

17-118307-A

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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IN THE MATTER OF THE ESTATE OF LANNY LENTZ:

DIANN WYATT, Respondent / Appellant,

vs.

LANA KENNEDY (Respondent) and MARILYN LENTZ (Petitioner),  
Appellees.

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On Appeal from the District Court of Shawnee County  
Honorable Frank Yeoman, District Judge  
District Court Case No. 2013-PR-000148

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REPLY BRIEF OF THE APPELLANT

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## **Reply Argument and Authorities**

### *Rule 6.05 Statement*

This reply brief is made necessary by new material contained in the appellees' brief. Specifically, that new material is the appellees' argument that this Court does not have jurisdiction to review the district court's December 2016 journal entry (Brief of the Appellees ("Aple.Br.") 6-8).

\* \* \*

### *Standard of Appellate Review*

Whether the Court has jurisdiction over this appeal is subject to unlimited review. *Mundy v. State*, 307 Kan. 280, 290, 408 P.3d 965 (2018).

\* \* \*

In the sole issue in her opening brief, Appellant Diann Wyatt argued that the trial court erred in valuing four real properties in its December 30, 2016 journal entry approving the final settlement of Decedent Lanny Lentz's estate (Brief of the Appellant ("Aplt.Br.") 12-26). She argued this was because the findings were unsupported by substantial competent evidence and were outside the range of any evidence before the trial court, requiring reversal and remand for a new settlement hearing (Aplt.Br. 12-26).

The appellees offer no response to the merits of Ms. Wyatt's argument at all, even as an alternative (Aple.Br. 6-10). They make no attempt to explain how any substantial competent evidence supports the trial court's findings of value at issue or how the findings were within the range of the evidence below (Aple.Br. 6-10).

Instead, the appellees' sole counterargument is that this Court lacks jurisdiction to review Ms. Wyatt's challenge to the December 2016 journal entry. They say this is because, post-judgment, Ms. Wyatt only filed a motion under K.S.A. § 60-260(b), which as a matter of law did not toll the time to file a notice of appeal from the December 2016 journal entry under K.S.A. § 60-2103(a), and so the notice of appeal she filed within 30 days of the denial of that motion was untimely to appeal the merits of the December 2016 journal entry (Aple.Br. 6-8).

The appellees' only counterargument is without merit. Ms. Wyatt's appeal is timely and this Court has jurisdiction.

**A. Ms. Wyatt's motion to reconsider the December 2016 journal entry tolled the time to file a notice of appeal from it until that motion was denied.**

The appellees' argument is premised entirely on an omission. They insist that Ms. Wyatt's motion titled "Petition to Set Aside And/Or Reconsider Order of Final Settlement And Reconstitute Claim For Damages Against Former Executrix Lana Kennedy" "was filed on January 27, 2017, 'pursuant to K.S.A. 60-260(b)(1) and (2)'" (Aple.Br. 5) (citing R.1 at 282). They say this is "[t]he starting point for reaching th[e] conclusion" that "[t]his [C]ourt does not have jurisdiction to review the" December 2016 journal entry: because "Ms. Wyatt's Petition for Reconsideration was expressly filed 'pursuant to K.S.A. 60-260(b)(1) and (2)'" (Aple.Br. 6) (citing R.1 at 282).

But Ms. Wyatt's Petition for Reconsideration did not state that it was filed *only* "pursuant to K.S.A. 60-260(b)(1) and (2)", as the appellees state. Rather, while expressly requesting the trial court to "reconsider" the

December 2016 journal entry, it stated it was filed “**in part** pursuant to K.S.A. 60-260(b)(1) and (2)” (R.1 at 282) (emphasis added). The appellees omit this entirely. (Ms. Wyatt hopes this omission was just an oversight.)

This omitted language is important because, unlike a 60-260(b) motion, which Ms. Wyatt concedes standing alone would not toll the time to file a notice of appeal, a “motion to reconsider” a journal entry does. For,

Kansas courts consider a motion to reconsider to be equivalent to a motion to alter or amend judgment. *Honeycutt v. City of Wichita*, 251 Kan. 451, 460, 836 P.2d 1128 (1992). K.S.A. ... 60-2103(a) provides that, by filing a motion to amend judgment, a party tolls the running of the 30-day period after judgment is granted in which to file a notice of appeal. Therefore, **by filing a motion to reconsider, a party tolls the running of the appeal period until that motion is decided.**

*Hundley v. Pfuetze*, 18 Kan.App.2d 755, 757, 858 P.2d 1244 (1993) (emphasis added); *see also*:

- *Bank of America, N.A. v. Inda*, 48 Kan.App.2d 658, 662-63, 303 P.3d 696 (2013) (motion to reconsider that cited § 60-260 as its authority still was sufficient to toll time for appeal and allow this Court jurisdiction);
- *Dieter v. Lawrence Paper Co.*, 237 Kan. 139, 144, 697 P.2d 1300 (1985) (time for notice of appeal began on denial of motion to reconsider);
- *Caplinger v. Carter*, 9 Kan.App.2d 287, Syl. ¶1, 676 P.2d 1300 (1984) (“A motion to reconsider is in substance, if not form, a motion to alter or amend under K.S.A. 60-259(f) and stays the time for appeal until ruled on by the court”); and
- *Bolser v. Zoning Bd. for Audrey Twp.*, 228 Kan. 6, 7-8, 612 P.2d 563 (1980) (same as *Dieter*, *supra*).

Ms. Wyatt's January 27, 2017 motion, to which the appellees aptly refer as her "Petition for Reconsideration", plainly satisfied this principle. While she did ask the trial court "*in part* pursuant to K.S.A. 60-260(b)(1) and (2)" to set aside the December 2016 journal entry, her motion *also* asked the trial court to "reconsider" the judgment (R.1 at 282) (emphasis added). It therefore was "equivalent to a motion to alter or amend judgment", which under § 60-2103(a) "tolls the running of the appeal period until that motion is decided." *Hundley*, 18 Kan.App.2d at 757, 858 P.2d 1244 (1993).

And Ms. Wyatt's Petition for Reconsideration equally plainly sought to preserve her right to appeal the December 2016 journal entry. Tellingly, she filed it on the 28th day after the December 2016 journal entry (R.1 at 268, 282), exactly the last day for a motion to alter or amend. *See* K.S.A. § 60-259(f). And it did not limit the authority it was brought under only to § 60-260(b) (R.1 at 282), as the appellees incorrectly state.

Moreover, any doubt the Court may have about the sufficiency of Ms. Wyatt's Petition for Reconsideration to toll the notice of appeal time must be resolved in favor of retaining jurisdiction. This is because "the right of appeal is favored by the law, and it will not be held to have been waived except upon clear and decisive grounds." *Brown v. Combined Ins. Co. of Am.*, 226 Kan. 223, 230, 597 P.2d 1080 (1979) (quoting *Wollard v. Peterson*, 145 Kan. 631, 632-33, 66 P.2d 375 (1937)). "Although adherence to 60-2103 is necessary to confer jurisdiction upon the appellate courts, when 'there is a valid controversy whether the statutory requirements have been complied with, [this Court is] required to construe those statutes liberally to assure justice in

every proceeding.” *Mundy*, 307 Kan. at 290-91, 408 P.3d 965 (quoting *State v. Griffen*, 241 Kan. 68, 70, 734 P.2d 1089 (1987)).

So, if the appellee is “able to discern and prepare for arguments on appeal” and not caught “surprised by [the appellant]’s appellate arguments”, doubt must be resolved in favor of the right to appeal. *Id.* at 291, 294. “[J]urisdictional rules should be read liberally ‘to allow the litigants the opportunity to have their claims heard and determined.’” *Vorhees v. Baltazar*, 283 Kan. 389, 394, 153 P.3d 1227 (2007) (citation omitted).

The appellees cannot claim that Ms. Wyatt’s Petition for Reconsideration would make them “surprised by [her] appellate arguments ...” *Mundy*, 307 Kan. at 294, 408 P.3d 965. In their response to it, they even argued she had not “state[d] any basis for reconsideration of the Order of Final Settlement” and that the order was supported by evidence (R.1 at 287). At the hearing over the Petition for Reconsideration, the trial court noted Ms. Wyatt was asking it to “reconsider the disposition of the case” (R.2 at 4). Counsel for the appellees argued “this matter is settled and that nothing under the statutes and/or the case law that is typically itemized for – as a basis for reconsideration has been presented in either of the pleadings that were filed by ... Ms. Wyatt” and so asked “that the [December 2016 journal entry] stand and the motions for reconsideration be denied” (R.2 at 11).

