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## **JURISDICTIONAL STATEMENT**

Relator Luanne S. Unnerstall brought this original proceeding in mandamus to obtain interlocutory review of an Order and Judgment entered by Respondent, The Honorable John B. Berkemeyer, Circuit Judge of the Circuit Court of Franklin County, Missouri, on November 21, 2008, admitting the Purported Will of Harold S. Unnerstall, deceased, to probate and an Order and Judgment Granting Letters Testamentary to Gary Unnerstall, the person designated to serve as the personal representative under the Decedent's Purported Will.

Relator filed a Petition in Mandamus in the Missouri Court of Appeals, Eastern District, seeking to set aside the orders and judgments entered by Respondent admitting the Purported Will to probate and granting Letters Testamentary to Gary Unnerstall, which Petition was denied in an Order dated February 6, 2009.

The Court has jurisdiction because it issued an Alternative Writ of Mandamus on March 31, 2009. Under Article V, Section 4 of the Missouri Constitution, (A-8) the Court has authority to determine and issue remedial writs.

## STATEMENT OF FACTS

Harold H. Unnerstall, hereafter “Decedent,” died on March 5, 2006, at which time he was a resident of and domiciled in Franklin County, Missouri. Decedent was survived by his wife, Luanne S. Unnerstall, who is the Relator in these proceedings. Relator has been adjudged to be a disabled person, and this proceeding is brought on her behalf by Anna Leighton, who is the duly appointed and serving conservator of the Estate of Relator. **(Ex. A)**<sup>1</sup>.

Subsequent to Decedent’s death, questions and controversies arose regarding the validity of an antenuptial agreement entered into between Decedent and Relator and regarding the division of Decedent’s estate between Relator and Decedent’s three children born of a prior marriage. Those questions and controversies had not been resolved prior to March 5, 2007, which was the last day of the year following the date of Decedent’s death. Accordingly, on that date, Relator filed a “Petition to Require Administration” of Decedent’s estate in the Franklin County, Missouri Circuit Court, Probate Division **(Ex. B)**, in order to secure the appointment of a personal representative and enable Relator to initiate proceedings to resolve the questions and controversies and determine her interest in Decedent’s estate.

On April 12, 2007, being one year and thirty-eight days after the date of Decedent’s death, a purported will of Decedent, consisting of a document titled “Last

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<sup>1</sup> This brief will cite to the exhibits submitted with the Petition in Mandamus filed in this Court as “Ex. \_\_\_.” Rule 84.24(g).

Will and Testament” dated February 18, 2003, and a “Codicil” thereto dated September 12, 2005, hereafter collectively referred to as the “Purported Will,” was “received” in the Probate Division (**Ex. B**). No document seeking admission of the Purported Will was filed at that time.

On January 25, 2008, after a delay occasioned by a change of judge, the “Petition to Require Administration” was sustained by Respondent (**Ex. B**). The docket entry sustaining the Petition also provided that Gary Unnerstall, hereafter “Unnerstall,” who is named as the personal representative under the Purported Will, would be “appointed Personal Representative upon proper application” (**Ex. B**).

Before Unnerstall had taken any action seeking his appointment as personal representative, an “Application for Probate of Will” was filed by Relator on September 12, 2008, at the request of Respondent (**Ex. C**). The Application was accompanied by a letter from Relator’s counsel to Respondent asserting that admission of the Purported Will was time barred and that the requested Application should be denied (**Ex. D**).

On October 30, 2008, an Application for Letters Testamentary seeking the appointment of Unnerstall as personal representative was filed (**Ex. B**). In addition, Respondent heard arguments regarding admission of the Will and other pending applications. (**Ex. B**).

On November 21, 2008, Respondent issued an Order and Judgment admitting the Purported Will to probate (**Ex. E, A1-A2**). Additionally, Respondent entered an Order and Judgment Granting Letters Testamentary to Unnerstall, the person designated to serve as the personal representative under the Purported Will (**Ex. F, A3-A5**).

