Court of Appeals of Kansas.

In the MATTER OF the CONSERVATORSHIP of Floyd BOGNER, Sr.
No. 102,275.
May 13, 2011.

Appeal from Harvey District Court; Joe Dickinson, Judge.
Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, and Jay Sizemore, of Newton, for appellant/cross-appellee Richard Greever.

Arlyn Miller and Myndee M. Reed, of Martindell Swearer Shaffer Ridenour LLP, of Hutchinson, for appellee/cross-appellant Juanita Silvey.

Before GREENE, C.J., BUSER and ATCHESON, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 This is an appeal from a conservator's accounting. Richard Greever, conservator for Floyd Bogner, Sr. (Floyd Sr.), was ordered to pay damages. He was also denied payment on part of his conservator and attorney fees, and he was ordered to pay the attorney fees of Juanita Silvey, Floyd Sr.'s eldest child. (Floyd Sr .'s children will be referenced by first names.) Greever appeals, and Juanita cross-appeals the district court's refusal to award additional damages.

Factual and Procedural Background

In 2001, Juanita filed the petition for a conservator. Counsel for two other of Floyd Sr.'s children, Floyd Bogner, Jr., and Wanda Meier, told the district court that "this is nothing more or nothing less than a family feud." Juanita's counsel agreed, stating, "[T]here is a family feud.... And the family is well-known and because of the anticipated conflicts, we have had a great deal of difficulty finding anybody who would serve as conservator. Mr. Greever finally did agree to serve."

Greever was appointed on an emergency basis, and in November 2001, he filed an inventory and valuation. Rather than itemizing Floyd Sr.'s farm equipment, Greever listed only a general category, "Farm Equipment (per 7/00 Inventory-net)," with reference to unidentified "equipment now titled to Wanda Meier and/or Floyd Bogner, Jr." Adding to the ambiguity was the fact that Floyd Sr. continued to farm with Floyd Jr., which resulted in an intermingling of their farm equipment.

Greever valued Floyd Sr.'s farm equipment at $98,327. Greever apparently took the value from an inventory and valuation prepared in 2000 by Lloyd Bogner, Floyd Sr.'s youngest child. Greever did not independently verify Lloyd's results.

In early 2002, the district court held its trial on Juanita's petition for appointment of a conservator. The transcript is not in the record. The district court appointed Greever and another individual, Elmer O. Bridgman, as coconservators. Bridgman gave his notice of resignation in November 2004, and the parties do not suggest his appointment altered Greever's duties in a material way.

Greever conducted a mediation with Floyd Jr. and Wanda over disputed ownership of certain farm equipment and other assets of the conservatorship estate. In November 2002, Greever asked the district court to approve a settlement which included a $55,000 payment by Floyd Jr. and Wanda to the conservatorship estate. Greever also informed the district court that Floyd Jr. would enter into a lease for "[c]ontinuing farm operations."

Both Juanita and Lloyd objected to the settlement, but the district court approved it. The district court also approved Greever's accountings for 2001, 2002, and 2003.

In August 2005, Greever filed his accounting for 2004 along with a new inventory and valuation, the first since 2001. This time he submitted an itemized list of the farm equipment and a valuation prepared by an appraiser, Paul Nisly.

Floyd Jr., Juanita, and Lloyd all objected to the 2005 inventory and valuation. Greever had valued the farm equipment at $27,235, and Juanita pointed out that the "reported value of the farm machinery and equipment ... had declined by more than $70,000." In October 2005, Greever filed a verified petition asking the district court to accept his resignation, approve the 2004 accounting, and allow payment of his conservator and attorney fees.

*2 At a hearing before a district magistrate judge, Greever testified that he "instructed Mr. [Nisly] to go inventory all of the farm equipment that was located at the farmhouse." Greever had no other knowledge concerning the farm equipment from the 2001 inventory and valuation. Greever stated, "Floyd [Sr.] was in possession of all that equipment and farming up and from the date of that inventory in 2000 until he went into the nursing home in January of 2005. I have no idea what equipment he may have disposed of, what equipment he may have sold." Greever said the equipment "was really all mixed together on various farms." Greever also said that until Floyd Sr. entered the nursing home, "I was never allowed on to the farmstead. [Floyd Sr.] ... threatened to shoot me."

