

IN THE SUPREME COURT OF MISSOURI

Supreme Court No. SC89982

STATE OF MISSOURI ex rel. LUANNE S. UNNERSTALL,
PROTECTEE, BY ANNA LEIGHTON, HER CONSERVATOR

Relator,

v.

THE HONORABLE JOHN B. BERKEMEYER,

Respondent.

Petition in Mandamus from the Circuit Court of the
County of Franklin, Missouri, The Honorable John B. Berkemeyer

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Relator Anna L. Leighton, Conservator of the Estate of Luanne Unnerstall, (hereinafter “Relator”) filed a Petition to Require Administration of the Estate of Harold H. Unnerstall (hereinafter “Decedent”) with the Probate Division in the Circuit Court of Franklin County (hereinafter “Probate Division”) on March 5, 2007, exactly one year after Decedent’s death. (A1). Even though Relator was well-aware of the existence of Decedent’s Last Will and Testament and Codicil thereto (hereinafter “Will”), she stated in said Petition that Decedent died *intestate*. (A1 at ¶ 1). Correspondence between Relator’s counsel and counsel for Gary Unnerstall reveals that Relator had actual knowledge of the existence of the Will prior to filing her Petition to Require Administration. (A3)(Correspondence and Receipt & Release, dated October 4, 2006 and addressed to Relator). In his Memorandum of Law filed November 14, 2008, Gary Unnerstall presented this correspondence to the Probate Division to conclusively establish Relator’s actual knowledge of the Will. Relator has never provided, recognized or contested the veracity of this correspondence in her pleadings before the Probate Division, the Court of Appeals or this Court.

No application for probate was filed by Gary Unnerstall, the person named under Decedent’s Will as personal representative, because Gary Unnerstall was not aware of any assets which were subject to probate administration. All of

Decedent's assets, including those to be distributed to Luanne Unnerstall, were held in trust. (A10)(Affidavit of Gary Unnerstall, filed with the Probate Division on May 23, 2007); (A12)(Affidavit of Richard A. Wunderlich).

When Gary Unnerstall received notice of Relator's Petition to Require Administration of Decedent's estate, he immediately took action to redress the false statement that Decedent had died intestate. On April 12, 2007, Gary Unnerstall filed the Will with the Probate Division. (A14-A23). On May 23, 2007, the Probate Division held a hearing on the Petition to Require Administration. At that hearing, Gary Unnerstall filed his Affidavit declaring that he was not aware of assets to be probated, and Relator filed a Petition to Discover Assets for the Probate Division to consider. (A10). Thereafter, a new judge was assigned to the case, causing some delay. (Rel.'s Ex. B at 3).

The parties reconvened before the Probate Division on January 25, 2008. After hearing arguments and receiving evidence regarding Relator's Petition to Require Administration and the existence of the Will, the Probate Division appointed Gary Unnerstall as Personal Representative pursuant to the Will (and upon proper application) and ordered Relator to pay court costs as well as the fee for publication of Notice of Letters Testamentary. (Rel.'s Ex. B at 4). The Probate Division ordered Relator to pay said amounts because, during the hearing on January 25, the attorney for Gary Unnerstall specifically requested that Relator pay

the costs and publication fees, given the fact that Gary Unnerstall was not aware of any assets to be probated to cover such costs. (Id.; A10).

Relator defied the Probate Division's January 25 Order: She failed to pay said amounts and merely filed a new application for letters on September 12, 2008. (Rel.'s Ex. B at 7). In spite of Relator's failure to comply, Gary Unnerstall complied and filed his application even though Relator had not paid the costs and fees. (A24-A25)(Personal Representative Gary Unnerstall's Application for Letters Testamentary).

The Probate Division again reviewed the matter at a hearing on October 30, 2008 where it heard arguments and granted the parties until November 14, 2008 to file memoranda. (Rel.'s Ex. B at 8-10). The parties did so, and on November 21, 2008, the Probate Division issued an Order appointing Gary Unnerstall as Personal Representative and issued the Letters Testamentary. (Rel.'s Ex. B at 10-12). On December 3, 2008, Notice of Letters Testamentary was published pursuant to Missouri Revised Statute § 473.033. (Rel.'s Ex. G). This was the first publication pursuant to the statute regarding the estate of Harold H. Unnerstall.

