



Court: Shawnee County District Court

Case Number: 2021-CV-000338

Case Title: Kristopher Carlson, et al. vs. John Carlson, et al.

Type: MEMORANDUM DECISION AND ORDER ON PETITIONERS' MOTION FOR FINAL ORDERS AND REASONABLE EXPENSES AND COSTS INCLUDING ATTORNEY'S FEES; DEFENDANT JOHN CARLSON'S MOTION FOR RELIEF FROM ORDER, AND PETITIONERS' MOTION TO STRIKE

SO ORDERED.

A handwritten signature in cursive script, reading "M.E. Christopher".

/s/ Honorable Mary E Christopher, District Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION EIGHT**

**KRISTOPHER CARLSON and
RYAN CARLSON,**)
)
 Petitioners,)
)
 v.)
)
 JOHN CARLSON and)
 KIMBERLY CARLSON,)
 Respondents.)
 _____)

Case No. 2021-CV-000338

MEMORANDUM DECISION AND ORDER
ON PETITIONERS’ MOTION FOR FINAL ORDERS AND
REASONABLE EXPENSES AND COSTS INCLUDING ATTORNEY’S FEES;
DEFENDANT JOHN CARLSON’S MOTION FOR RELIEF FROM ORDER; AND
PETITIONERS’ MOTION TO STRIKE

This matter comes before the Honorable Mary E. Christopher on the following motions:

- *Petitioners’ Motion for Final Orders and Reasonable Expenses and Costs Including Attorney’s Fees*, filed March 24, 2022;
- *Defendant John Carlson’s Response to Petitioners’ Motion for Final Orders and Reasonable Attorney’s Fees and Defendant John Carlson’s Motion for Relief from Order*, filed November 3, 2022;
- *Petitioners’ Motion to Strike Defendant John Carlson’s Response to Petitioner’s Reply to Defendant John Carlson’s Response to Petitioners’ Motion for Final Orders and Reasonable Expenses and Costs Including Attorney’s Fees and Memorandum in Support*, filed November 23, 2022.

Petitioners Kristopher Carlson and Ryan Carlson appear through their attorneys, J. Phillip Gragson and Kara L. Eisenhut. Respondent John Carlson appears through his attorney Philip Wright.

This Court has reviewed the motions, responses, replies and all supporting briefs of the parties. After careful consideration and being fully apprised on the premises, the Court finds as follows:

I. FACTS

Kristopher Carlson, Ryan Carlson, John Carlson, and Kimberly Carlson are all beneficiaries of the Roger and Leticia Carlson Joint Revocable Trust. Mother of Kristopher, Ryan, John and Kimberly, Leticia Carlson, was the last surviving settlor of the Roger and Leticia Carlson Joint Revocable Trust. John Carlson was identified as the Trustee of the trust.

At some time prior to Leticia Carlson's death, respondent John Carlson moved to her residence at 10535 SW Burlingame Road, Wakarusa, KS. Leticia Carlson passed away on March 11, 2021. Leticia and Roger Carlson's residence was part of the Roger and Leticia Carlson Joint Revocable Trust corpus. According to the provisions of the trust, upon the last surviving settlor's death, the residence was to be appraised and sold. Under section 10c, after sale of the trust assets, "the trustee shall divide the remaining trust estate into as many equal shares as there shall be Children of the Settlers then living." (Trust Document, p. 8.) Liquidation of trust assets was to take place within 3 months of the last surviving settlor's death. John Carlson continued living at the residence at 10535 SW Burlingame Road after Leticia's death, however, expressing no plans to obtain an appraisal, to move, or to sell the residence.

Petitioners filed this suit alleging John Carlson was in breach of his duties as Trustee under K.S.A. 58a-706. (See Pet., filed June 24, 2021.) Petitioners asked for his removal as trustee, alleging John Carlson had committed a breach of trust and was unfit to administer the trust effectively. Petitioners asked that the Court appoint the successor Trustee or a third party trustee, and order an accounting for all trust funds spent to date. In addition, petitioners sought a

declaratory judgement pursuant to K.S.A. 60-257 declaring the Trustee in violation of his duties, and injunctive relief in the form of a temporary injunction to protect the rights of the beneficiaries.

A return of service of summons as to John Carlson was filed on July 6, 2021, certified service on John Carlson on July 3, 2021. John Carlson filed his Answer to the Petition on July 19, 2021.

