SO ORDERED.

SIGNED this 15th day of October, 2013.

Janice Miller Karlin
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	**Case No. 12-40195**
Mary Carol Moses,	**Chapter 7**
Debtor.	

Order Denying Motions to Vacate of Debtor Mary Moses and Intervenor Ruth Moses

Before me are two contested motions related to a default order entered more than one year ago, on September 4, 2012 (the "Default Order"), namely: (1) Debtor Mary Moses' Motion to Vacate the Default Order on Debtor's Homestead Exemption;[1] and (2) Intervenor Ruth Moses' Motion to Vacate the Default Order on Debtor's Homestead Exemption.[2] In an attempt to untangle the web of family ties, the Trustee,

[1] Doc. 76. The Trustee objected to this motion at Doc. 77.

[2] Doc. 67. The Trustee objected to this motion at Doc. 75.

along with the Debtor and Intervenor, filed a Joint Stipulation of Facts[3] and briefs supporting their positions.[4]

After full consideration of those pleadings, I conclude that the motions to vacate must be denied. Debtor Mary Moses has not carried her burden under Federal Rule of Civil Procedure 60(b)(1) to show the alleged excusable neglect. Intervenor Ruth Moses has not demonstrated that she has standing to attack the Default Order, and, even if she did, she similarly fails to carry her burden under Rule 60(b).

I. Factual and Procedural Background

Debtor Mary Moses, and her sister, the Intervenor Ruth Moses, along with their father Raymond Moses, moved into real property on Stafford Road in Ottawa, Kansas in 1988. Debtor and her sister have lived there ever since. In 1992, their father deeded his interest in the residence to them as joint tenants, with full rights of survivorship. In 2010, the Franklin County Appraiser's Office valued the real property at approximately $200,000. At that time, the residence was "free and clear" of any mortgage or other type of encumbrance, including real property taxes.

On or about October 1, 2010, Debtor contacted Legal Helpers Debt Resolution

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[3] Doc. 78 (Stipulation of Facts between Ruth Moses, Mary Moses, and the Trustee). The parties informed the Court by e-mail at the time the stipulation was filed that the Joint Stipulation is complete, and no additional evidence is needed.

[4] Doc. 84 (Trustee's Brief in Opposition to Debtor's Motion to Vacate Default Order and Ruth Moses' Motion to Vacate Default Order); Doc. 88 (Intervenor Ruth Moses' Brief in Support of Motion to Vacate Default Order Denying Debtor's Claims of Exemptions); and Doc. 100 (Debtor's Brief in Support of Debtor's Motion to Vacate Default Order). Briefing on this matter has been significantly delayed by several motions for extension of time. The motion to vacate of Intervenor Ruth Moses, which brought this issue to the forefront, was filed May 21, 2013, but full briefing on the issues was not completed until October 8, 2013.

Service ("Legal Helpers") seeking options to repay her significant credit card debt, which exceed $55,000. Debtor entered into a contract with Legal Helpers for its services in reducing her credit card debt and, in compliance with their formal agreement, she began forwarding approximately $700 per month for repayment of the debt.

In April 2011, Citibank sued Debtor to obtain a judgment for the unpaid balance due on the credit card account she had with it. After receiving the summons from Citibank, Debtor contacted Legal Helpers by phone, and notified a representative that Citibank had filed the lawsuit and that she was concerned about the lawsuit. During a phone conversation with Legal Helpers in April or May 2011, Debtor understood the representative to tell her that if she owned property or had a bank account, that she should remove her name from the title of those items because of the Citibank lawsuit. Debtor was not asked by Legal Helpers, and therefore did not inform Legal Helpers, that she owned an undivided one-half interest in the real property in Ottawa, Kansas.

Because Debtor believed she had received sound legal advice from Legal Helpers, she completed a quit claim deed form on May 27, 2011, transferring her interest in the Ottawa, Kansas real property to her sister, Ruth Moses. The quit claim deed was simultaneously filed with the Franklin County Register of Deeds. Debtor admits she executed the quit claim deed on the real property in favor of her sister based upon her understanding of the advice from Legal Helpers. Ruth paid Debtor no consideration in connection with the transfer of Debtor's interest via the quit claim deed, which based on a value of $200,000, may have been worth about $100,000.