The magistrate entered detailed orders and ordered Greever "to contact [Nisly]. I want [Nisly] to go to the five pieces of property ... [and] I want him to add any additional items." Nisly did so, and on February 8, 2006, Greever's counsel sent the results to the magistrate with copies to all parties. Nisly found $21,650 of farm equipment at the "home place" and $97,475 of equipment at

"Floyd Jr.'s place." The magistrate accepted Greever's accountings, accepted his resignation as conservator, and appointed Paula S. Nichols as the new conservator. Juanita appealed these rulings to the district court.

In May 2006, the magistrate entered orders for Nichols, stating her "duties shall include developing and filing with the Court a plan for administration of the Conservator's estate, as provided by K.S.A. 59–3039. The Conservator shall consult with the Court, to establish a time frame for filing the plan, and, for implementation of provisions of the plan." The magistrate directed Nichols to identify any of Floyd Sr.'s assets controlled by third parties, identify farm equipment allegedly transferred to third parties, determine the validity of such transfers, and "take appropriate action for recovery." Juanita appealed this as well.

In January 2007, the district court appointed David F. Holmes as conservator. In April 2007, Greever filed another verified petition asking the district court to accept his accountings and allow fees. The district court set the motion for hearing.

At this hearing Juanita testified regarding the farm lease that Greever, acting as conservator, had entered into with Floyd Jr. The lease required semi-annual payments in 2003 of $8,860. Describing herself as "an accountant and a tax return preparer that specializes in farm tax management," Juanita testified from federal tax returns that Floyd Jr. made only one payment in 2003. Juanita further testified that under the lease Floyd Jr. was responsible for the cost of all seed in 2002 and that he had failed to reimburse the conservatorship. Based on this evidence, the district court ordered another hearing "to determine whether the former conservator Richard Greever, misused any assets or funds of the wards or failed to faithfully or diligently carry out his duties and responsibilities as conservator."

*3 The main issue at this subsequent hearing was the lack of any inventories and valuations between 2001 and 2005. Greever maintained the "equipment was still being used in the farming operation. I saw no real need to go out and inventory the equipment and separate out each field what was [Floyd Jr.'s] and what was [Floyd Sr.'s]." Greever claimed that Floyd Sr.'s "farming dealings" were outside his control as conservator and that he could control only Floyd Sr.'s "financial dealings." Greever had to acknowledge, however, that in 2004 his counsel instructed him that "[a] complete inventory needs to be prepared." When the district court asked Greever, "So we really don't know on this day ... out of the $119,000 that Mr. Nisly inventoried ... how much of that belongs to [Floyd Sr.] and how much belongs to [Floyd Jr.]," Greever answered, "That's correct."

In February 2008, the district court found that Greever

"has never submitted an accurate inventory of the conservatee's estate. At the

outset, Mr. Greever relied on an inventory of equipment supplied to him by others, and later on, an inventory of equipment supplied to him without the necessary breakdown as to ownership of the equipment. (Mr. [Nisly's] inventory.) For reasons that all are too obvious now, this lack of information concerning the farm equipment and its value has contributed to the ongoing disputes among the offspring of Floyd Bogner, Sr."

Nevertheless, the district court stated:

"It would be unfair to Mr. Greever to characterize the inventory shortcomings as indicative of a general lack of care or concern for the ward's welfare. Mr. Greever performed a valuable service for [Floyd Sr.] by paying [his] bills and performing other services for [him]. This is not a case of fraud, but rather a situation where Mr. Greever did not use due diligence in making sure that the inventory filed included an accurate description of items and values concerning farm equipment in the estate."

In July 2008, the district court held a hearing on damages and attorney fees. Floyd Jr. testified that Floyd Sr. had sold some of his equipment because he would not accept money from Greever. Floyd Jr. acknowledged that his father never discussed his dealings with Greever and that Floyd Sr. may have sold some of his equipment before the conservatorship was even established.

The district court said it would take the matter under advisement, and it allowed the parties to make additional filings "[i]f anyone else has anything ... to add." Juanita filed nearly 200 pages of proposed findings, conclusions, and attachments on damages. Greever also filed proposed findings regarding damages.

In its ruling the district court stated the "inventories were generally incomplete, inaccurate, and failed to identify ownership." Given this "continuing cloud of uncertainty," the district court thought it "impossible now to be precise about the damage[s] to the conservatorship estate." Therefore, "rather than guess at what the damages are," the district court ruled "none are awarded as to the equipment."

*4 The district court believed, however, that "[t]he same cannot be said ... for other damages." The district court ordered Greever to pay "for the $8,860 rental payment, unreimbursed seed wheat of $1,915.73, and seed cleaning of $867.75." As for Greever's request for conservator and attorney fees, the district court thought it "inappropriate to allow [those] fees to be assessed against the estate of the conservatee, and accordingly, those requests are denied." The district court also gave Juanita opportunity to submit attorney fees which, if reasonable, "may [be] assessed against Mr. Greever."