Relator filed a Petition in Mandamus with the Eastern District Court of Appeals, challenging the Probate Division's jurisdiction to admit the Will. This first Petition was properly and justly denied on February 6, 2009. (Rel.'s Ex. H). Relator filed this, her second Petition in Mandamus, on March 9, 2009. As a result

of this unnecessary and protracted litigation, Gary Unnerstall and Decedent's children have been made parties to extensive probate proceedings and uncertainty related thereto for more than two years.

It is also important to point out that, on October 23, 2008, Relator invoked the Probate Division's jurisdiction by filing a Petition for Declaratory Judgment, to Determine Title to Real Estate and to Discover Assets. This second Petition is presently pending before the Probate Division. Relator seeks to set aside a transfer of real estate and deed of trust interest conveyed by Decedent and Luanne Unnerstall to the "Harold H. Unnerstall Revocable Trust" on February 21, 2003. (A26-A32; See also Rel.'s Ex. B at 8). In this Petition, Relator seeks relief from the Probate Division and specifically prays that the Probate Division order assets and property of Decedent be turned over to the Personal Representative of the estate. (A31). Now, by extraordinary measures and notwithstanding her specific invocation of the Probate Division's jurisdiction, Relator questions the Probate Division's jurisdiction to admit the Will to probate and to establish Gary Unnerstall as Personal Representative pursuant to that Will.

POINT RELIED ON

RESPONDENT PROPERLY ADMITTED THE WILL AND PROPERLY ENTERED ITS ORDER GRANTING LETTERS TESTAMENTARY AND, THUS, THE ISSUANCE OF WRIT OF MANDAMUS IS INAPPROPRIATE BECAUSE: (A) THE PROBATE DIVISION PROPERLY APPLIED RSMo. § 473.050 IN ADMITTING THE WILL, AND RELATOR HAS NO CLEAR, UNEQUIVOCAL RIGHT TO REVERSE THE PROPER ADMISSION OF THE WILL; (B) THE ISSUANCE OF A WRIT OF MANDAMUS IS INAPPROPRIATE BECAUSE THE PROBATE COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE WILL; (C) RELATOR COMES TO THIS COURT WITH UNCLEAN HANDS AND WOULD CONTINUE TO BENEFIT FROM HER QUESTIONABLE CONDUCT BEFORE THE PROBATE DIVISION IF A WRIT OF MANDAMUS IS ISSUED; AND, (D) RELATOR HAS, BY HER OWN PETITION, INVOKED THE JURISDICTION OF THE PROBATE DIVISION, AND, THUS, EQUITABLE DOCTRINES OF WAIVER AND ESTOPPEL PRECLUDE HER FROM CHALLENGING THE DIVISION'S JURISDICTION TO ADMIT THE WILL.

RSMo. § 473.050.3 (2000)

RSMo. § 473.033 (2000)

In re Estate of Givens, 234 S.W.3d 519 (Mo. App. E.D. 2007)

Bosworth v. Sewell, 918 S.W.2d 773 (Mo. 1996)

Estate of Croom v. Bailey, 107 S.W.3d 457, 463 (Mo. App. S.D. 2003)

Singer v. Siedband, 138 S.W.3d 750 (Mo. App. E.D. 2004)

ARGUMENT

After the Court of Appeals properly denied her Petition in Mandamus, Relator now seeks extraordinary relief from the highest court of this State, causing significant delay and unnecessary expense for the judiciary and all parties involved. This second Petition in Mandamus is yet another attempt on the part of Relator to avoid the just and proper admission of a valid Will that should govern the administration of Decedent's estate.