On August 11, 2021, the Court received testimony and evidence on the petitioners' request for temporary injunction and mandamus orders. (See *Journal Entry and Order* filed 8-30-21.) The Court removed John Carlson as Trustee, appointed a trustee so that an accounting could be performed, and issued a temporary injunction. *Id.* John Carlson was to be compensated for his time as trustee at the rate of \$250.00 per month; he was also to pay rent for the time in which he lived at the property owned by the trust; and was to vacate the residence at 10535 SW Burlingame Road, Wakarusa, KS within 45 to 60 days, which was part of the trust corpus, so that it could be appraised and sold as provided in the trust. John Carlson was also ordered to turn over all documents related to the trust corpus, including banking records, to the successor trustee, and to advise the successor trustee as to everything that had been done with trust assets to date.

On more than one occasion when he appeared before the Court, including at this hearing, John Carlson was admonished to seek legal counsel. He was also instructed of the importance of following the Court's orders. This Court also asked John Carlson questions concerning his personal situation and ability to complete the tasks before assigning specific deadlines to defendant including:

- ... shall have 45 to 60 days to move from the trust real estate located at 10535 SW Burlingame Road, Wakarusa, KS 66545;
- ... shall turn over any and all documents related to the [Roger and Leticia Carlson Joint Revocable Trust], including reports, receipts, accountings, videos, etc., to the successor

trustee [CoreFirst Bank] and advise them as to everything that has been done regarding the trust to date.

Journal Entry and Order, filed August 30, 2021.

On September 8, 2021, John Carlson filed a *Motion for Altering/Amending Judgment and/or a New Hearing*. Petitioners filed a response to defendant's motion and *Motion for Reasonable Expenses and Costs Including Attorney's Fees* (September 23, 2021).

This Court entered a *Memorandum Decision and Order* on September 27, 2021, denying John Carlson's *Motion for Altering/Amending Judgment and/or New Hearing*. The Court noted the evidence presented at the hearing made it very clear to the Court that the provisions of the trust were not being followed, and the co-beneficiaries of the trust were not being provided the information that they requested or needed to receive from John Carlson. See *Memorandum Decision and Order*, filed Sept. 27, 2021.

Once the deadlines for John Carlson set forth in the order had passed, petitioners filed a motion to impose sanctions under K.S.A. 60-211. (See *Motion for Order to Appear and Show Cause* filed October 14, 2021.) Petitioners requested the Court issue a contempt citation due to John Carlson's failure to comply with the Court's August 30, 2021 order. An order to appear and show cause was issued to John Carlson with a hearing scheduled for November 9, 2021.

At the hearing, defendant John Carlson was allowed opportunity to explain himself and present argument as to why he had failed to comply with the Court's orders. After considering testimony and evidence, the Court found John Carlson to be in indirect contempt of the Court's orders. The Court granted petitioners' request for attorney fees for filing the contempt action. John Carlson was again ordered to vacate the property at 10535 SW Burlingame Road, Wakarusa, KS, with a deadline of 14 days.

II. ANALYSIS

A. Petitioners' Motion to Strike Defendant John Carlson's Response to Petitioner's Reply (11-23-22)

In their *Motion to Strike*, petitioners argue that when John Carlson filed *Defendant John Carlson's Response to Petitioner's Reply*, the document was mis-labeled as a response. According to petitioners, the "response" is actually a prohibited sur-reply under Shawnee County District Court Rule 3.202(b). Petitioners move this Court to strike defendant's response and to not consider it.

DCR 3.202(b) provides that "a party opposing a motion ... shall ... file ... a written response to the motion.... The party may ...after the service of such response in opposition upon him ... file ...a written reply memorandum. No sur replies will be allowed."

On March 24, 2022, petitioners filed their *Motion for Final Orders*. The case was stayed for two consecutive 90-day periods at the request of the parties. On November 3, 2022, John Carlson filed a *Response to Petitioners' Motion for Final Orders*. On November 10, 2022, petitioners filed a *Reply to John Carlson's Response to Petitioner's Motion for Final Orders*. (See Ct. file.) At that point, the matter was fully briefed.

On November 23, 2022, John Carlson filed *Defendant John Carlson's Response to Petitioner's Reply*. The Court agrees this document is not a "response" but instead qualifies as a sur-reply, which is prohibited under Shawnee County District Court Rule 3.202(b). Thus, the Court finds *Defendant John Carlson's Response to Petitioner's Reply* should be stricken from the record; it will not be considered by this Court.