Debtor made all payments to Legal Helpers as agreed until late 2011, when she discovered Legal Helpers was not in turn paying her credit card debt, as Legal Helpers had agreed to do. On February 23, 2012, Debtor Mary Moses filed for Chapter 7 bankruptcy protection, claiming a homestead exemption for the Stafford Road real property. At a continued § 341 meeting in July 2012,[5] Debtor testified that she did not hold an "interest" in the real property, meaning that she did not hold title in the property. On August 8, 2012, the Trustee filed an objection to Debtor's Claim of Exemption of the homestead, along with a notice with a 21-day opportunity to object.[6] If Debtor had objected, a hearing would have been set.

The Trustee mailed a copy of her Objection to Exemption and the Notice to Debtor at her Stafford Road home on August 8, and Debtor freely admits receiving a copy of this Objection to Exemption and Notice in August 2012. The Court's docket sheet also reflects that Debtor's attorney was sent an electronic copy of both the Objection and Notice through the Court's electronic filing system at the electronic address she maintains with the Court.[7]

Debtor did not object to the Trustee's Objection to Exemption. As a result, when the objection deadline expired, I construed the objection as uncontested, and, on

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[5] *See* 11 U.S.C. § 341 (requiring a "meeting of creditors" wherein the trustee "shall orally examine the debtor").

[6] Doc. 33 (Trustee's Objection to Debtor's Exemption); Doc. 34 (Notice with Opportunity for Hearing).

[7] *See* Doc. 33 and 34 showing electronic service on August 8, 2012 to Counsel at frenchlawbankruptcy@cox.net.

September 4, 2012, entered an Order Denying Debtor's Claim of Exemption.[8] The Default Order, which was prepared by the Trustee, states that the real property is not subject to a claim of exemption under Kansas law.

Debtor also admits that she received a copy of the Default Order at her Stafford Road residence in September 2012, and the Court's docket sheet shows that Debtor's counsel was sent a copy of this order through the Court's electronic filing system on September 4, 2012.[9] Approximately six months later, on March 21, 2013, the Trustee filed an adversary proceeding against Debtor's sister, Intervenor Ruth Moses, seeking to recover the alleged cash value of the interest the Trustee alleges Debtor improperly transferred to Ruth Moses.

Apparently in response to the filing of the adversary case against her sister, Debtor filed a motion to convert her case to one under Chapter 13 on April 11, 2012;[10] that motion to convert was set for an evidentiary hearing as a result of the Trustee's objection based on good faith.[11] Two days before that evidentiary hearing, Ruth Moses filed a motion to intervene in Debtor's chapter 7 bankruptcy case[12] and a motion to vacate the Order Denying Debtor's Claim of Exemption.[13] Debtor then filed a motion

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[8] Doc. 37.

[9] Doc. 38.

[10] Doc. 57.

[11] Doc. 62.

[12] Doc. 69.

[13] Doc. 67.

to continue[14] the evidentiary hearing on the motion to convert. At a hearing on the motion to continue conducted one day before that trial, I granted Ruth Moses' motion to intervene and the motion to continue the evidentiary hearing. After I questioned Ruth Moses' standing at that hearing, Debtor promised to file her own motion to vacate, which she filed two weeks later.[15] I then set a briefing schedule for the motions to vacate.

As a final preliminary matter, this is a core proceeding and the parties stipulate this Court has jurisdiction to enter final judgment.[16]

II. Analysis

A. Debtor Mary Moses' Motion to Vacate the Default Order on her Homestead Exemption

Debtor seeks relief from the Default Order granting the Trustee's objection to her homestead exemption under Federal Rule of Civil Procedure 60(b)(1). Rule 60 is applicable to bankruptcy proceedings via Federal Rule of Bankruptcy Procedure 9024.[17]

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[14] Doc. 68.

[15] Doc. 76.

[16] *See* 28 U.S.C. § 157(b)(2)(A) (stating that "matters concerning the administration of the estate" are core proceedings that a bankruptcy judge has jurisdiction to hear and determine).

This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and 11 U.S.C. § 1334(a) and (b) and by operation of a Standing Order dated August 1, 1984, effective July 10, 1984, referenced in D. Kan. Rule 83.8.5, wherein the District Court for the District of Kansas referred all cases and proceedings in, under, or related to Title 11 to the Districts' bankruptcy judges.

[17] *See* Fed. R. Bank. P. 9024 (stating that Rule 60 is applicable to "cases under the Code" except for motions to reopen, complaints to revoke discharge, and complaints to revoke an order confirming a plan).

Rule 60(b)(1) states:

> (b) 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:
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> (1) mistake, inadvertence, surprise, or excusable neglect[.]