Finally, that Ms. Wyatt’s Petition for Reconsideration did not raise the argument she now makes in her opening brief does not change this. The appellees seem to ascribe some significance to the fact that it “did not address the issue of the district court’s valuations of the real properties in the estate”

(Aple.Br 7). But since 1963, the filing of a post-judgment motion has not been “a prerequisite to appellate review” in Kansas. *Bingham v. Hillcrest Bowl, Inc.*, 199 Kan. 40, 46, 427 P.2d 591 (1967). So, regardless of whether an argument was included in a post-judgment motion or whether the appellant appeals from the denial of the post-judgment motion at all, “a party may obtain a review of trial errors by appealing the judgment even if it did not appeal from a” post-judgment motion. *Atkinson v. Orkin Exterminating Co.*, 5 Kan.App.2d 739, 752, 625 P.2d 505 (1981), *aff’d* 230 Kan. 277 (1981).

Especially liberally construed in favor of allowing Ms. Wyatt’s appeal, her Petition for Reconsideration plainly did exactly what it stated and sought the trial court to reconsider its December 2016 journal entry. The law of Kansas is that it therefore tolled the time to file a notice of appeal until it was denied. *Hundley*, 18 Kan.App.2d at 757, 858 P.2d 1244.

**B. Ms. Wyatt’s notice of appeal filed within 30 days of the order denying her motion to reconsider therefore was timely, and this Court has jurisdiction of her appeal from the December 2016 journal entry.**

Accordingly, the law of Kansas is that Ms. Wyatt’s July 5, 2017 notice of appeal was timely and this Court has jurisdiction.

The district court entered the journal entry of final settlement of Mr. Lentz’s estate on December 30, 2016 (R.1 at 268). This was a final, appealable judgment under K.S.A. § 59-2401(a)(12) and (b), which provide that “[a] judgment or decree of partial or final distribution” entered in a probate case is subject to “[a]n appeal from a district court to an appellate court ....” *See also In re Estate of Bertrand*, 188 Kan. 531, 537-38, 363 P.2d

412 (1961) (final settlement of probate estate is appealable judgment under this provision).

Appeals from judgments and orders in probate cases are governed by the ordinary rules of civil procedure applicable to civil appeals. § 59-2401(c). So, just as with any other civil case,

in appeals from judgments and orders in probate cases entered by a district judge or an associate district judge the running of the time for appeal is terminated by a timely motion for rehearing or such other motion as may be enumerated in K.S.A. 60-2103(a), and the full time for appeal fixed in K.S.A. ... 59-2401(a) commences to run and is to be computed from the date the written order on such a motion is signed by the judge and filed with the clerk of the court.

*In re Estate of Burns*, 227 Kan. 573, 575, 608 P.2d 942 (1980); *see also In re Guardianship of Sokol*, 40 Kan.App.2d 57, 64, 189 P.3d 526 (2008) (“the time limitation for filing an appeal from a Chapter 59 judgment is tolled by the timely filing of a postjudgment motion pursuant to K.S.A. 60-2103(a)”).

Under § 60-2103(a), Ms. Wyatt therefore had “30 days from entry of the judgment” on December 30, 2016 in which to appeal, “terminated by timely motion ... under K.S.A. 60-259 ... to alter or amend the judgment ....” If a timely motion to alter or amend was filed, the 30 days to appeal instead would “be computed from the entry of any” order “granting or denying” that motion. § 60-2103(a).

Ms. Wyatt’s motion to reconsider the December 2016 journal entry – “equivalent to a motion to alter or amend” it, *Hundley*, 18 Kan.App.2d at 757, 858 P.2d 1244 – was timely. A motion to alter or amend a judgment is due 28 days from the date of the judgment to which it refers. § 60-259(f). 28 days

from December 30, 2016 was January 27, 2017. Ms. Wyatt filed her motion that day (R.1 at 282).

Ms. Wyatt's notice of appeal therefore also was timely. It was due 30 days "from the entry of" the district court's order "denying" her motion to reconsider. § 60-2103(a). The district court denied her motion to reconsider on June 5, 2017 (R.1 at 297). 30 days later was July 5, 2017. She filed her notice of appeal that date, specifically stating that she "appeals the Order of Final Settlement, filed on December 30, 2016" (R.1 at 307).

As in the existing uniform law of Kansas – *Hundley* and all the other decisions cited *supra* at p.3 in which a motion to reconsider filed within 28 days of a judgment was held to toll the time to appeal until within 30 days of the order denying that motion, Ms. Wyatt's Petition for Reconsideration makes her appeal timely and this Court has jurisdiction. The appellees' argument otherwise, premised on a conspicuous omission, is without merit.

### **Conclusion**

This Court should reverse the district court's judgment and remand this case for a new hearing.

Respectfully submitted,

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**Certificate of Service**

I certify that on August 6, 2018, I electronically filed a true and accurate Adobe PDF copy of the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

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