The district court concluded by stating:

"[I]t should be said that Mr. Greever's shortcomings were not intentional. This was a job that nobody wanted, and for good reason. The ward's off-spring were at odds with each other and the ward himself threatened to shoot Mr. Greever. The problem was that Mr. Greever tried to soldier on despite these terrible circumstances, rather than seeking help, or stepping aside."

In December 2008, Juanita filed her motion for attorney fees. She sought "reasonable attorney fees expended for recovering costs or assets dissipated by the conservator." The recovery spoken of could only have been that ordered against Greever; it does not appear that Juanita recovered directly the amounts owed by Floyd Jr. She specified that "[a]ttorney fees in the amount of $13,034.95 were incurred by [her] from January 21, 2008, to July 25, 2008." She alleged that she had actually spent "in excess of $50,000 in legal fees" from her "personal funds." She contended, "[I]t is only equitable that Mr. Greever be required to share a fraction of the burden carried by [her] to seek justice for the ward."

The district judge awarded attorney fees to Juanita and "against Mr. Greever for $13,034.95" and further stated:

"As I may have mentioned before, Mr. Greever's plight reminds me of the saying that 'no good deed goes unpunished.' I think Mr. Greever's malfeasance was the result of very difficult circumstances which included co-mingling of assets with Floyd Bogner, Jr., a non-cooperative ward, and feuding siblings which only made Mr. Greever's tasks more difficult. That being said, it is also true that Mr. Greever ignored the requests of his own attorney, and opposing counsel, to remedy these problems, but those issues were never adequately addressed."

Greever appeals, and Juanita cross-appeals.

Application of Statutes and Standards Regarding Damages

Greever first argues the district court applied "the wrong legal statutes and standards" on damages. Juanita contends the district court properly interpreted Kansas law. Statutory interpretation is subject to unlimited review. *Unruh v. Purina Mills,* 289 Kan. 1185, 1193, 221 P.3d 1130 (2009). Our task is to ascertain the legislative intent from the statutory language, giving common words their ordinary meanings. *Padron v. Lopez,* 289 Kan. 1089, 1097, 220 P.3d 345 (2009).

*5 Because Greever's appeal concerns events after July 1, 2002, it is controlled by "the act for obtaining a guardian or a conservator, or both" (Act). K.S.A. 59–3050 *et seq. ;* L.2002, ch. 114, secs. 1–46, 80–82. The Act provides:

"(b) A conservator shall have the following general duties, responsibilities, powers and authorities:

....

"(3) to separately possess and manage all the assets of the estate of the conservatee and to collect all debts and assert all claims in favor of the conservatee, and with the approval of the court, to compromise the same....

"(4) to prosecute and defend all actions in the name of the conservatee or as necessary to protect the interests of the conservatee.

....

"(6) to possess and manage any ongoing business that the conservatee was managing and operating prior to the appointment of the conservator." K.S.A. 59–3078(b)(3), (4), and (6).

Greever contends that even if he violated these duties, he did so innocently and damages are not allowed. He relies on K.S.A. 59–3088 while contending K.S.A. 59–3086 and K.S.A. 59–3089 do not apply.

The district court did not specify the legal authority for its action. The three statutes Greever cites are very similar in structure. They bring a conservator's performance before the district court and are distinguished primarily by means of who initiates the inquiry.

K.S.A. 59–3086(a) applies where a conservator files a "verified petition requesting a hearing" on the "accounting for the purpose of allowance and settlement." K.S.A. 59–3088(a) applies where a "verified petition" is filed "requesting the court to accept the resignation of ... the conservator," among other options. K.S.A. 59–3089(a) applies "any time the court has reason to believe that the ... conservator ... has failed to faithfully or diligently carry out such person's duties or responsibilities or to properly exercise such person's powers or authorities." In this last instance, it is the district court, not the conservator or another party, which initiates the hearing by a show cause order. See K.S.A. 59–3089(a).

We believe K.S.A. 59–3086 and K.S.A. 59–3088 applied since Greever asked for an allowance of his accounting and also asked to resign. The statutes dealt with distinct issues, but Greever combined the issues in one petition. We doubt K.S.A. 59–3089 applied since the matter was brought to the district court by petition, although the district court did order a number of hearings. We need not resolve this question, however, to complete our review of the district court's decision.