Pursuant to the issuance of Letters Testamentary to Unnerstall, a notice of the appointment of the personal representative was caused to be published by the Clerk of the Probate Division pursuant to §473.033 RSMo (2000) (at A11-12). On December 29, 2008, an affidavit verifying the publication of such notice in compliance with that statute was filed in the Probate Division, which shows the first publication as having occurred on December 3, 2008 (**Ex. G, A6-A7**).

On February 3, 2009, Relator filed a Petition in Mandamus in the Missouri Court of Appeals, Eastern District, seeking to set aside the orders and judgments entered by Respondent admitting the Purported Will to probate and granting Letters Testamentary to Unnerstall. The Court of Appeals denied this Petition in an Order dated February 6, 2009 (**Ex. H**).

In summary, and as aid to this Court, following is a time sequence of the events described above:

March 5, 2006	Date of death of Harold H. Unnerstall
March 5, 2007	Petition to Require Administration filed by Relator
April 12, 2007	Purported Will “received” (filed) in Probate Division
January 25, 2008	Petition to Require Administration sustained by Respondent
September 12, 2008	Application for Probate of Will filed as requested by Respondent
October 30, 2008	Application for Letters Testamentary filed by Gary Unnerstall
November 21, 2008	Order and Judgment issued by Respondent admitting Purported Will

November 21, 2008	Order and Judgment granting Letters Testamentary to Gary Unnerstall
December 3, 2008	First Publication of Notice pursuant to Section 473.033 RSMo (2000)
February 3, 2009	Petition for Mandamus filed by Relator in Missouri Court of Appeals, Eastern District
February 6, 2009	Petition for Mandamus denied

**POINT RELIED ON**

**I. RELATOR IS ENTITLED TO A WRIT OF MANDAMUS REQUIRING RESPONDENT TO VACATE ALL ORDERS AND JUDGMENTS ADMITTING THE PURPORTED WILL OF DECEDENT TO PROBATE AND GRANTING LETTERS TESTAMENTARY, BECAUSE RESPONDENT DID NOT HAVE SUBJECT MATTER JURISDICTION TO ENTER THE ORDERS AND JUDGMENTS, IN THAT THE PURPORTED WILL HAD NOT BEEN PRESENTED FOR PROBATE WITHIN THE TIME LIMIT PRESCRIBED BY SECTION 473.050.3(2) AND, ABSENT SUCH TIMELY PRESENTMENT, THE PURPORTED WILL WAS FOREVER BARRED FROM ADMISSION TO PROBATE IN THIS STATE AND LETTERS TESTAMENTARY COULD NOT BE ISSUED PURSUANT TO THAT TIME BARRED WILL.**

*State ex rel. Bier v. Bigger*, 178 S.W.2d 347, 350-51 (Mo. banc 1944)

*Boillot v. Conyer*, 861 S.W.2d 152, 154 (Mo.App. E.D. 1993)

*State ex rel. Plymessenger v. Cleaveland*, 387 S.W.2d 556, 561 (Mo. 1965)

*Wyers v. Arnold*, 147 S.W.2d 644, 647 (Mo. 1941)

Section 472.160.1(14) RSMo (2000)

Section 473.033 RSMo (2000)

Section 473.043.1 (RSMo (2000)

Section 473.050 RSMo (2000)

Section 473.083.1 RSMo (2000)

## ARGUMENT

I. RELATOR IS ENTITLED TO A WRIT OF MANDAMUS REQUIRING RESPONDENT TO VACATE ALL ORDERS AND JUDGMENTS ADMITTING THE PURPORTED WILL OF DECEDENT TO PROBATE AND GRANTING LETTERS TESTAMENTARY, BECAUSE RESPONDENT DID NOT HAVE SUBJECT MATTER JURISDICTION TO ENTER THE ORDERS AND JUDGMENTS, IN THAT THE PURPORTED WILL HAD NOT BEEN PRESENTED FOR PROBATE WITHIN THE TIME LIMIT PRESCRIBED BY SECTION 473.050.3(2) AND, ABSENT SUCH TIMELY PRESENTMENT, THE PURPORTED WILL WAS FOREVER BARRED FROM ADMISSION TO PROBATE IN THIS STATE AND LETTERS TESTAMENTARY COULD NOT BE ISSUED PURSUANT TO THAT TIME BARRED WILL.

