal shares "...as of the date of the last of us to die." The Court finds that John and Ruth Locklin joined into, and consented to, the Trust.

(R. III, 746-747)

The parties clearly joined in and consented to an agreement to dispose of their property in a certain manner upon the death of the second of them to die.

> 5. Did the Trust contain an identical distribution of property upon the death of the survivor? The Court finds that the Trust provided for the same distribution, regardless of whether Ruth or John Locklin died first.

(R. III, 747)

Defendants/Appellants apparently concede that this factor is satisfied, but suggest that such a distribution is consistent with the settlors' alleged intent to revise and amend the Trust in the future. (Brief of Defendants/Appellants, p.21)

As in *Mangels*, the sixth factor, joint revocation of former wills, is irrelevant because the instrument at issue is a trust agreement. *Mangels,* 40 Kan. App. 2d at 117.

> 7. Was there consideration given? The Court finds that each party acted in consideration of the other party's action. The Court further finds that the transfer of property and insurance policies, as well as the mutual covenants for disposition of the trust estate, constituted consideration given by John and Ruth Locklin.

B. (R. III, 747)

Defendants/Appellants suggest there is no evidence or reference to consideration being given by either John or Ruth Locklin. (Brief of Defendants/Appellants, 22) However, the Schedule of Property conveyed to the trust by John and Ruth Locklin clearly shows consideration was given for the agreement. (R. I, 16-17) Furthermore, mutual

covenants and agreements, such as the promise made by John and Ruth Locklin to convey their property in a certain manner upon the death of the second of them to die, constitutes valuable consideration.

The District Court carefully considered each factor and made findings and conclusions to support its ruling that the Trust became irrevocable upon the death of Ruth A. Locklin.

E. Summary Judgment was properly granted by the District Court.

The standards for summary judgment are well known. Judgment on all or part of a claim "... should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." K.S.A. 60-256 (c)(2). As this Court held in *Boucek v. Boucek, 297 Kan. 865, 869-870, 305 P.3d 597, 602 (2013):*

> The standard of review governing cases that arise on appeal from summary judgment is a familiar one, and it applies here:
>
> "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 which 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." *Waste Connections of Kansas, Inc. v. Ritchie Corp.,* 296 Kan. 943, Syl. ¶ 1, 298 P.3d 250 (2013).

In this case, summary judgment was properly granted because the issue for determination was the effect of a written document, a legal decision, and there were no issues of material fact in dispute. The District Court properly construed the Trust from the four corners of the document. The offer of improper parol evidence by Defendants/Appellants cannot create an issue of material fact, precluding summary judgment.

II. The District Court properly entered judgment without further evidentiary hearing.

The standard of review for determining damage awards is whether the District Court committed an abuse of discretion. *Fitzpatrick v. Allen*, 24 Kan. App. 2d 896, syl. 22, 955 P.2d 141 (1998)

Defendant/Appellants contend that if Plaintiffs/Appellees are entitled to summary judgment, the District Court erred by calculating damages based solely upon Defendant/Appellant, Keith Locklin's valuation of the Trust assets, without conducting a further evidentiary hearing regarding gains and losses in the Trust assets since the death of John W. Locklin. Defendants/Appellants did not request an evidentiary hearing in the District Court, nor did Defendants/Appellants seek modification of the Journal Entry of Judgment.

"[W]hile 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.' *Stewart v. Cunningham,* 219 Kan. 374, 381, 548 P.2d 740 (1976)." *Peterson v. Ferrell*, 302 Kan. 99, 106, 349 P.3d 1269, 1275 (2015)

In this case, the District Court's award of damages was based upon the value of four equal shares of the trust assets as of date of death of John W. Locklin, using the valuation numbers in the accounting provided by Defendant/Appellant, Keith Locklin. (R. III, 747-748) Thus, the District Court had a reasonable basis for the computation of damages.

The fact that Defendants/Appellees may have operated the farm in a manner that lost money, or that Defendant/Appellant, Keith Locklin, as Successor Trustee, managed the Trust in such a manner as to lose money, is irrelevant in determining the amount to which Plaintiffs/Appellees were entitled as of the date of death of John W. Locklin. Plaintiffs/Appellees should not shoulder the burden of Defendants/Appellants' unfortunate management decisions.

III. The Court's Award of Attorney Fees and Expenses was entirely appropriate.

"Where a statute vests a district court with the authority to award attorney fees as the district court sees fit, such award is reviewed for an abuse of discretion. *Rinehart v. Morton Buildings, Inc.*, 297 Kan. 926, 942, 305 P.3d 622 (2013). A district court abuses its discretion if (1) it acts arbitrarily, fancifully, or unreasonably; (2) its decision is based on an error of law; or (3) its decision is based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013)." *Alain Ellis Living Trust v. Harvey D. Ellis Living Trust*, 385 p.3d 533 (Kan. App., November 18, 2016)

An award of attorney fees is within the discretion of the court. *In re Estate of Somers*, 277 Kan. 761, 89 P.3d 898 (2004), *distinguished on other grounds*, *McCabe v. Duran*, 39 Kan. App. 2d 450, 180 P.3d 1098 (2008). The court may determine both the

amount of attorney fees and expenses to be awarded and the party or parties responsible for payment of the fees and expenses. K.S.A. 58a-1004.