The parties do not dispute that the Default Order was a final order, and I find that the "Order Denying Debtor's Claim of Exemption" was, in fact, a final order.[18] A Rule 60(b)(1) motion to vacate "must be made within a reasonable time," and "no more than a year after entry of the judgment or order." The Default Order that Debtor seeks to vacate was entered on September 4, 2012, so Debtor's motion to vacate, ultimately filed on June 4, 2013, was filed almost ten months after the objection was filed (on August 8), and nine months after the order was entered.

Debtor alleges that Rule 60(b)(1) relief based on excusable neglect is justified due to a calendaring error made by her attorney, which error was based on her attorney's medical condition during the winter of 2012 and spring of 2013. Specifically, Debtor's attorney alleges a "severe allergic reaction" in the winter of 2012, that persisted for seven months. Counsel then alleges that in March 2013 she "developed a neurological condition" and an injury that exacerbated the problem, requiring medical treatment from March 2013 through June 2013. The relevant time period for

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[18] *See Clark v. Brayshaw (In re Brayshaw)*, 912 F.2d 1255, 1256 (10th Cir. 1990) ("Grant or denial of a claimed exemption is a final appealable order from a bankruptcy proceeding."); *see also Lampe v. Iola Bank & Trust (In re Lampe)*, 278 B.R. 205, 208 (10th Cir. BAP 2002) ("The bankruptcy court's order regarding the Debtor's claim of exemption is an appealable order.").

the analysis of this motion is August and September of 2012—the months during which the objection and order were filed and entered, and presumably during the months following the alleged initial allergic reaction, although this latter fact is not clear.[19]

Debtor's attorney alleges slightly different facts in the brief filed in support of Debtor's motion to vacate. In that brief, Counsel never mentions a calendaring error, instead simply stating that she "failed to respond" to the August 2012 objection to exemption and that "Debtor's counsel's health concerns and family turmoil prevented her from realizing the error." Her brief claims she suffered from medical conditions in the winter of 2012, followed by a seven month severe allergic reaction and then a spring 2013 neurologic problem. The brief then alleges, for the first time, that her children also had health problems. These had not been mentioned in Debtor's motion to vacate; her affidavit states that these health issues occurred "during the first 341 [hearing]." Debtor's first 341 hearing was in March 2012—some six months before counsel's response to the Trustee's Objection to Exemptions was required, but counsel's brief is, frankly, not clear about this timing, and as a result I am unable to determine

[19] Equally important to note, Debtor's allegations are just that, allegations and argument. Despite asking for a Joint Stipulation of Fact concerning the motions to vacate, the Joint Stipulation actually filed does not in any way address the facts alleged concerning calendaring errors or medical issues. The parties confirmed that this Joint Stipulation was complete, and that they did not need additional evidence to support the motions to vacate. For that reason, I cannot allow Debtor's counsel to now add facts to which the Trustee has not been given the opportunity to consider or consent. *See* Doc. 100 p.2 (Debtor's brief in support of her Motion to Vacate, admitting "[a]ll counsel agreed that there were no disputed facts in regard to the Motions to Vacate").

the exact time frame of Counsel's children's health issues.[20]

Rule 60(b) relief "is extraordinary and may only be granted in exceptional circumstances."[21] The Tenth Circuit utilizes the following factors to determine excusable neglect: "the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."[22] "The determination of whether a party's neglect is excusable is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission."[23] Debtor bears the burden of demonstrating excusable neglect, although all doubts in the equitable analysis of excusable neglect are to be resolved in her favor.[24]

After examining the pertinent factors, I find that Debtor has not shown excusable neglect. Although Debtor alleges the Trustee (and thus the creditors of her estate) would suffer no prejudice from vacating the default order, the Trustee argues that the entire course of this case, and the related adversary proceeding, has been plotted based on the Default Order. The Trustee has expended countless hours on these

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[20] Again, these allegations are not stipulated. Debtor's counsel has, however, submitted an affidavit that lays out *some* of the alleged facts.

[21] *Marcus Food Co. v. DiPanfilo*, 671 F.3d 1159, 1166 (10th Cir. 2011).

[22] *Id.* at 1172 (internal quotations omitted).

[23] *Segura v. Workman*, 351 Fed. App'x 296, 298 (10th Cir. 2009) (unpublished) (internal quotations omitted).

[24] *Id.* at 1172.

matters, relying on the finality of the order on Debtor's homestead exemption.