B. John Carlson's 11-3-22 Motion for Relief from August 30, 2021, Order

This Court next turns to respondent John Carlson's *Motion for Relief* from this Court's order filed August 30, 2021, that he should pay rent for the time in which he lived at the property owned by the trust. Interestingly, John Carlson does not dispute that he failed to turn over trust documents, refused to move out of the residence so that it could be appraised and sold as required by the trust, failed to meet deadlines set by the Court, or that he disobeyed this Court's orders.

In his motion, John Carlson asks the Court to reconsider its August 30, 2021 orders arguing: (1) the Court should not have ordered him to pay rent to the trust because, although he never expressly asserted it, he claimed a homestead exemption by remaining in the residence; and, (2) he should not have been ordered to leave the residence so quickly (even if the trust provided for sale within three months) because his presence at the residence actually benefited the estate.

Respondent does not identify a particular statute or case law as authority for reconsideration. Carlson's motion essentially asks this Court to reconsider its prior judgment under K.S.A. 60-259(f), or to grant relief from judgment under K.S.A. 60-260.

A motion to reconsider is generally treated as a motion to alter or amend judgment under K.S.A. 2016 Supp. 60-259(f). The decision to grant or deny a motion to alter or amend is within the discretion of this Court. *Miller v. Johnson*, 295 Kan. 636, 677, 289 P.3d 1098 (2012). However, a motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment. K.S.A. 60-259(f). Here, John Carlson filed its motion on November 3, 2022, seeking relief from a judgment entered on August 30, 2021, more than fourteen months after the judgment was entered.

Grounds for relief from a final judgment, order or proceeding under K.S.A. 60-260(b) may be obtained for one of several enumerated grounds, but the motion "must be made within a reasonable time, and for reasons under paragraphs (b)(1), (2) and (3) no more than one year after

the entry of the judgment or order, or the date of the proceeding.” Under both K.S.A. 60-259(f) and 60-260(b)(1)[mistake], (2)[newly discovered evidence] and (3)[fraud], John Carlson’s motion is untimely as 14 months is well beyond the deadline set forth in both statutes.

Next, the Court considers whether K.S.A. 60-260(b)(4), (5) and (6) provide a basis for reconsideration of the August 30th order. K.S.A. 60-260(b) states:

“*Grounds for relief from a final judgment, order or proceeding.* On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:

- ...
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.”

Petitioners assert in their Reply that John Carlson’s Response implies he is alleging misrepresentation by an opposing party, which falls under (b)(3), fraud.

If the real basis for granting relief falls under K.S.A. 60–260(b)(3)—fraud, misrepresentation, or misconduct by an opposing party, reconsideration remains time barred by the 1–year statutory time limit. While under K.S.A. 60-260(b)(6), this Court may reconsider its prior ruling for “any other reason that justifies relief,” “[a movant] cannot invoke subsection (b)(6) to circumvent the 1–year statute of limitations.” *In re Est. of McLeish*, 49 Kan. App. 2d 246, 259–60, 307 P.3d 221, 231 (2013). “Relief cannot be granted under K.S.A. 60–260(b)(6) if the real reason for granting relief falls under one listed in (b)(1) to (3) and more than a year has gone by since the entry of the judgment. *In re Marriage of Reinhardt*, 38 Kan.App.2d 60, 62, 161 P.3d 235 (2007).

“To determine whether the movant's request for relief was filed in a reasonable time, the court measures the time from when the movant came into possession of

facts justifying the relief to the time he filed his motion seeking relief. Also relevant to determine reasonableness is whether the movant provides good reason for failing to file his motion earlier and whether such delay has prejudiced any of the other parties.

In re Est. of McLeish, 49 Kan. App. 2d 246, 260, 307 P.3d 221, 231 (2013), citing *Wilson v. Wilson*, 16 Kan.App.2d 651, 660–61, 827 P.2d 788, *rev. denied* 250 Kan. 808 (1992).

Unfortunately, John Carlson fails to provide any information relevant to this inquiry to the Court. The burden justifying reconsideration falls on the moving party. Here, John Carlson fails to provide the supporting facts to the Court to establish a statutory basis to grant relief on his motion filed more than 14 months after the Order was entered.

C. Petitioner’s Motion for Final Orders and Reasonable Expenses and Costs

Next, the Court turns to *Petitioner’s Motion for Final Orders and Reasonable Expenses and Costs Including Attorney’s Fees*. Petitioners’ request for a final order granting a permanent injunction is now moot. In addition, petitioners have withdrawn their request for an accounting of the assets of the trust. The matters remaining at issue include: (1) rent to be paid to the trust by John Carlson; (2) petitioner’s request for reasonable expenses and costs, including attorney fees.