Contrary to Relator's contention, the Probate Division properly admitted the Will as the Will was presented within the time limit provided in § 473.050.3(1), which explicitly allows admission of a will presented within six months of first publication. If this Court exercises its extraordinary power of mandamus and overrules the lower court in this case, Relator will benefit from her questionable conduct before the Probate Division. Moreover, equitable principles require this Court deny Relator's request for exceptional relief. Relator comes to this Court with unclean hands, barring her request for relief. Similarly, by filing a Petition for Declaratory Judgment, to Determine Title to Real Estate and to Discover Assets, Relator invoked the jurisdiction of the Probate Division, and, thus, principles of waiver and estoppel preclude her from arguing that the Probate Division's exercise of jurisdiction was improper. Accordingly and for the reasons set forth herein,

Relator's Petition in Mandamus should be denied, and the Alternative Writ of Mandamus should be quashed.

Legal Standard

“A writ of mandamus is a hard and fast unreasoning writ, and is reserved for extraordinary emergencies.” Norval v. Whitesell, 605 S.W.2d 789, 791 (Mo. banc 1980). “There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus.” State ex rel. Kelley v. Mitchell, 595 S.W.2d 261, 266 (Mo. banc 1980). It has also been held that a writ of mandamus issues *only* in a case of necessity to prevent injustice or great injury. State ex rel. Univ. Park Building Corp. v. Henry, 376 S.W.2d 614, 617-618 (Mo. Ct. App. 1964).

For a writ of mandamus to issue under Missouri law, the party seeking the writ must prove: (1) a clear, existing, and unconditional legal right in the relator and (2) a corresponding, present, imperative, and unconditional duty upon the part of the respondent. State ex rel. Kiely v. Schmidli, 583 S.W.2d 236, 237 (Mo. Ct. App. 1979); State ex rel. Pub. Serv. Com'n of Missouri v. Missouri Pac. R. Co., 218 S.W. 310, 311 (Mo. banc 1919). In other words, mandamus does not establish a right, but enforces one that is established. Henry, 376 S.W.2d at 617-618. Mandamus will not lie when the right sought to be enforced is doubtful; it is an

appropriate remedy only when the right to relief is clear and unequivocal. State ex rel. Jay Bee Stores, Inc. v. Edwards, 636 S.W.2d 61, 62-63 (Mo. banc 1982).

A. The Probate Division Properly Applied RSMo. § 473.050 in Admitting the Will, and Relator Has No Clear, Unequivocal Right To Reverse the Proper Admission of the Will.

Upon actual notice of Relator's Petition for Administration and the impending issuance of letters on Decedent's estate, Gary Unnerstall presented the Will to the Probate Division, satisfying the six-month time limit set forth in Missouri Revised Statutes § 473.050.3(1). In fact, Relator opened Decedent's estate by filing her Petition to Require Administration within the prescribed time period, triggering the statutory process of administration, which typically includes publication of notice of letters on the estate. Section 473.050.3(1) expressly provides that a will may be presented within six months of first publication. Here, the Will was presented before first publication, and thus, was properly admitted. Accordingly, Relator has failed to establish an unequivocal right to reverse the Probate Division's decision to admit the Will and issue letters testamentary.

A relator seeking issuance of an extraordinary writ must show that the right she seeks to enforce is clearly established and presently existing. State ex rel. Brentwood Sch. Dist. v. State Tax Comm'n, 589 S.W.2d 613, 615 (Mo. banc 1979). Mandamus will not lie if this right is doubtful, it is only appropriate if this

right is clear and unequivocal. See State ex rel. Jay Bee Stores, Inc. v. Edwards, 636 S.W.2d 61, 63 (Mo. 1982). In order to meet this requirement in the case at bar, Relator must demonstrate that she possesses a clear, unequivocal, presently existing, specific right to proceed in the *intestate* administration of Decedent's estate despite the existence of a valid and properly admitted last will and testament. See State ex rel. Treasurer of State of Missouri v. Siedlik, 851 S.W.2d 80, 81 (Mo. App. E.D. 1993).