The length of the delay in this case—the Default Order was entered nine months before Debtor filed her motion to vacate—and that delay's impact on the judicial proceedings, is also not in Debtor's favor. "Rule 60(b) has dual timeliness standards: a 'reasonable time' standard for all motions filed under 60(b), and a maximum one-year statute of limitations from entry of the order for motions filed under 60(b)(1)."[25] Although Debtor's motion to vacate was filed within the one-year statute of limitations, the nine month delay is not reasonable. Debtor has personally known, as has the attorney she voluntarily elected to hire to represent her, since at least August 2012, and very likely earlier due to questioning at repeated, continued 341 hearings, that the Trustee opposed Debtor's homestead exemption.[26] Accordingly, it should not have come as a surprise to Debtor herself, or her attorney, when the objection to the homestead exemption arrived in the mail. I may consider "whether the attorney attempted to correct his action promptly after discovering the mistake."[27] I find there was not a timely correction made here.

Debtor and her counsel also received actual notice in early September 2012

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[25] *Davis v. Warden, Fed. Transfer Ctr.*, 259 Fed. App'x 92, 94 (10th Cir. 2007) (unpublished). *See also Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 954 (10th Cir. 2004) (noting that the "reasonable time" requirement of Rule 60(b) applies to Rule 60(b)(1), (2), and (3), and is not necessarily satisfied by filing within one year), *abrogated on other grounds by United Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006).

[26] Debtor's counsel admits this in her Motion to Vacate when she states, at ¶7, that "Debtor's counsel repeatedly clarified to the Trustee during the 341 meetings that Debtor believed her share of the homestead to be exempt." Doc. 76.

[27] *Jennings v. Rivers*, 394 F.3d 850, 857 (10th Cir. 2005).

when the Default Order was entered sustaining the Trustee's objection.[28] In addition, the dispute about Debtor's homestead is at the center of this entire bankruptcy case, so there have been repeated notices of this issue. Even Debtor's counsel admits in her motion to vacate that she and the Trustee "conversed through many emails before and after" the Trustee's objection was filed,[29] and Debtor and her Counsel were notified of the filing of the adversary case related to the real property in March 2013.

Debtor's delay has also resulted in significant impact on the judicial proceedings. I was required to continue the evidentiary hearing on Debtor's motion to convert because of the late-filed motions to vacate, which also likely prejudiced the Trustee, who undoubtedly had already prepared for the trial scheduled to start less than 24 hours later. A "sufficient justification" must be given for any delay in filing a Rule 60(b) motion,[30] and no sufficient justification is shown here.[31]

Next, I consider the reason for the delay, including whether it was within the reasonable control of Debtor as movant. "Fault in the delay remains a very important factor—perhaps the most important single factor—in determining whether neglect is excusable. . . . Likewise, a court may take into account whether the mistake was a

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[28] Debtor admits receiving both the objection and Default Order at her home address.

[29] Doc. 76 at 2, ¶ 9.

[30] *Sorbo v. United Parcel Serv.*, 432 F.3d 1169, 1178 (10th Cir. 2005).

[31] *See, e.g.*, *Calhoun v. Schultze*, 197 F.R.D. 461, 463 (D. Kan. 2000) (calling a delay of three months "significant;" failure to respond caused court to grant unopposed motion and cancel pretrial conference).

single unintentional incident (as opposed to a pattern of deliberate dilatoriness and delay)."[32] Although Debtor's failure to respond was a singular mistake, and not one in a series of dilatory tactics, I find that the fault for the delay in this case must reside with Debtor and her Counsel.[33]

Even if her attorney's calendaring error was the cause of the attorney's failure to timely respond to the Trustee's motion, there is simply no explanation why Debtor failed to respond at all, even after receiving the Default Order, and why she ignored this matter for the subsequent nine months. The stipulated facts show that Debtor is employed at Washburn University as a Transcript Analyst,[34] so she is apparently well able to read, write and otherwise communicate with her Counsel. And Debtor admits she also personally received both the Trustee's Objection to Exemption and the Court's Default Order at her home address. What is missing from her argument is why she then elected not to contact her attorney to question why her attorney had failed to oppose the objection to exemptions, or to promptly seek relief from the Default Order regarding the exemptions.

Although Debtor's Counsel's attempts to explain her own failure to respond based on a calendaring error due to her own medical problems, she does not attempt

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[32] *Segura v. Workman*, 351 Fed. App'x 296, 298–99 (10th Cir. 2009) (unpublished) (internal quotations omitted).

[33] Clients must "be held accountable for the acts and omissions of their chosen counsel." *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 396 (1993).