1. Rent to be Paid to the Trust by John Carlson

As part of its August 30, 2021 order, this Court directed that John Carlson move from the trust property within 45-60 days; that the real property be appraised to determine its sale value and rental value; and that John Carlson was to pay the trust the appraised rate of rent from the time of his mother’s passing through the time he moves out of the property. The property was appraised on February 27, 2022, and assessed a rental value of \$1,850.00 per month.

The provisions of the trust called for the residence to be appraised and sold within 3 months of the last surviving settlor’s death, which would have been by **June 11, 2021**. According to the return of service of summons, certified service on John Carlson did not occur until July 3, 2021.

Under these facts the Court believes it proper to amend its prior order as to the length of time for the payment of rent by John Carlson, from July 3, 2021, until the date he moved out of the property.

In his response, John Carlson contends that he vacated the property by the deadline of December 1, 2021. Petitioners express a belief “that John Carlson was still residing in the residence in the month of December 2021.” There is no evidence before the Court for it to be able to make a conclusive determination as to the precise date he vacated the residence, but by his own admission John Carlson was there until December 1, 2021.

Under K.S.A. 60-260(b)(6), this Court may reconsider its prior ruling for “any other reason that justifies relief.” Under the circumstances, the Court amends its prior order as to the length of time John Carlson is to pay rent to the trust from July 3 to December 1, 2021, or 5 months’ rent. At the rate of \$1,850.00 per month, John Carlson is ordered to pay the trust \$9,250.00, as rent fees for his use of the residence during the time from July 3 to December 1, 2021. The Court concludes this amount is sufficient “to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred.” K.S.A. 58a-1002(a)(1).

Much of John Carlson’s brief is devoted to discussion of the homestead exemption. Significantly, John Carlson never asserted that right during the time he lived in the residence. As such, he has waived his right to assert the exemption.

Even if he had raised the issue, John Carlson would not have prevailed in claiming exemption against the other co-beneficiaries of the trust who co-own the property with him. “A homestead right of occupancy may be established on a co-tenancy title, an equitable title, or an executory contract purchase, a lease hold estate, or an estate for life, as against almost any class of claimants except co-tenants.” *Cole v. Coons*, 162, Kan, 624, 633, 178 P.2d 997 (1947). All four beneficiaries of the trust have a ¼ equitable interest in the real property and as such are legal co-

tenants. While the exemption might have been effective as against the claims of creditors, the remaining beneficiaries of the trust are not creditors trying to take John Carlson's interest, rather this action was filed to enforce the terms of the trust.

This Court concludes the issue of the homestead exemption is moot and does not merit further discussion.

2. Request for Reasonable Expenses and Costs Including Attorney Fees

Petitioners also request an award of costs and expenses, including reasonable attorney fees, pursuant to K.S.A. 58a-1004. "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." K.S.A. 58a-1004.

An award of attorney fees under K.S.A. 58a-1004 is discretionary, and appellate review of a district court's decision regarding attorney fees under that statute is necessarily subject to our abuse of discretion standard. *Cresto v. Cresto*, 302 Kan. 820, 848, 358 P.3d 831, 849 (2015), citing *In re Estate of Somers*, 277 Kan. 761, 773, 89 P.3d 898 (2004).

While great deference is given a trial court in these matters, this court has stated that "appellate courts, as well as trial courts, are experts as to the reasonableness of attorneys' fees and may, in the interest of justice, fix counsel fees when in disagreement with views of the trial judge." *Buchanan v. Employers Mutual Liability Ins. Co.*, 201 Kan. 666, 676, 443 P.2d 681 (1968); see *Wolf v. Mutual Benefit Health & Accident Association*, 188 Kan. 694, 714, 366 P.2d 219 (1961); *Lattner v. Federal Union Ins. Co.*, 160 Kan. 472, 480-81, 163 P.2d 389 (1945).

In re Est. of Somers, 277 Kan. 761, 773, 89 P.3d 898, 907 (2004).

In his Response, John Carlson argues the petitioners took unwarranted actions that put the trust at risk, including (1) filing suit to seek an order removing him as trustee, and (2) filing suit to

seek an order for him to vacate the residence. John Carlson also sets forth reasons why the “terms of this particular Trust make it extremely onerous to comply with,” presumably to provide justification for him remaining in the residence longer than the 3 months provided in the terms of the trust and in violation of the Court’s orders.

The Court previously received testimony and considered the benefit of the presence of John Carlson to the trust at the August 11th hearing. Upon the death of the surviving settlor on March 11, 2021, John Carlson had the duty to follow the terms of the trust by obtaining an appraisal of the property and placing it on the market for sale. He refused to do so. John Carlson also refused to provide information to the other beneficiaries of the trust.