With respect to Juanita's involvement in the litigation, Greever contends: "K.S.A. 59–3086 allows the court to review and assess a request by the conservator for an accounting for an allowance and settlement.... Nothing in the statute gives a third party the ability to challenge any accounting." But K.S.A. 59–3086(a)(4) requires the verified petition to include, among other things, "the

names and address of ... adult children ... of the conservatee." And K.S.A. 59–3086(b) obliges the conservator to give notice to "such persons that if they have any objections to the accounting or accountings for which final allowance and settlement is sought that they must file their written objections with the court prior to the scheduled hearing or that they must appear at the hearing to present those objections."

*6 This was the procedure followed below. The hearing was on Greever's petition, and Juanita had a right to notice. Juanita appeared and presented objections, which was her right. Even if only K.S.A. 59–3088 applied, as Greever argues, it provided the same right to notice and appearance at the hearing. See K.S.A. 59–3088(a), (b).

Greever next contends the district court exceeded the scope of Juanita's appeal from the district magistrate judge. We disagree. District court review is not only de novo,

> "[t]he right to file new pleadings shall not be abridged or restricted by the pleadings filed, or by failure to file pleadings, in the proceedings before the district magistrate judge; nor shall the trial or the issues to be considered by the district judge be abridged or restricted by any failure to appear or by the evidence introduced, or the absence or insufficiency thereof, in the proceedings before the district magistrate judge." K.S.A. 59–2408.

This brings us to the remedies allowed by statute. K.S.A. 59–3086(f) and K.S.A. 59–3088(f) are identical in this regard: If the district court finds a conservator "has innocently misused any funds or assets" of the conservatorship estate, the court shall order the conservator "to repay such funds or return such assets" to the estate.

Greever's failure to collect the 2003 rent and 2002 seed payments was an innocent misuse of funds or assets of the conservatorship estate. "Assets" and "funds" are broad terms. See Webster's New Collegiate Dictionary 67, 465 (1973). Given the legislature combined them, it intended an even broader reach. We conclude the legislature intended these provisions of the Act to cover the entire value of a conservatorship estate.

In the present case, the conservatorship estate held a contractual right to payment from Floyd Jr. of "$8,860.00 payable April 17, 2003, and $8,860.00 payable on September 1, 2003." Floyd Jr. also agreed to pay "all bills and expenses related to ... the seed." These payment rights were assets of the estate. See *Lesem v. Harris,* 102 Kan. 222, 223, 169 P. 959 (1918) ("[D]efendant was compelled to buy in the assets, including the lease."); *Stocker v. Davidson,* 74 Kan. 214, 217, 86 P. 136 (1906) ("[I]t is a right of action arising upon contract and is an asset belonging to the corporation.").

As for "misused," it is perhaps an even broader word. It means simply "to use incorrectly." Webster's New Collegiate Dictionary 737 (1973). Greever clearly used the conservatorship estate's rights incorrectly. He should have collected the rent and seed debts and otherwise asserted these claims on Floyd Sr.'s behalf. See K.S.A. 59–3078(b)(3). He did not, and the evidence supports the district court's conclusion that the failure was innocent.

We acknowledge the legislature spoke of a conservator's duty to "repay" funds or "return" assets upon innocent misuse. See K.S.A. 59–3086(f); K.S.A. 59–3088(f); K.S.A. 59–3089(d). This could suggest that the funds or assets in question must have been *taken* by a conservator and not simply overlooked as in the present case. But given the breadth of the terms chosen by the legislature in the same provision—funds, assets, and misuse—we do not believe it intended to restrict the claim or the remedies. The evident intent was for a conservatorship to be reimbursed in cases of innocent misuse, whatever form the misuse may have taken.

*7 At the very most, the combination of terms rendered the legislature's intent ambiguous. If so, we would consider the provisions as a whole and still conclude the legislature intended to hold conservators responsible for any failure to collect on behalf of a conservatorship estate. See State *v. Raschke,* 289 Kan. 911, 914, 219 P.3d 481 (2009) (appellate courts should consider various parts of an act together to bring the provisions into a workable harmony, if possible).

The district court did not identify a statutory basis for its ruling. But we conclude from our examination of the Act that it had statutory authority to order Greever to pay for his failure to collect. The result was, therefore, correct. See *Robbins v. City of Wichita,* 285 Kan. 455, 472, 172 P.3d 1187 (2007).

Evidence of Damages Related to Farm Rent or Seed Costs

Greever maintains "[t]he district court received no evidence that would support a finding that there was farm rent or seed costs owed to the conservatorship, nor was there any evidence as to the costs of such debt."