[34] Doc. 78, Stipulation No. 8. Debtor's sister, Ruth, with whom she lives, is a Senior Administrative Assistant with the Kansas Corporation Commission. Stipulation 7.

to explain why she did not immediately react *after* receiving the Court's Order Denying Debtor's Claim of Exemptions on September 4, 2012.[35] While I am very sympathetic with Counsel's series of medical ailments, under these facts, this is insufficient: "Parties desiring relief must particularize, and generally do not acquit themselves of responsibility by showing merely that they placed the case in the hands of an attorney."[36] Indeed, "[c]arelessness by a litigant does not afford a basis for relief under Rule 60(b)(1)."[37] And Counsel has not made it clear whether her own, or her children's, health problems overlapped the pertinent time period.[38]

Finally, I must assess whether Debtor has acted in good faith throughout this litigation, and I find that this factor also does not favor Debtor. Although not explicit, Debtor's motion to vacate actually implies that the failure to timely respond to the objection to exemption or the Default Order was a strategic choice.[39] Debtor's Counsel

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[35] *See, e.g.*, *United States v. Williams*, 257 Fed. App'x 65, 68 (10th Cir. 2007) (unpublished) (affirming decision of lower court that even a complete failure to know about a court order "did not justify her complete failure to check up on the status of an on-going IRS proceeding").

[36] *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990).

[37] *Calhoun v. Schultze*, 197 F.R.D. at 462 (citing *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990)).

[38] For example, counsel alleges a "severe allergic reaction" in "winter 2012," with lingering symptoms for seven months. But this time frame is so vague that the Court cannot determine that it even overlaps the relevant August to September 2012 time frame. Even if these facts were more clearly presented, the parties agreed that their Stipulation of Facts was complete, and those facts do not contain any evidence about counsel's medical problems.

[39] The Trustee also notes in her brief that while Debtor's counsel argues that her medical issues reasonably prevented her from responding to the initial Objection to Exemptions or in timely moving to vacate the resulting Default Order, that Debtor's

states that "Counsel believed resolution would be obtained by converting to a Chapter 13. After meeting with counsel for [Ruth Moses] and deciding upon another course of action, it was necessary to respond to Trustee's objection to Debtor's Exemptions."[40] Frankly, it strains credulity to think that Debtor's Counsel only realized that an order was entered on an adverse objection to exemption at the time the motion to vacate was filed, given that the real property exemption had been front and center of this bankruptcy case from the beginning. The more likely scenario seems to be that Debtor and her Counsel chose not to fight the exemption, and planned all along to convert if an adversary was filed. But when Debtor's sister became involved after the Trustee filed the adversary proceeding, they elected a new litigation tactic. "[A] party who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes."[41]

Debtor has not carried her burden to show excusable neglect that justifies vacating the Court's Order. Debtor did not show that "culpable conduct did not cause the default."[42] Debtor's motion to vacate[43] is denied.

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counsel was nevertheless medically able to file other pleadings in the case, referring to a Request for Transcript, Doc. 35, filed August 14, 2012. *See also* Doc. 50, Debtor's Objection to Motion for Turnover filed December 31, 2012 (five months before Debtor's counsel filed the Motion to Vacate).

[40] Doc. 76 at 4, ¶ 19.

[41] *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999).

[42] *Zimmerling v. Affinity Fin. Corp.*, 478 Fed. App'x 505, 508 (10th Cir. 2012) (unpublished) (internal quotations omitted).

[43] Doc. 76.

B. Intervenor Ruth Moses' Motion to Vacate the Default Order on Debtor's Homestead Exemption

Intervenor Ruth Moses argues that the Default Order on Debtor's Homestead Exemption should be set aside based on Rule 60(b)(6). Rule 60(b)(6) permits a court to "relieve a party or its legal representative from a final judgment, order, or proceeding" for "any other reason that justifies relief." Ruth Moses argues she is entitled to relief because: (1) she did not have notice of the Trustee's objection to exemption, "or any information that would signal to [Ruth] that her interests in the property rights of her home were in jeopardy," and was "substantially prejudiced" by the Default Order; and (2) the Default Order misstates Kansas law, because it states that "under Kansas law, the Debtor is prohibited from exempting real property which the Debtor does not own and, therefore, the Real Property is not subject to a claim of exemption under Kansas law." The Trustee responds that Intervenor Ruth Moses lacks standing to seek relief from the Default Order because she was not a party to that order. The Trustee also argues that Intervenor cannot meet her burden under Rule 60(b).