Defendants/Appellants acknowledge that an award of fees and costs is discretionary pursuant to K.S.A. 58a-1004, but challenge whether Plaintiffs/Appellees' actions have benefitted the Trust estate. (Brief of Defendants/Appellants, p.25)

The Official Comment to K.S.A. 58a-1004 provides, "The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust." If the litigation results in the resolution of a legal issue so that a trust can be administered properly, then an award of attorney fees is reasonable. In *In re Matter of Will of Daniels*, 247 Kan. 349, 357, 799 P.2d 479 (1990), the court, in considering an award of attorney fees in the context of a probate proceeding pursuant to K.S.A. 59-1504, indicated:

> In *In re Estate of Hannah,* 215 Kan. 892, 529 P.2d 154 (1974), we construed the provisions of a testamentary trust established in a testator's will. The heirs at law of the primary beneficiary of the trust argued they were entitled to attorney fees pursuant to K.S.A. 59–1504. We found it proper to reimburse the heirs for reasonable attorney fees on the premise that it is beneficial to an estate to have questions of law determined where there is doubt as to the proper construction of a will. 215 Kan. at 900, 529 P.2d 154. (emphasis added)

The same analysis has been applied to an award of attorney fees in trust cases pursuant to K.S.A. 58a-1004. For example, in *Estate of Somers*, 277 Kan. 761, 89 P.3d 898 (2004), the grandchildren successfully argued for an award of attorney fees because "the fees were beneficial and necessary for the proper administration of the Trust." *Id.*, at 772. "The trial court made a finding that the efforts of the Grandchildren's attorneys

secured a favorable result for the Shriners' remainderman and clarified a controversy pending between the annuitants and remainderman and trustee." *Id.*, at 774.

In this case, the efforts of the Plaintiffs/Appellees not only clarified, but resolved the controversy with respect to whether the original Trust or the purported Trust Amendment controlled distribution of the Trust. Plaintiffs/Appellees' efforts were "beneficial and necessary for the proper administration of the Trust" because the Successor Trustee, Defendant/Appellant, Keith Locklin (and Defendant/Appellant, Allen Locklin), contested the Plaintiffs/Appellees' position and "but for" Plaintiffs/Appellees' efforts, the Trust would have been administered incorrectly, in accordance with the Trust Amendment. Clearly, the Plaintiffs/Appellees' efforts were beneficial and necessary for the proper administration of the Trust.

Defendants/Appellants suggest that "...from an equitable standpoint, [the award of attorney fees and expenses] is indefensible." (Brief of Defendants/Appellants, 25) The Plaintiffs/Appellees have a substantial number of complaints about the conduct of Defendant/Appellant, Keith Locklin, both as Successor Trustee and individually. However, at a minimum, the District Court found that Defendant/Appellant, Keith Locklin, as Successor Trustee, violated several duties owed as trustee. (R. 586)

Plaintiffs/Appellees demonstrated that even if the Trust Amendment had been valid – the position advocated by Defendants/Appellants – Keith Locklin, as Successor Trustee, had not complied with the Trust Amendment and had converted a life insurance policy and an IRA account for his own purposes. The issue is now moot, but it does demonstrate that

the Plaintiffs/Appellees had to vigorously pursue Keith Locklin and eventually had him removed as trustee.

Justice and equity require an award of fees and expenses because Plaintiffs/Appellees had to sue to obtain that to which they were legally entitled. Defendants/Appellants stood to lose significant percentages of their shares of the Trust if the Trust Amendment was found to be invalid and they thoroughly and completely contested the case. Despite the resistance of the Defendants/Appellants, Plaintiffs/Appellees' efforts resulted in the Trust being administered correctly and appropriately, as recited in the Journal Entry of Judge Nafziger.

CONCLUSION

The District Court properly found that the Trust was unambiguous. For more than three years, Defendants/Appellants also argued the Trust was unambiguous. The District Court correctly determined the intent of the grantors based upon the four corners of the document and it would have been improper for the court to resort to parol evidence, such as testimony of Judge Weingart or Defendants/Appellants.

The District Court carefully made findings of fact and conclusions of law in determining that the Trust was joint and contractual and, following *Mangels*, determined that the Trust could only be amended by the grantors acting together.

The Court was not required to conduct a further hearing regarding damages, particularly since the calculation of damages was based upon the valuations provided by Defendant/Appellant, Keith Locklin.

The award of attorney fees, which was one-half the amount requested, was within the discretion of the District Court and should be affirmed.

The result in this case is just and reasonable. The Court should affirm the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of June, 2017, a copy of the foregoing Brief of Plaintiffs/Appellees was served via email to the following counsel for Defendants/Appellants, at the following email addresses:

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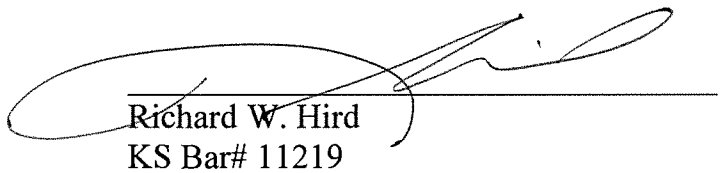

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