K.S.A. 58a-809 requires a trustee to take “reasonable steps to take control of and protect the trust property.” K.S.A. 58a-810(a)-(b) requires that the trustee keep adequate records for the administration of the trust and keep the trust property separate from the trustee's own property. K.S.A. 58a-813(a) requires the trustee to keep the beneficiaries reasonably informed about the administration of the trust and of material facts necessary for them to protect their interest in the trust.¹ “A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.” K.S.A. 58a-1001(a). If a breach occurs, a court may remedy the breach by, among other things, removing the trustee as provided in K.S.A. 58a-706. K.S.A. 58a-1001(b)(7).

The Court took John Carlson’s testimony and actions into consideration in setting a reasonable deadline for him to move from the property; removing him as Trustee; and deciding

¹ “A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information as required by Section 813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee.” K.S.A. 58a-706, UTC Comment. *Matter of O.E. Bradley & E.L. Bradley Tr.*, 60 Kan. App. 2d 66, 79, 490 P.3d 51, 62 (2021).

that he should be paid a monthly amount for his services while acting as Trustee.² The arguments related to the propriety of petitioner's actions in filing suit to take action to remove John Carlson as Trustee and to obtain an order to vacate the residence are moot. The Court has already weighed possible benefits and/or hazards to the trust, made its findings and issued its ruling that he should be removed and a successor Trustee named.

The Uniform Trust Code Comments to K.S.A. 58a-1004 state, in pertinent part:

The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. *Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud.* With respect to a party's own fees, Section 709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust.

Uniform Trust Code Cmt, K.S.A. 58a-1004.

At the time of the August 2021 hearing, John Carlson was self-represented. The evidence before the Court leads it to conclude that John Carlson may have acted out of ignorance, emotion, or an overabundance of stubbornness, but the evidence fails to show that any breach of the trust or other failing was done maliciously or in bad faith. For this reason, the Court denies petitioners' request for payment of attorney fees. The Court agrees it was necessary for the petitioners to file this lawsuit, however, and thus, grants reimbursement of statutory costs.

III. CONCLUSION

For all the reasons stated above, the Court finds as follows:

- *Petitioners' Motion to Strike Defendant John Carlson's Response to Petitioner's Reply (11-23-22)* is granted; as a result, *Defendant John Carlson's Response to Petitioner's Reply* is stricken;

² Respondent does not challenge the Court's prior order that he should receive a monthly fee as Trustee.

- *Defendant John Carlson's Response to Petitioners' Motion for Final Orders and Reasonable Attorney's Fees and Defendant John Carlson's Motion for Relief from Order (11-3-22)* is denied;
- *Petitioners' Motion for Final Orders and Reasonable Expenses and Costs Including Attorney's Fees (3-24-22)* is granted in part and denied in part:
 - Petitioners' request for a permanent injunction is denied as moot.
 - Petitioners' request for an accounting of the assets of the trust is denied as moot.
 - Respondent John Carlson is ordered to pay the trust rent fees in the amount of \$9,250.00, with post-judgment interest at the statutory rate.
 - Petitioners' request for attorney fees is denied, but petitioners are awarded statutory costs.

This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

This Order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

**HON. MARY E. CHRISTOPHER
DISTRICT COURT JUDGE**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, with a copy sent via U.S. Mail to any *pro se* party, providing notice to the following:

J. Phillip Gragson, #16103
Kara L. Eisenhut, #27055
Henson, Hutton, Mudrick,
Gragson & Vogelsberg LLP
3649 SW Burlingame Road, Suite 200
Topeka, KS 66611
(785) 232-2200
jpgragson@hmgllaw.com
keisenhut@hmgllaw.com
ATTORNEYS FOR PLAINTIFFS

Philip Wright, #23937
Wright Law Firm, LC
4460 W. 107th St.
Overland Park, KS 66207
(913) 710-9885 phone/fax
philip@pwrightlaw.com
ATTORNEY FOR DEFENDANT
JOHN CARLSON

Jeremy L. Graber
Foulston Siefkin LLP
822 South Kansas Avenue, Suite 200
Topeka, KS 66612-1203
Phone: 785-354-9412
Fax: 785-233-1610
jgraber@foulston.com
ATTORNEYS FOR KIMBERLY CRAWFORD,
TRUSTEE

_____/s/ Vicky Haynes
Division 8 Administrative Assistant
Vicky.Haynes@kscourts.org