I must first assure myself that Intervenor Ruth Moses has standing to challenge the Default Order.[44] Standing jurisprudence encompasses both constitutional standing and jurisdictional standing.[45] Constitutional standing requires the presence of a "case

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[44] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (detailing the limit of courts' jurisdiction and the requirement of standing to sue).

[45] *The Wilderness Soc'y v. Kane County, Utah*, 632 F.3d 1162, 1168 (10th Cir. 2011) ("The Supreme Court's standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing which embodies judicially self-imposed limits on the exercise of federal jurisdiction." (internal quotations omitted)).

or controversy," and requires that the individual has suffered "an 'injury in fact' that a favorable judgment will address."[46] Prudential standing requires that the litigant assert its own particular rights, and forbids a litigant from "'rest[ing] his claim for relief on the legal rights or interest of third parties.'"[47]

Admittedly, a joint tenant *can* be a party in interest concerning real estate, and assert his or her rights to co-owned property of the estate. For example, a Tenth Circuit BAP case, *In re Kasparek*,[48] discusses a joint tenant's rights to contest a chapter 7 trustee's motion to sell under § 363 of the Code. In *Kasparek*, however, the joint tenant had his own real property interest at stake: the trustee was seeking to sell not only the Debtor's interest in the property, but also the joint tenant's interest, and the joint tenant was a named defendant in the adversary case being appealed.[49]

No party has cited to any case, however, that supports the Intervenor's standing to vacate a default order on the *Debtor's* claim of a homestead exemption. Intervenor Ruth Moses claims that her intervenor status makes her a party in interest, and permits her to challenge the Default Order, based on the case of *Ruiz v. Estelle*.[50] In

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[46] *Id.* (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)); *see also Steel Co.*, 523 U.S. at 103–04 ("This triad of injury in fact, causation, and redressability constitutes the core of Article III's case or controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.").

[47] *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

[48] 426 B.R. 332 (10th Cir. BAP 2010).

[49] *Id.* at 339–40. There is no actual reference in *Kasparek* to standing. *Kasparek* is merely an example case where a joint tenant pursued remedies from a bankruptcy court.

[50] 161 F.3d 814 (5th Cir. 1998).

Ruiz, the Fifth Circuit considered intervention in a prison conditions lawsuit under Federal Rule of Civil Procedure 24(a)—intervention of right—based on a provision of the Prison Litigation Reform Act that granted a right to intervene to state legislators.[51] The *Ruiz* Court analyzed the statutory intervention language, and concluded that the individual legislators were given an unconditional right to intervene in the prison litigation.[52] The Court then examined the constitutionality of the statutory intervention language, based on the argument that granting legislators the right to intervene would violate Article III of the Constitution for lack of the legislators' standing.[53] The *Ruiz* Court concluded that Article III did not require the intervenors to independently possess standing where the intervention was into a subsisting and continuing Article III case or controversy, and the relief sought by the intervenors was "also being sought by at least one subsisting party with standing to do so."[54]

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[51] *Id.* at 816–18.

[52] *Id.* at 821.

[53] *Id.* at 828–29.

[54] *Id.* at 830 (relying on *Diamond v. Charles*, 476 U.S. 54, 64 (1986)). The Tenth Circuit discusses the same rule in *San Juan County, Utah v. United States*, 503 F.3d 1163 (10th Cir. 2007).

The Supreme Court has recently analyzed the *Diamond* case, the Supreme Court case upon which *Ruiz* relies, and limited it to the conclusion there present—that a pediatrician engaged in private practice was not permitted to defend the constitutionality of an abortion law after the state chose not to appeal an adverse ruling—when it ruled in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013), that a private party does not have standing to defend the constitutionality of a state statute. In *Hollingsworth*, the Supreme Court reiterated that a "party must seek a remedy for personal and tangible harm." *Id.* at 2661. *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) ("An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III." (internal quotations omitted)).

The intervenor in this case takes the language from *Ruiz* too far. The *Ruiz* Court held that a party seeking to intervene under Rule 24 need not establish Article III standing as long as another party with constitutional standing remained in the case on the same side as the intervenor. But this standing to intervene is not the same as standing to challenge a default order. The longstanding doctrine of prudential standing requires that each party assert his or her own individual and particular rights, and forbids a litigant from "'rest[ing] his claim for relief on the legal rights or interest of third parties.'"[55] Simply stated, prudential standing forbids Ruth from asserting her sister Mary's rights.[56]

Here, although Intervenor and Debtor are related, there is no connection between an order overruling Debtor's claim of a homestead exemption and the Intervenor—the order ruled on the Debtor's rights, not the Intervenor's rights. The Intervenor can still assert her own homestead exemption in any proceeding. Furthermore, Intervenor certainly does not have standing to make Debtor's arguments for her, which is what Intervenor is asking this Court to allow. Intervenor Ruth Moses is not arguing that her own rights were impacted by the Default Order, just that her sister, Mary Moses' rights were impacted. These are arguments that Debtor Mary Moses could have, and should have, made for herself.