> "An appellate court generally reviews a district court's findings of fact to determine if the findings are supported by substantial competent evidence and are sufficient to support the district court's conclusions of law. Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. [Citation omitted.]" *Hodges v. Johnson,* 288 Kan. 56, 65, 199 P.3d 1251 (2009).

We have carefully reviewed the record and cannot agree with Greever's assertions regarding the lack of evidence. Juanita testified to the rent and seed costs, and her proposed findings set out the damages in detail along with supporting documents. Greever contends he was denied notice on "the issue of damages for rent and seed costs," but he did not complain below. The district

court, moreover, gave the parties additional time to brief the issues. Greever was thereby able to file his own proposed findings, where he merely repeated his argument from the hearing—that while he "dispute[d] these claims," the rent and seed payments should be made by Floyd Jr., not by himself. A reasonable person might regard the evidence below as sufficient to support the conclusion that Greever did not collect a 2003 rent payment or the 2002 seed reimbursement.

Juanita's Attorney Fees

Greever contends the district court erred in ordering him to pay Juanita's attorney fees. Based on our review of the record, Greever was ordered to pay attorney fees Juanita had incurred in her individual capacity. "Attorney fees cannot be granted absent statutory authority or an agreement by the parties. A trial court does not have statutory authority to impose attorney fees under its equitable powers absent statutory authority." *Brennan v. Kunzle,* 37 Kan.App.2d 365, Syl. ¶ 14, 154 P.3d 1094, *rev. denied* 284 Kan. 945 (2007). The authority to award fees is a question of law subject to unlimited review. See *Unruh,* 289 Kan. at 1200, 221 P.3d 1130.

*8 In support of his position, Greever relies upon *In re Conservatorship of Chapman,* 36 Kan.App.2d 730, 144 P.3d 771 (2006), *rev. denied* 283 Kan. 931 (2007), which considered conservatorships for several children. Their father was the conservator, and he misused the conservatorship estates. Their mother intervened, and on appeal she made a "short, conclusory argument" for the "attorney fees and expenses ... incurred in seeking [father's] removal as conservator." 36 Kan.App.2d at 745, 144 P.3d 771.

The mother relied on the identical language in K.S.A. 59–3088(f) and K.S.A. 59–3089(d) quoted below to support her claim for attorney fees and expenses. These statutes provide that where the district court finds the conservator innocently misused the funds or assets of the conservatee's estate, or where the conservator embezzled or converted the funds or assets for the conservator's personal use,

> "the court may order the forfeiture of the conservator's bond, or such portion of thereof as equals the value of such funds or assets, including any lost earnings and the costs of recovering those funds or assets, including reasonable attorney fees, as the court may allow, and may require of the surety satisfaction thereof." K.S.A. 59–3088(f); K.S.A. 59–3089(d).

This court did "not read the statutes as allowing an order directing [father] to directly pay [mother] for the attorney fees she personally expended." 36 Kan.App.2d at 746, 144 P.3d 771. Instead, "the statute is clearly designed to provide for reimbursement of recovery costs to the conservatorship estate and not individually to [the mother]." 36 Kan.App.2d at 746, 144 P.3d 771. Critically, in our opinion, no conservator's bonds were filed in *Chapman.* The attorney fee provisions of K.S.A. 59–3088(f) and K.S.A. 59–3089(d), which explicitly deal with

bond forfeiture, therefore did not apply. See 36 Kan.App.2d at 745–46, 144 P.3d 771.

In the present case, a bond was filed. But based once again on our review of the record, Juanita did not proceed upon the bond below. She did not mention the bond in her motion for attorney fees. The district court did not mention the bond in its ruling, and it ruled against Greever personally. Juanita also does not brief bond forfeiture on appeal, although at oral arguments she contended the present action is a "first step" in that direction. We will not resolve the question here. Our point is that, under these circumstances, *Chapman* provides that a district court may not order a conservator personally to pay the attorney fees of an interested party. See 36 Kan.App.2d at 746, 144 P.3d 771.

Juanita does not address *Chapman* on appeal, and she cites no statutory authority apart from that considered in that case. We believe *Chapman* controls the outcome. The district court therefore erred in ordering Greever to pay Juanita's attorney fees.