## STANDARD OF REVIEW

Relief by mandamus is appropriate “where the court has acted in excess of its jurisdiction in a case rightfully before it.” *State ex rel. Corcoran v. Buder*, 428 S.W.2d 935, 939 (Mo.App. E.D. 1968). A writ of mandamus is proper when there is (1) “an existing, clear, unconditional legal right in the relator,” (2) “a corresponding, present, imperative, unconditional duty upon respondent,” and (3) a “default” by respondent in satisfying that duty. *State ex rel. Belle Starr Saloon, Inc. v. Patterson*, 659 S.W.2d 789, 790 (Mo.App. E.D. 1983).

The proper standard of review for a writ of mandamus “is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes.” *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007). In this instance, Respondent abused his discretion by entering orders and judgments admitting the Purported Will to probate, after the special statute of limitations set forth in §473.050.3 RSMo (2000) had expired and the Purported Will was “forever barred from admission to probate,” and by granting Letters Testamentary pursuant to the provisions of the time barred Purported Will.

The Court should issue an absolute writ of mandamus, as Respondent has acted “without authority and in excess of his jurisdiction” by admitting the Purported Will to probate in contravention of the applicable statute. *Wyers v. Arnold*, 147 S.W.2d 644, 648 (Mo. 1941). Relator has properly invoked mandamus, and this Court has the authority to act if it concludes that Respondent has acted in excess of his jurisdiction and failed to properly apply the law.

**Section 473.050 RSMo (2000)—Special Statute of Limitation**

The law of Missouri has always been, and remains, that “the right to dispose of or take property under a will is not a natural right but is purely a statutory one.” *Wyers v. Arnold*, 147 S.W.2d 644, 647 (Mo. 1941). In this regard, the statutes governing wills not only set forth the legal requirements for a valid will, but also require that a will “must be probated to give it life and force...[and] resort must be had to a tribunal authorized for that purpose.” *Id.*

The time for probating a will is limited, however, by a “special statute” of limitations, which cannot be tolled for any reason not set forth in the statute, including fraud or concealment. *State ex rel. Bier v. Bigger*, 178 S.W.2d 347, 350 (Mo. banc 1944). Once that “special statute” of limitations has run, the probate division in which the estate administration is pending no longer has the jurisdiction to admit or reject the will. *State ex rel. Plymesser v. Cleaveland*, 387 S.W.2d 556, 561 (Mo. 1965); *State ex rel. Estate of Perry ex rel. Perry*, 168 S.W.3d 577, 584 (Mo.App. W.D. 2005); *In re Politte’s Estate*, 460 S.W.2d 733, 735 (Mo.App. E.D. 1970).

Section 473.050 RSMo (2000) is the currently applicable special statute limiting the time for probating of the Purported Will (A14-15). That statute provides that in order for the Purported Will to be “effective as a will,” it must first be “presented” for probate and then “admitted” to probate. Section 473.050.1 RSMo (2000). The term “presented” is a defined statutory term, requiring both delivery of the Purported Will to the probate division and filing of an affidavit or a petition seeking to have the will admitted to probate. Section 473.050.2 RSMo (2000).

In this instance, the two “presented” requirements were not met until September 12, 2008, when Relator, at the request of Respondent, filed an “Application for Probate of Will” (**Ex. C**), the Purported Will itself having previously been delivered (“received”) on April 12, 2007 (**Ex. B**). Thus, the Purported Will was not “presented” until two years and four months after Decedent’s date of death.