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[55] *The Wilderness Soc'y v. Kane County, Utah*, 632 F.3d 1162, 1168 (10th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

[56] *See Raley v. Hyundai Motor Co., Ltd.*, 642 F.3d 1271, 1275 (10th Cir. 2011) (noting that prudential standing requires that an individual not "seek to pursue another person's legal rights, litigate a mere generalized grievance, or raise a challenge falling outside the zone of interests protected by the law involved").

The Tenth Circuit has recently addressed the problem presented when parties who are indirectly affected by bankruptcy court orders attempt to mire a bankruptcy case in endless litigation.[57] The Tenth Circuit in *Krause* discussed the additional prudential standing requirement for appeals from bankruptcy court orders that the party appealing be a "person aggrieved" by the bankruptcy court order being appealed. The Tenth Circuit noted that this requirement has been maintained "because, without such a requirement, bankruptcy litigation could easily 'become mired in endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order.'"[58] The Tenth Circuit then stated:

> 'Bankruptcy proceedings regularly involve numerous parties, each of whom might find it personally expedient to assert the rights of another party even though that other party is present in the proceedings and is capable of representing himself. . . . In this context, the courts have been understandably skeptical of the litigant's motives and have often denied standing as to any claim that asserts only third-party rights.'[59]

Although not dealing with a matter on appeal, the Circuit's reasoning applies equally here. Intervenor Ruth Moses seeks to assert the homestead rights of Debtor Mary Moses. Mary Moses is represented by counsel and is bound by the choices she has made in this litigation. Clearly, her sister would have made different choices, but the fact remains that Debtor Mary Moses was the one whose exemptions were affected by the

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[57] *United States v. Krause (In re Krause)*, 637 F.3d 1160, 1167–69 (10th Cir. 2011).

[58] *Id.* at 1168 (quoting *Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989)).

[59] *Id.* (quoting *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 644 (2d Cir. 1988)).

Default Order, not any property right of Intervenor Ruth.[60]

Even if Intervenor Ruth Moses had standing to challenge the Default Order entered against Debtor Mary Moses, she also has failed to meet the Rule 60(b) standards for vacating that Default Order. Although in her motion to vacate, she mentions both Rule 60(b)(4) and Rule 60(b)(6), her support brief never actually articulates under which provision of Rule 60(b) she proceeds. Because she repeatedly argues that the Default Order should be vacated in the interest of justice, however, I will assume Intervenor is proceeding under Rule 60(b)(6).

Rule 60(b)(6) permits a court to vacate an order based on any "reason that justifies relief." Although relief under Rule 60(b)(6) is reserved for extraordinary circumstances, "the rule should be liberally construed when substantial justice will thus be served."[61] The decision on a Rule 60(b)(6) motion is a discretionary decision.[62]

Intervenor claims she is entitled to relief under this provision because she did not have notice of the original objection to Debtor's claim of exemption, and thus was not notified before the Default Order was entered. She also claims the Default Order was based on statements by the Trustee in her objection to exemption that are not supported by Kansas law.

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[60] The Court had no jurisdiction over Intervenor Ruth Moses when the Default Order was entered, and the Default Order cannot have possibly affected Intervenor Ruth Moses's rights. This Court only has jurisdiction to alter the rights of Ruth Moses in the adversary proceeding that has since been filed against her by the Trustee in this case.

[61] *McGraw v. Barnhart*, 450 F.3d 493, 505 (10th Cir. 2006) (internal quotations omitted).

[62] *Id.*

The Court questions the timeliness of the Intervenor's motion to vacate. As previously noted, the Default Order that is the subject of this dispute was filed in September 2012. Intervenor Ruth Moses asserts she first learned of this dispute when she was served with summons in the adversary proceeding on or about March 26, 2013.[63] She asserts this notwithstanding she and her sister live in the same home and apparently commute to work every work day with one another in their only, shared car,[64] and notwithstanding, as Ruth claims, "The Sisters have a very close relationship and have shared a residence together nearly all of their lives."[65] Even using the March 2013 date, however, she then waited almost two months—until May 21, 2013—to file her motion.[66] Although the parties' extensive Joint Stipulation of Facts implies that Ruth Moses has or should have known for some time about the Trustee's objection to Mary Moses' exemption of the property, Rule 60(c)(1) requires only that a motion to vacate be filed "within a reasonable time." The time lapse here was not significant

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[63] *See* Doc. 5 in AP 13-7007, showing service of summons was mailed to Intervenor on March 26, 2013.