Contrary to Relator's contention that a flat, one-year time limit applies to the admission of any will to probate, § 473.050.3 expressly provides two, alternative time limits. Although Relator correctly points to § 473.050.3 which sets forth the time limits for presentment of a will, she fails to read this subsection in its entirety. She ignores the fact that the question of which time limit applies is expressly contingent upon publication of notice of the issuance of letters testamentary or of administration. RSMo. § 473.050. First, § 473.050.3 provides that, in cases where an estate is opened and statutory notice is published, a will must be presented within six months of the date of first publication. RSMo. § 473.050.3(1). Alternatively, and only in cases where statutory notice is *not* published because an estate has *not* been opened (See RSMo. § 473.033), a will must be presented within one year after the date of death of the testator. RSMo. § 473.050.3(2).

Typically, a petition for letters testamentary or of administration commences the administration of an estate. See State ex rel. Plymesser v. Cleaveland, 387 S.W.2d 556, 559 (Mo. 1965). Missouri courts have consistently held that the *filing* of a petition for administration is the key event in opening an estate and initiating the probate process. In re Estate of Givens, 234 S.W.3d 519, 522-23 (Mo. App. E.D. 2007)(“even where the petition for letters of administration is filed on the last day of the one year limitations period, the probate division nevertheless was required to open an estate and issue letters testamentary or for administration more than one year after the death of a decedent . . .); Lopiccolo v. Semar, 890 S.W.2d 754, 757-58 (Mo. App. E.D. 1995). The filing of a petition for administration within the statutory time limit opens an estate and triggers other statutory requirements and time limits, including the scheduling of a statutory hearing and the publication of notice. Ibid. Generally, issuing the letters testamentary or of administration triggers the publication of notice. Bosworth v. Sewell, 918 S.W.2d 773 (Mo. 1996).

In this case, Relator filed a Petition to Require Administration of the Estate on March 5, 2007, exactly one year after Decedent’s death, opening Decedent’s estate. (A1). On April 12, 2007 and in response to Relator’s request for administration, Gary Unnerstall filed the Will in the Probate Division. (A14). Accordingly, the Probate Division appointed Gary Unnerstall as Personal

Representative and ordered Relator to pay court costs and the fee associated with publication of notice. (Rel.'s Ex. B at 4). Relator failed to comply, and as a result, first publication under the statute was delayed until December 3, 2008. (Rel.'s Ex. G). Thus, Relator cannot avail herself of the one-year time bar because she tolled the running of that statute when she filed her Petition to Require Administration in March 2007 (the key event in opening an estate). As such, this is a case where an estate has been opened and notice has been published in accordance with § 473.033, and, thus, this case is governed by § 473.050.3(1). In this situation, § 473.050.3(1) expressly allows a will to be presented within six months of first publication. Therefore, the Probate Division properly admitted the Will.

Furthermore, Relator's interpretation of the time limits set forth in § 473.050.3 is inconsistent with the language, history and spirit of the statutory scheme. Indeed, the statutory history of § 473.050.3 supports Respondent's interpretation and application of the time limits. Although Missouri does not formally maintain its legislative history, prior versions of Missouri statutes governing time limits on the admission of a will, specifically prior versions of §§ 473.050 and 473.070, shed significant light on the legislature's intent in devising the current scheme under § 473.050.3 (1) and (2). Prior to 1996, § 473.050 stated "no proof shall be taken of any will . . . unless the will has been presented to the probate division, within six months from the date of the first

publication of notice of granting letters of testamentary or of administration . . . ”. Also, in this earlier version of the statute, § 473.070 set forth an overarching time limit during which a will could be admitted to probate. Specifically, § 473.070 provided: “*In addition to the limitations of time provided in § 473.050, no written will shall be admitted to probate and no administration granted unless application is made to the court for the same within three years from the death of the decedent.*” (emphasis added).