Greever's Conservator and Attorney Fees

Greever argues the district court erred in denying his conservator and attorney fees. The district court, however, did not deny Greever all fees. Greever had already been awarded conservator and attorney fees, and the district court held any additional fees were "inappropriate." In context, this was a discretionary decision. See K.S.A. 59–1717 (the district court must determine "just and reasonable" fees); *In re Guardianship & Conservatorship of Heck,* 22 Kan.App.2d 135, 146, 913 P.2d 213 (1996) ("Determination of the reasonableness of such expenses [of the conservator is] subject to the trial court's discretion and will be reversed only when that discretion is abused.").

*9 Greever does not show an abuse of discretion. He admitted to his failures to identify, inventory, and value Floyd Sr.'s farm equipment. Limiting Greever to the fees he had already received was just and reasonable under the circumstances.

Juanita's Cross–Appeal

Juanita contends the district court failed "to hold Greever accountable to any degree for the loss of [Floyd Sr.'s] farm equipment." This begs the question concerning the amount of that loss. The district court found no reliable evidence for the loss, if any, and according to Juanita this was not a negative finding. We need not decide the standard of review because we would affirm under any standard.

Juanita blames Greever for the lack of evidence: "Guidance from other jurisdictions, and common sense, suggest that when a conservator's accounting is challenged, the burden of proof is on the conservator to prove the accuracy of his accounting, and to prove his compliance with his fiduciary obligations." For other

jurisdictions Juanita cites *Matter of Estate of Logan,* 120 Idaho 226, 229, 815 P.2d 35 (Ct.App.1991), *cert. denied* 504 U.S. 976, 112 S.Ct. 2948, 119 L.Ed.2d 571 (1992), and *In re Estate of Berger,* 166 Ill.App.3d 1045, 1056, 117 Ill.Dec. 339, 520 N.E.2d 690 (1987), *app. denied* 122 Ill.2d 574, 125 Ill.Dec. 216, 530 N.E.2d 244 (1988). These cases deal with a conservator's burden to prove the propriety of an accounting, not to disprove damages. Greever naturally bore the burden to prove the propriety of his own accountings. See K.S.A.2010 Supp. 59–3086(e). The question here is whether he bore the burden to refute Juanita's allegations regarding damages, even if those allegations were unsupported by evidence.

K.S.A. 59–3086(f) provides: " *If the court finds by a preponderance of the evidence* that the conservator has innocently misused any funds or assets of the conservatee's estate, the court shall order the conservator to repay such funds or return such assets to the conservatee's estate." (Emphasis added.) Under this statute the district court could order Greever to pay damages only if a preponderance of the evidence showed: (1) damages and (2) their amount. Without any reliable evidence regarding the fate of Floyd Sr .'s farm equipment, the district court could not determine these questions.

The damages order against Greever is affirmed, as is the district court's denial of Greever's request for additional conservator and attorney fees. The order requiring Greever to pay Juanita's attorney fees is reversed, and the case is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded with directions.

ATCHESON, J., concurring in part, dissenting in part:

There is much to approve of in the majority's able opinion. And I do approve of most of it. I join in its general interpretation and construction of K.S.A. 59–3086 and K.S.A. 59–3088, the denial of attorney fees to Juanita Silvey, the denial of additional fees to Richard Greever, and the treatment of the farm equipment issue. I respectfully dissent from the majority's application of the statutory provisions to impose liability on Greever for the unpaid farm rent and seed costs. On the facts, as presented in the appellate record, Greever should not be obligated for the rent and probably not for the seed costs.

*10 The majority opinion well lays out the facts. I highlight a few circumstances especially pertinent to my analysis. Greever was appointed conservator for Floyd Bogner, Sr., in 2001. As the trial judge outlined and the majority recounts, the job came with built-in impediments that might have thwarted the most skilled conservator. Greever worked at fulfilling his statutory obligations, and none of the judges reviewing his efforts impute any sort of bad motive or improper profiteering to him. Throughout the proceedings, Juanita, one of Bogner's daughters, pushed to be named conservator and frequently implored

the trial court to review a variety of issues regarding her father's estate.

In November 2002, Greever brokered a settlement of claims between two of Bogner's other children regarding certain property interests related to the estate. Under the settlement, Bogner's son and namesake, Floyd Bogner, Jr., was to pay to his father's estate seed costs associated with their joint farming operation for the 2002 growing season. As part of the settlement, Floyd, Jr. also entered into a written lease for use of farmland that called for him to make rental payments to the estate on March 1 and September 1, 2003, of $8,860 each. The trial court approved the settlement.