[64] Doc. 78 ¶ 9, ¶ 48 (Joint Stipulation).

[65] Ruth Moses' Motion to Intervene, Doc. 69 ¶ 1, and again in her Brief in Support of Motion to Vacate, Doc. 88 p.2. The parties also stipulate that Ruth and Mary share living expenses, jointly care for their shared vehicle, and even share bank accounts where both deposit their paychecks and pay bills. Doc. 78 ¶ 45, ¶ 49.

[66] The Trustee's objection to Debtor's Motion to Convert states that she made "demand upon Ruth Moses to recover the value of the transfers and the demand has gone unsatisfied." Doc. 62 ¶ 24. The objection seems to discuss the time line of the case in chronological order, suggesting that even before the Trustee served Ruth Moses with the March 21, 2013 adversary complaint, that the Trustee had contacted Ruth demanding repayment of the alleged transfer pursuant to 11 U.S.C. § 548. Accordingly, although I need not, and do not, rely on this fact to decide these motions, it certainly seems possible that Ruth Moses knew about all of this before March 21, 2013.

enough to wholly ban consideration of the motion.

A movant seeking relief under Rule 60(b)(6), however, must show "extraordinary circumstances justifying the reopening of a final judgment."[67] "Rule 60(b)(6) relief is difficult to attain and is appropriate only when it offends justice to deny such relief."[68]

The only circumstances Intervenor Ruth Moses alleges are not extraordinary.[69] First, she argues that she was not given formal notice of the Trustee's objection to exemption, or the resulting Default Order. But the Trustee had no obligation to give non-parties to this bankruptcy case any notice of her objection to the Debtor's claimed exemptions. Intervenor cites to no provisions of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure that require notice to a joint tenant when a Trustee challenges the Debtor joint tenant's exemption of property. To the contrary, Federal Rule of Bankruptcy Procedure 4003(b)(4) specifically delineates who shall receive notice of objections to exemptions, and requires notice only to "the trustee, the debtor and the debtor's attorney, and the person filing the [exemption] list and that person's attorney."

Intervenor Ruth Moses' second argument for relief—that the Default Order is based on misstatements of Kansas law—is also not sufficient to justify relief under

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[67] *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

[68] *Morales v. Jones*, 480 Fed. App'x 898, 901 (10th Cir. 2012) (unpublished) (internal quotations omitted).

[69] *See Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 580 (10th Cir. 1996) ("Relief under Rule 60(b)(6) is appropriate when circumstances are so unusual or compelling that extraordinary relief is warranted, or when it offends justice to deny such relief." (internal quotations omitted)).

Rule 60(b)(6). "Courts have found few narrowly-defined situations that clearly present 'other reasons justifying relief' under Rule 60(b)(6).'" [70] Generally, for example, courts have granted relief under this Rule when a party shows fraud by the party's own counsel, failure to receive notice of judgment in time to file an appeal, or cases of extreme hardship where adequate redress is prohibited.[71] These facts are simply not present here. Intervenor Ruth Moses has neither argued, let alone demonstrated, that she has experienced "extraordinary circumstances" justifying vacatur of the Default Order. Ruth Moses is not even a party to the order, and her personal rights are not determined by that Default Order. The burden under Rule 60(b)(6) is steep, and Ruth Moses has not met it here.

III. Conclusion

I deny both the motion to vacate of Debtor Mary Moses,[72] and the motion to vacate of Intervenor Ruth Moses.[73]

There are two motions that remain pending: Debtor's motion to convert her case to one under Chapter 13 of the Bankruptcy Code,[74] and the Trustee's motion for

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[70] 11 C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 2864 at 351–52 (2d Cir. 1995).

[71] *Id.*

[72] Doc. 76.

[73] Doc. 67.

[74] Doc. 57. The Trustee's objection to this motion is Doc. 62.

turnover, seeking $2416.46 from bank account funds Debtor held on the filing date.[75] The Court sets both these motions for evidentiary hearing on the Court's stacked docket on **November 21/22, 2013.** Trial briefs are due on **November 15, 2013**.

It is so ordered.

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[75] Doc. 46. Debtor's objection to this motion is Doc. 50.