In order to be effective, however, these two “presented” requirements had to be met within the time limitations set forth in the special statute of limitations, §473.050.3

RSMo (2000), and if that did not occur, the Purported Will “is forever barred from admission to probate in this state.” Section 473.050.5 RSMo (2000) (A14-15). In this instance, the Purported Will was not timely presented.

When the Purported Will was finally “presented” on September 12, 2008, the initial inquiry required was to determine whether or not it was timely presented. This in turn depended upon whether or not notice pursuant to §473.033 RSMo (2000) had been given prior to the Purported Will being “presented” (A14-15). Section 473.050.3. If such notice had “previously been given,” then the time limitations set forth in §473.050.3(1) RSMo (2000) would determine timely presentment. If such notice had “not previously been given,” then the time limitations set forth in §473.050.3(2) RSMo (2000) would determine timely presentment.

Here, the first publication of notice occurred on December 3, 2008 (**Ex. G, A6-A7**), almost 3 months after the Purported Will was “presented” on September 12, 2008. Accordingly, the determination of whether or not the Purported Will was timely presented is governed by §473.050.3(2) RSMo (2000), and that provision clearly, and unequivocally, states that the statute of limitations expired “one year after the date of death” of Decedent, i.e., on March 5, 2007 (A14-15). At that point in time, and notwithstanding the provisions of §473.043.1 RSMo (2000)<sup>2</sup> (at A13), Unnerstall had not

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<sup>2</sup> Section 473.043.1 RSMo (2000) provides, in pertinent part, that the person having custody of a decedent’s will shall deliver it to the probate division of the circuit court having jurisdiction of the estate, or of the county where the will is found.

even delivered the Purported Will to the Probate Division (**Ex. B**). Further, a petition seeking admission of the Purported Will to probate, being the second of the two “presented” requirements, would not be filed for an additional 16 months thereafter (**Ex. C**). As a result, the Purported Will was “forever barred from admission to probate in this state.” Section 473.050.5 RSMo (2000) (A14-15).

In short, Decedent’s death on March 5, 2006, triggered the one-year statute of limitations under §473.050.3(2) RSMo (2000) for the Purported Will to be “presented” for probate. That year ended on March 5, 2007, without any filing whatsoever having been made with respect to the Purported Will. As a result, on and after March 6, 2007:

1. The Purported Will of Decedent was “forever barred from admission to probate in this state.” Section 473.050.5 RSMo (2000) (A14-15).

2. Respondent no longer had subject matter jurisdiction to admit or reject the Purported Will. *State ex rel. Plymesser v. Cleaveland*, 387 S.W.2d 556, 561 (Mo. 1965). See, also, Francis M. Hanna, Missouri Practice Series: Probate Code Manual §473.050 (2d ed.) (“Presentment of a will for probate is a condition precedent to the court’s subject matter jurisdiction over the will...”).

Notwithstanding the fact that the Purported Will was not timely “presented” for probate and is, therefore, “forever barred from admission to probate,” on November 21, 2008, Respondent exceeded his jurisdiction by admitting the Purported Will to probate and granting Letters Testamentary to Unnerstall, the person designated as personal representative under the Purported Will.

In ordering the admission of the Purported Will and granting Letters Testamentary based thereon, Respondent was acting without subject matter jurisdiction and either ignoring or erroneously applying the applicable law. And, it is well settled that “any action taken by the court lacking subject matter jurisdiction is null and void.” *Brunig v. Humburg*, 957 S.W.2d 345, 348 (Mo.App. E.D. 1997).