The court file in this case suggests little in managing Bogner's affairs was accomplished without a fight from one or more of the offspring. A pitched battle raged over the farm equipment for years and seemed to be the focus of attention for much of that time. The paper trail for that stretch, however, indicates Greever was something short of aggressive in seeking the 2002 seed costs and the second farm rental payment for 2003 from Floyd, Jr.

In October 2005, Greever asked the trial court to allow him to resign as conservator. Juanita sought to be named his replacement. On April 12, 2006, the trial court approved Greever's resignation and appointed Paula Nichols as conservator for Bogner. She didn't last as long as Greever. On January 18, 2007, the court named David Holmes to be conservator.

In April 2007, Greever requested court approval of various accountings he had filed and payment of the last of his fees. The trial court held a hearing on Greever's request on August 8, 2007. At the hearing, Juanita testified that Floyd, Jr. had not paid for the seed from 2002 and had not made the second rental payment from 2003. The trial court determined that Floyd, Jr. had never made those payments. The trial court ultimately found the seed costs totaled $2,783.48 and the unpaid rent came to $8,860.

Those uncollected payments account for the judgment against Greever, not including the attorney fees award to Juanita that all of us agree should be set aside. The trial court concluded Greever owed the estate a sum equal to the seed costs and rent because he "should have known these amounts were unpaid and could have collected these payments in a timely manner."

Basically, the trial court determined that Greever failed to collect the seed costs and rental payment from Floyd, Jr. because of laxity or neglect. The first issue is whether that sort of inaction subjects a conservator to some sort of statutory obligation to an estate for the financial loss. After some reflection on the statutory language in K.S.A. 59–3086 and K.S.A. 59–3088, I agree with the majority that a conservator may face such liability. The statutes, however, are less than crystalline. Nevertheless, the facts here do not, in my view, establish liability on Greever's part for the rental payment and probably do not as to the seed costs

even under the reading the majority gives to the statutes.

*11 Each statute uses identical language: "If the court finds ... the conservator has innocently misused any funds or assets of the conservatee's estate, the court shall order the conservator to repay such funds or return such assets to the conservatee's estate." K.S.A. 59–3086(f); K.S.A. 59–3088(f). The majority correctly points out that language reasonably could be construed to apply only to instances in which the conservator has actively spent funds or applied assets in an inappropriate way. The word "misuse" suggests that meaning. Similarly, the requirement that the funds be *repaid* or the assets *returned* indicates a conservator has actively removed the funds or assets from the corpus of the estate.

The fit of that language with the facts here is less than well tailored. The seed costs and rental payment were accounts receivable of the estate; they would be considered assets under any reasonable understanding of that term. That much is plain. But here, Greever did not disturb those assets or use them at all. He did nothing. They remained part of the corpus of the estate. And that was the problem. Through his inaction, Greever failed to convert the accounts receivable, one type of asset, into cash, another and generally more desirable asset. Maybe that's misuse. I agree with the majority that it is in the context of the financial relationship between a conservator and a conservatee's estate.

Thus, for example, if a conservatee's estate included a piece of commercial rental property and the tenant left at the end of the lease, the conservator would have an obligation to take reasonable steps to find a new occupant. The failure to do so would constitute misuse of that asset. The principal purpose of the asset is to generate a revenue stream for the owner. And the failure to realize that purpose—even through inaction—must be misuse. The loss to the estate would be the rental income, and the conservator could be held liable for the shortfall in revenue until a new tenant moves in. I doubt the Kansas Legislature meant to exempt that sort of neglect from the scope of K.S.A. 59–3086 or K.S.A. 59–3088. (I will return to that example to show why judgment should not have been entered against Greever here.) But the legislature could have better highlighted the statutes' intended purpose. The statutes might read: "If the court finds ... the conservator has innocently misused any funds or assets of the conservatee's estate or has otherwise caused a diminution in the value of the estate through unreasonable or imprudent business decisions, delay, or neglect, the court shall order the conservator to restore the estate to the financial condition it would have had in the absence of such misuse, business decision, delay, or neglect."

The existing statutory language, however, should be broadly construed to effect the purpose of protecting a conservatee's estate from depletion through a conservator's inappropriate decisions. The provisions holding a conservator accountable for those losses reflect remedial enactments designed to protect those who because of infirmity are unable to protect themselves. See *Byrd v.*

Kansas Dept. of Revenue, 43 Kan.App.2d 145, 154, 221 P.3d 1168 (2010), *rev. granted on other grounds* January 10,2011 (quoting *Southwestern Bell Tel. Co. v. Kansas Corporation Comm'n,* 29 Kan.App.2d 414, 421, 29 P.3d 424 [2001]). That, of course, is the reason for appointing a conservator in the first place, and if he or she fails in that duty, there ought to be a legal reckoning for the resulting financial losses to the estate. See K.S.A. 59–3051(a) (defining person "in need of a guardian or conservator").