The 1996 legislative reforms restructured the time limitations set forth in the former §§ 473.050 and 473.070. If the legislature sought to maintain a flat, overarching time limitation on the admission of a will, it could have simply merged the language of §§ 473.050 and 473.070.¹ However, the Missouri

¹ If the legislature intended to simply merge §§ 473.050 and 473.070, one would imagine that the two subsections of § 473.050.3 would simply read:

- (1) no proof shall be taken of any will... unless the will has been presented to the probate division, within six months from the date of the first publication of notice of granting letters of testamentary or of administration ...
- (2) *In addition to the limitations of time provided in subsection (1), no written will shall be admitted to*

legislature chose to amend the language in § 473.050. The legislature’s choice to amend § 473.050 clearly demonstrates its intention to change the time limitations for admission of a will. The current language of § 473.050.3(1) provides that in cases where notice is given, a will may be admitted within six months of the date of first publication of that notice. However, § 473.050.3(2) does *not* adopt the former language of “[i]n addition to”, rather it provides a second, *alternative* (not additional or overarching) time limitation *only* where an estate is *not* opened and notice of letters is *not* published.

Furthermore, the legislature’s 1996 revisions to the statutes establishing the time limit for admission of a will include an express reference to § 473.033, which governs publication of notice of letters and is triggered when an estate is opened. This express reference further demonstrates the Missouri legislature’s intent to change the time limits for admission of a will. Specifically, the current, revised § 473.050.3(2) provides that the one-year time bar applies *only* “In cases where notice has not previously been given in accordance with section 473.033 of the granting of letters on the estate of testator” In other words, the one-year time bar applies when an estate has *not* been opened. If the legislature intended for a

probate unless application is made to the court for the same within one year from the death of the decedent.

flat, one-year bar to apply to the admission of a will whether or not an estate had been opened, there would be no need to explicitly reference § 473.033 in § 473.050.3(2). If the legislature intended for the one-year bar to apply, § 473.050.3(2) would merely read: “To be properly admitted, any will must be presented within one year after the date of death of the testator,” without specific reference to § 473.033.

In addition to the statutory history, public policy suggests that this Court should reject Relator’s incomplete analysis of § 473.050.3. Relator’s interpretation of the statute of limitations set forth in § 473.050.3 would lead to unjust results in Missouri probate courts. Under Relator’s logic, any interested party could file a petition for administration exactly one year after the death of the testator—even if he/she had actual knowledge of the existence of a valid will—and thereby moot any opportunity for any other interested party to admit a will to probate. By falsely filing a petition for administration on the last day of the statutory period, he/she would force the estate to be administered according to rules of intestate administration, despite the known existence of a valid will. Such a construction is unreasonable and creates perverse incentives. Missouri law should *not* be interpreted to reward “bad actors” who circumscribe a known and valid will by simply waiting until the last day of the statutory period, filing a petition for

administration, and indicating that the Decedent died intestate, even though they are aware, as Relator was in this case, that a valid will exists.

In sum, Relator has not established and cannot argue that she has a clear, unequivocal right to bar the admission of the Will and to proceed in the *intestate* administration of the Decedent's estate. The Will was properly admitted. It was presented in a timely manner, pursuant to § 473.050.3(1), because Gary Unnerstall filed the Will less than six weeks after Relator's Petition to Require Administration of the Estate was filed and applied for its admission prior to the first publication of notice of the granting of letters pursuant to § 473.033. Relator mistakenly relies on the one-year time limit for admission of a will and ignores the alternative provision granting parties six months from the date of first publication of notice to present a will. RSMo. § 473.050.3(1). Accordingly, Relator cannot clearly and unequivocally demonstrate that the Will was improperly admitted or that she has the right to proceed in the *intestate* administration of Decedent's estate notwithstanding the presentment of the valid Will. Thus, this Court should quash its Alternative Writ in Mandamus and allow the Probate Division to proceed with the administration of Decedent's estate under the Will.

B. The Issuance of a Writ of Mandamus Is Inappropriate Because The Probate Court Properly Exercised Its Discretion In Admitting the Will.