Mandamus is the appropriate remedy when a Respondent has abused his discretion and there is no avenue to appeal. See *State ex rel. University Bank v. Blair*, 365 Mo. 699, 700 (Mo. banc 1956) (“The general rule is that mandamus will not lie if a specific and adequate remedy by appeal exists.”). In this instance, mandamus is appropriate. As explained above, Respondent abused his discretion and exceeded his authority in admitting the Purported Will to probate and granting Letters Testamentary to Unnerstall. No appeal is allowed, however, for an order admitting a will to probate. Section 472.160.1(14) RSMo (2000) (A9-10). The judgments entered by Respondent constitute a determination by Respondent that he had jurisdiction to enter the judgments. Such a determination “is not an appealable order and instead is properly reviewable by an extraordinary writ.” *Boillot v. Conyer*, 861 S.W.2d 152, 154 (Mo.App. E.D. 1993) (cited with approval in *State ex rel. Estate of Perry ex rel. Perry*, 168 S.W.3d 577, 583, n.5 (Mo.App. W.D. 2005)). In this instance, such a review and the issuance of a permanent writ is warranted.

The Relator may not appeal Respondent’s actions, nor may she bring a will contest action, which can address “the validity of a probated will” (Section 473.083.1 RSMo

(2000) at A16-17), but not the question of Respondent's subject matter jurisdiction. *State ex rel. Plymnesser v. Cleaveland*, 387 S.W.2d 556, 560 (Mo. 1965).

The purpose of special statutes "limiting the time for probating wills is expressed in one of the earliest of them, 21 James I, chap. 16, 'For the quieting of men's estates and the avoiding of suits.'" *State ex rel. Bier v. Bigger*, 178 S.W.2d 347, 351 (Mo. banc 1944). Section 473.050 RSMo (2000) carries forward this purpose by requiring a will, "to be effective as a will," be presented "within one year" after a decedent's death. Absent timely presentment, the will is ineffective and the decedent is deemed to have died intestate. In either event, there is a "quieting" of the matter.

If, however, Respondent's improper judgment admitting the Purported Will is not set aside now, unnecessary and protracted litigation concerning the probate and administration of Decedent's estate will result. Relator will certainly appeal from any final judgment upon the eventual closing of Decedent's estate to raise the statute of limitations issue, and that future appeal will be inadequate to protect the courts and the parties from needless and potentially redundant litigation in the interim over the effectiveness and interpretation of the Purported Will. Further, if that appeal results in Respondent's judgment being reversed, then administration of Decedent's estate would have to be entirely reconsidered based upon intestacy.

In short, the question of testacy versus intestacy needs to be resolved now, while administration of Decedent's estate is pending. This will ensure that the administration is properly conducted and will avoid unnecessary litigation. Intervention by this Court is the only presently viable means to accomplish this purpose.

## CONCLUSION

For the reasons set forth above, the Respondent erred in issuing an order and judgment admitting the Purported Will to probate and an order and judgment granting Letters Testamentary pursuant to the Purported Will. These orders and judgments should be vacated. Accordingly, the Court should issue a Writ of Mandamus requiring Respondent to vacate all Orders and Judgments admitting the Purported Will of Decedent to Probate and granting Letters Testamentary to Unnerstall, and to enter an Order declaring that Decedent died intestate.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one (1) copy of the printed brief and one (1) copy of the floppy disk required by Rule 84.06(g) have been served on Richard A. Wunderlich, Attorney for Gary Unnerstall, individually and as Personal Representative, by FedEx delivery, and on David L. Baylard on behalf of Donna Malone and Jeffrey Unnerstall, by FedEx delivery, and on The Honorable John B. Berkemeyer, by FedEx delivery, to their business addresses on the 29th day of May, 2009.

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**COMPLIANCE WITH RULE 84.06(c)**

The undersigned hereby certifies that Relator's Brief contains the information required by Rule 55.03, that the Brief complies with the limitations contained in Rule 84.06(b) in that Relator's Brief contains 4,131 words, as indicated by the word count of the word processing system used to prepare the Brief.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)**

**COMES NOW** Relator, by and through her counsel of record, Carnahan, Evans, Cantwell & Brown, P.C., and hereby certifies that the floppy disk containing Relator's Brief filed herewith has been scanned for viruses and is virus free.

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