*12 The difficulty here rests in determining just what Greever legally ought to be required to repay or return to the estate as the result of his lassitude in failing to collect the debts Floyd, Jr. owed. Greever never took funds from the estate. The estate didn't have funds; it had accounts receivable. Greever had no assets to return because the assets—the accounts receivable—were always there. During the time Greever served as conservator, those assets were not diminished in any way. Or at least the overdue rental payment plainly was not.

Assuming Floyd, Jr. continued to be recalcitrant in settling up his obligations, the conservator could have filed suit to collect the debts. The seed costs were due in late 2002 based on the written settlement agreement. And the rental payment was due September 1, 2003, based on the written farm lease. The statute of limitations on those actions would be 5 years. K.S.A. 60–511(1). Accordingly, the conservator of Bogner's estate could have filed suit to collect the seed costs until sometime in late 2007 and to collect the lease payment until September 1, 2008. Those debts were notorious no later than August 8, 2007, when Juanita raised a ruckus about them in open court. By then, Greever had been relieved as conservator; Nichols had come and gone; and Holmes had been the conservator for nearly 6 months.

Nothing in the record suggests some legal bar prevented either Nichols or Holmes from pursuing a collection action against Floyd, Jr. Holmes had more than a year remaining on the limitations period for the 2003 rental payment. I fail to see why Greever ought to pay the estate the equivalent of that debt. He did nothing that irrevocably compromised the value of the asset. The successor conservators could have taken the necessary action—filing suit—to protect the estate's financial interests reflected in the account receivable for the farm rent. But they did not. As best I can tell, the limitations period expired on Holmes' watch after he had been on duty for a year and a half. That's when the account receivable for the rent became worthless. And it strikes me the liability for that loss falls on the incumbent conservator at that time.

The account receivable for the rent due from Floyd, Jr. differs from the hypothetical lost revenue stream from the vacant commercial property I described earlier. The unoccupied building represents a continuing loss, month after month. A conservator, having failed to take reasonable steps to secure a replacement tenant, should be liable for each month's loss as it accrues. Once a month has passed, the revenue lost for that time cannot be recouped. It is

irretrievably gone.

The same was not true, however, of Floyd, Jr.'s debt for the farm rent. The amount was fixed and unchanging as of the delinquency in September 2003. It remained so during the balance of Greever's service as conservator. So, too, throughout Nichols' stint and for the first 18 months of Holmes' tenure. The asset was not irretrievably lost until the limitations period expired. With respect to the 2003 rental payment, Greever's delay did not deplete or compromise the asset. And Greever cannot be held accountable under K.S.A. 59–3086 or K.S.A. 59–3088 as if his conduct did. (A court might well have found Greever's inaction to be a legally sufficient ground to remove him as conservator. But good grounds to replace a conservator do not necessarily have to entail financial losses to the estate.)

*13 There could be circumstances in which a conservator's inaction and delay in collecting a fixed debt might result in a loss to the estate before expiration of the limitations period to bring a legal action. For example, the debtor might go out of business or otherwise become judgment proof during the period of the conservator's inaction. If the evidence demonstrated that prompt collection efforts likely would have been successful, then the conservator ought to be held liable to the estate for the value of an account receivable that languished into worthlessness. No comparable facts appear in this record as to the farm rent.

The record, however, is unilluminating with regard to some legally significant mileposts for the seed costs. It is not readily apparent when in 2002 Floyd, Jr. was to pay those costs, and, in turn, I cannot tell when the limitations period on a collection action for them would have expired. The statute of limitations would have run after Greever had been replaced as conservator. But whether the successor conservator (presumably Nichols) would have had sufficient time remaining on the limitations clock to assess the overall condition of the estate, recognize the specific situation with the seed costs, and get into court with a collection action is not nearly so clear. The unpaid seed costs may not have been apparent until Juanita raised the issue in court in early August 2007. By then, the limitations deadline might have been rapidly approaching.

Accordingly, I would be disposed to reverse and remand with regard to the seed costs. On remand, the trial court would have to determine when Greever's successor knew of that debt or reasonably should have been aware of it and whether, in light of those dates, the successor had a fair opportunity to collect the debt from Floyd, Jr. If so, Greever would have no legal liability to the estate for the value of that account receivable. If not, then he would.