Relator cannot establish that the Probate Division abused its discretion in admitting the Will. The second requirement for issuance of a writ of mandamus is a present, imperative, unconditional duty upon the part of the respondent to perform the act requested by the relator. Kiely, 583 S.W.2d at 237. Because of the extraordinary nature of mandamus, Relator’s burden of proof on the elements of a claim for mandamus is *exceptionally* high. Mandamus is only appropriate to require the performance of a ministerial act, and it “cannot be used to control the judgment or discretion of a public official” Missouri Growth Ass’n v. State Tax Comm’n, 998 S.W.2d 786, 788 (Mo. banc 1999) (quoting State Bd. of Health Center v. County Comm’n, 896 S.W.2d 627, 631 (Mo. banc 1995)). Discretionary actions involve “[d]eterminations of facts or a combination of facts and law.” State ex rel. Rock Road Frontage, Inc. v. Davis, 444 S.W.2d 43, 46 (Mo. Ct. App. 1969). Abuse of discretion is when an official acts clearly against the logic of the circumstances then before him and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 73 (Mo. 1999). If reasonable persons can differ about the propriety of the action taken by the official, then it cannot be said that the official abused his discretion. Id.

The extraordinary remedy of mandamus sought here should not be used to circumvent the Probate Division's decision to admit the Will. The Probate Division's ruling was logical under the circumstances. The Probate Division properly exercised its discretion in analyzing the facts, applying the law, specifically § 473.050.3(1), to those facts and deciding to enforce the Decedent's last wishes as set forth in the valid and properly presented Will.

Relator argues that the flat, one-year statute of limitations applies here without question, but Relator fails to disclose that her own misstatement that Decedent died intestate and her failure to comply with the Probate Division's Order allow her to suggest some sort of ambiguity as to which provision of § 473.050 should apply. After Relator petitioned the Probate Division for administration of Decedent's estate within the one-year period to start the administration process, the Probate Division uncovered Relator's failure to disclose the Will and ordered Relator to pay the court costs and fees associated with publication Notice of Letters Testamentary. (Rel. Ex. B at 4). Relator failed to pay those fees and cause the letters to be published. Gary Unnerstall, through his attorney, specifically requested the Probate Division order Relator to pay costs associated with opening the estate because, to the best of his knowledge, there were no assets to be probated. (A10 at ¶ 2; A12 at ¶ 2). Now, Relator not only ignores the Probate Division's Order regarding how administration should proceed,

but also ignores subsection (1) of § 473.050.3, which allows for the admission of the Will within six months of first publication. As the Probate Division correctly ruled, admission of the Will to probate was proper as it was presented prior to any publication of letters thereof. See § 473.050.3 (1).

Moreover, as a matter of public policy, this Court should not allow Relator's suggested, hyper-technical application of § 473.050.3 to overrule the proper admission of the Will. It is Respondent's position, and the Probate Division so concluded, that the statute expressly permits the admission of the Will under the circumstances. The Missouri Court of Appeals has held "that it is the intent of the legislature that duly executed instruments testamentary of a decedent are to be accorded legal recognition. A decedent's last wishes with regard to the disposition of decedent's properties are to be carried out when not otherwise prohibited by law. 'The practice of withholding a will from probate is certainly not to be recommended. . . .'" Estate of Croom v. Bailey, 107 S.W.3d 457, 463 (Mo. App. S.D. 2003) (citing Rubinstein v. Rubinstein, 283 S.W.2d 603, 606 (Mo. 1955)). The Probate Division correctly exercised its discretion to overcome the obvious injustice that would have resulted if Relator was permitted to bar the Will from admission on the basis of her own false statement that Decedent died intestate and her failure to comply with the Probate Division's Order to pay costs and publication fees. Accordingly, Relator has not established and cannot claim that

the Respondent had an unconditional duty to refuse to admit the Will. Thus, the issuance of a writ of mandamus is inappropriate.

C. Additionally, Relator Comes to This Court with Unclean Hands and Would Continue to Benefit From Her Questionable Conduct Before the Probate Division if a Writ of Mandamus is Issued.

Relator's Petition in Mandamus is yet another misplaced attempt to avoid the probate of Decedent's valid Will. A writ of mandamus is a "discretionary writ, partaking in some respects of the nature of equity, and relator cannot have it if he comes with unclean hands and has been guilty of misconduct in connection with the very thing he seeks by it to compel respondent to do." State ex rel. Hyde v. Medical Society, 295 Mo. 144, 145 (Mo. 1922). "It is a well recognized rule that equity will not aid a party who comes into court with unclean hands . . . Such conduct as will disqualify a party from equitable relief need not be fraudulent, but simply indicative of a lack of good faith in the subject matter of the suit." State ex rel. Kelcor, Inc. v. Nooney, 966 S.W.2d 399, 404 (Mo. App. E.D. 1998) (citing Hardesty v. Mr. Cribbins's Old House, Inc., 679 S.W.2d 343, 348 (Mo. App. 1984)).

Relator's request for mandamus relief is barred by her unclean hands. In seeking mandamus with this Court, Relator attempts to compel the Probate Division to deny the admission of the Will in the face of her own false statement

that Decedent died intestate and her failure to comply with a court order. Fraud under the probate code is explicitly addressed in § 472.013 of the Missouri Revised Statutes, which provides in pertinent part:

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this code, or if fraud is used to avoid or circumvent the provisions or purposes of this code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person, other than a bona fide purchaser, benefiting from the fraud, whether innocent or not. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than ten years after the time of commission of the fraud.

An intentional misstatement in a petition for administration constitutes fraud under the probate code. Singer v. Siedband, 138 S.W.3d 750 (Mo. App. E.D. 2004). Similarly, fraudulent non-disclosure may give rise to an independent cause of action under this provision of the code. See Bosworth v. Sewell, 918 S.W.2d 773 (Mo. 1996).

As set forth above, Relator's assertion that Decedent died intestate, contained in her Petition to Require Administration, may constitute fraud under the probate code. If the Decedent's Will is not admitted to probate, Relator will be permitted to benefit from her misstatement and failure to comply with the Probate Division's Order to cover costs and fees associated with publication of notice. When Relator filed her Petition on March 5, 2007, she knew Decedent had executed a testamentary document in February 2003 and that the Will existed. (See A3). As evidenced in a letter dated October 4, 2006 from the Estate of Harold Unnerstall to Relator, Relator had actual knowledge that Harold Unnerstall, in fact, had executed the Will. (A3 at ¶ 1). Notwithstanding actual knowledge that the Will existed, Relator averred in paragraph one of her Petition to Require Administration of the Estate that Decedent died *intestate*. (A1 at ¶ 1). In stark contrast to Relator's questionable conduct, Respondent Gary Unnerstall acted appropriately and reasonably. He did not seek to present the Will prior to Relator's filing of a Petition to Require Administration because he did not believe that there were any assets in the estate to be probated. Upon notice that the estate would be probated, Gary Unnerstall swiftly filed the Will with the Probate Division and sought to have it admitted.²

² Relator relies heavily on State ex rel. Bier v. Bigger, 352 Mo. 502 (Mo. banc 1944), in support of the proposition that not even "fraud" tolls the statute of

Moreover, because Relator should have acknowledged and presented the Will in her Petition, the Probate Division ordered Relator to bear the costs of filing the appropriate application for Letters Testamentary and to pay the fee of publication thereof. (Rel.'s Ex. B at 4). Although Gary Unnerstall believed there were no assets subject to probate administration, he, in good faith, complied with the Probate Division's Order. (See A10; A12). To the contrary, Relator failed to comply with the Probate Division's Order. And, now, Relator seeks to rely on her failure to cause publication of notice pursuant to the Probate Division's Order as

limitations for admission of a will. (Rel.'s Brief at 6, 9, 13). However, Relator fails to point out the obvious and compelling dissimilarities between the facts involved in Bigger and the facts of this case.² First, Bigger did not involve fraud under the Probate Code, but rather an allegation of fraudulent concealment of a Will. Secondly, unlike in this case, the probate court in Bigger had refused to admit the Will, and Relator filed his Petition in Mandamus with this Court in an extraordinary effort to force admission of the Will. Finally and most significantly, in Bigger, the will at issue was *not* presented within the statutory period following the first publication of Notice of Letters of Administration and thus, was barred. Here, the Will was timely presented under § 473.050.3. Thus, contrary to Relator's suggestion, Bigger does not support her position.

grounds to apply the one-year bar for admission of the Will and a basis for her Petition in Mandamus.

Accordingly, Relator falsely stated that Decedent died intestate and failed to comply with the Probate Division's Order, and as such, she has come to this Court with unclean hands. In order to prevent Relator from further benefiting from her questionable conduct, this Court must deny Relator's request for extraordinary relief.

D. Because Relator Has, By Her Own Petition, Invoked the Jurisdiction of the Probate Division, Equitable Doctrines of Waiver and Estoppel Preclude Her From Challenging the Division's Jurisdiction to Admit the Will.

Relator's request for mandamus relief is also precluded by the doctrines of waiver and estoppel. Mandamus is a discretionary remedy and should only be exercised within sound legal discretion, in accordance with established rules of law. State ex rel. Lowry v. Yates, 251 S.W.2d 834, 835 (Mo. App. 1952). Among the issues reviewed by this Court in its discretion are the equitable doctrines of waiver and estoppel. Id. Parties are estopped from raising a claim of a lack of jurisdiction if they invoke or accept the benefits and burdens of a court's jurisdiction. See State ex rel. York v. Daugherty, 969 S.W.2d 223, 225 (Mo. banc 1998) (holding that "the complementary doctrines of waiver and estoppel" barred a

relator from challenging the legitimacy of a Family Court Commissioner's judgment). A party's reliance on the legitimacy of a court's jurisdiction warrants the application of the doctrines of waiver and estoppel. Id.

Relator began the administration of Decedent's estate in the Probate Division by filing her Petition to Require Administration. (See A1). Moreover, after she petitioned the Probate Division for administration of Decedent's estate, Relator invoked its jurisdiction yet again to determine the property and assets of Decedent's estate and to adjudicate the validity of documents executed in conjunction with the Will. (See A27, A29 at ¶¶ 8, 15, referencing the Quit Claim Deeds executed in February 2003 and the Antenuptial Agreement executed September 11, 1988). In that Petition, Relator specifically requests that the property and assets of the estate be turned over to the Personal Representative. (A30). Accordingly, Relator has invoked and relied on the legitimacy of the Probate Division's jurisdiction. As such, the long-standing doctrines of estoppel and waiver preclude her request for extraordinary, equitable relief in the form of a writ of mandamus.

CONCLUSION

Under Missouri law, in order for a writ of mandamus to issue, Relator must prove: (1) she has a clear, existing, and unconditional legal right and (2) Respondent has a corresponding, present, imperative, and unconditional duty.

As described in detail above, Relator has failed to meet her burden, and no writ of mandamus should issue.

The Probate Division properly admitted the Will as the Will was properly presented *before* the first publication of notice of letters testamentary. Furthermore, if this Court exercises its extraordinary power of mandamus in this case and reverses the Probate Division's decision to admit the Will, it will allow Relator to further benefit from her questionable conduct before the Probate Division. Fundamental principles of equity mandate that Relator's Petition in Mandamus be denied. She comes to this Court with unclean hands, and principles of waiver and estoppel preclude her from arguing that the Probate Division's exercise of jurisdiction was improper.

For the foregoing reasons, Relator's Petition for Writ of Mandamus should be denied, and the Alternative Writ in Mandamus should be quashed.

Respectfully submitted,

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Dated: June 23, 2009

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct (1) printed copy of Respondent's Brief and Appendix thereto and (2) a CD-Rom, scanned and virus-free, containing Respondent's Brief were served via First Class U.S. mail, on this 23rd day of June, 2009, to:

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CERTIFICATE OF COMPLIANCE WITH RULES 84.06(b), (c) AND (g)

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Brief are 6,228. The undersigned relied on the word count feature of her Firm's word processing system to arrive at that number.

The undersigned further certifies that the labeled CD-ROM, filed concurrently herewith, has been scanned for viruses and is virus-free and contains an electronic copy of the foregoing Brief in Microsoft Word format.
