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POINT RELIED ON

I. RESPONDENT ERRED IN ADMITTING THE PURPORTED WILL OF THE DECEDENT TO PROBATE AND GRANTING LETTERS TESTAMENTARY AND, THUS, THE ISSUANCE OF A WRIT OF MANDAMUS IS WARRANTED BECAUSE: (A) 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 §473.050.3(2) RSMo (2000) 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; (B) THE ISSUANCE OF A WRIT OF MANDAMUS IS APPROPRIATE BECAUSE RESPONDENT HAD NO DISCRETION TO ADMIT THE PURPORTED WILL OF DECEDENT TO PROBATE AND EXCEEDED HIS JURISDICTION BY ACTING IN CONTRAVENTION OF THE SPECIAL STATUTE OF LIMITATION SET FORTH IN §473.050.3(2) RSMo (2000); (C) RELATOR DOES NOT COME TO THIS COURT WITH UNCLEAN HANDS BECAUSE DECEDENT HAD NO EFFECTIVE WILL AND RELATOR CAUSED NO DELAY IN PRESENTMENT OF THE PURPORTED WILL OR IN PUBLICATION

OF NOTICE; AND (D) RELATOR AGREES THAT RESPONDENT HAS JURISDICTION OVER PROBATE MATTERS, BUT THIS DOES NOT PRECLUDE HER FROM CHALLENGING THE COURT'S JURISDICTION TO ADMIT THE PURPORTED WILL BASED ON RESPONDENT'S ACTIONS IN WHICH HE LACKED JURISDICTION.

In re Rahn's Estate, 291 S.W. 120, 123 (Mo. 1926)
State ex rel. Bier v. Bigger, 178 S.W.2d 347, 350-51 (Mo. banc 1944)

State ex rel. City of Jennings v. Riley, 236 S.W.3d 630, 631 (Mo. banc 2007)

Wyers v. Arnold, 147 S.W.2d 644, 648 (Mo. 1941)

Missouri Constitution, *Article V*, §27.3

Section 473.013 RSMo (2000)

Section 473.020 RSMo (2000)

Section 473.033 RSMo (2000)

Section 473.043 RSMo (2000)

Section 473.050 RSMo (2000)

ARGUMENT

A. 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 §473.050.3(2) RSMo (2000) 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.

Respondent argues that the filing of the Petition to Require Administration of Decedent's estate pursuant to §473.020.2 RSMo (2000) tolled the one-year time bar set forth in §473.050.3(2) RSMo (2000) for the presentment of the Purported Will of Decedent. (Respondent's Br. at 12). Respondent further argues this tolling of the statute continued until December 3, 2008, when the first publication of notice pursuant to §473.033 RSMo (2000) occurred (Relator's Ex. G), at which point §473.050.3(1) RSMo (2000) became applicable and allowed six additional months for presentment of the Purported Will. (Respondent's Br. at 12).

In essence, it is Respondent's position that the statutory provisions governing the commencement of a probate administration and those governing presentment of a will are inextricably intertwined. Relator submits that not only do the statutes and cases cited

by Respondent fail to support Respondent's position, but in fact Missouri law is to the contrary.

As a beginning point, Respondent's assertion that the filing of the Petition to Require Administration tolled the one-year time bar is incorrect because the statute itself contains no tolling provision and, absent that, this statute cannot be tolled for any reason. *State ex rel. Bier v. Bigger*, 178 S.W.2d 347, 350 (Mo. banc 1944). Furthermore, Relator's action to commence administration of the Decedent's estate is completely separate from, and not dependent upon, Decedent even having a will.

The probate division of a circuit court has exclusive jurisdiction of "all matters pertaining to probate business," including "granting of letters testamentary or of administration." Section 473.013 RSMo (2000). That jurisdiction is normally invoked and "attaches when an application for letters is made." *Novak v. Akers*, 669 S.W.2d 644, 648 (Mo.App. S.D. 1984). That jurisdiction can also be invoked, as it was here, by a petition to require administration, which seeks issuance to the proper person "of letters testamentary or of administration." Section 473.020.1 RSMo (2000). Clearly, application of §§473.013 and 473.020 RSMo (2000) is not dependent upon a decedent having a will, as each of those sections provides for letters of administration.

The reverse of the foregoing is also true. Section 473.050.4 RSMo (2000) clearly contemplates a will being "presented for and admitted to probate" whether or not an administration of a decedent's estate begins at that time. In fact, no court action is required for a will to be "presented", as §473.050.2 RSMo (2000) only requires delivery of the will and of one of the specified documents seeking its admittance in order for the

will to be “presented.” This has led one court to conclude “that the presentment process is not *per se* part of the application for letters testamentary process.” *In re Estate of Croom*, 107 S.W.3d 457, 461 (Mo.App. S.D. 2003).

Thus, Respondent’s assertion, notably without citation to any authority, that “Relator cannot avail herself of the one-year time bar [under §473.050.3(2) RSMo (2000)] because she tolled the running of that statute when she filed her Petition to Require Administration” (Respondent’s Br. at 12) is totally inaccurate. Section 473.020.2 RSMo (2000), which provides for the filing of a Petition to Require Administration, is only concerned with securing the opening of a probate administration and the issuance of letters, not with the presentment of a will.

Respondent also asserts that the Purported Will of Decedent was timely “presented” and properly admitted under §473.050.3(1) RSMo (2000). (Respondent’s Br. at 12). In support of the assertion, Respondent argues that “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.” (Respondent’s Br. at 12). Although Respondent’s assertion that the Purported Will of Decedent was timely presented is incorrect, his argument that Relator’s interpretation is inconsistent with prior law is correct -- as it should be.

Prior to 1996, the statutes of limitation governing the admission of a will to probate were set forth in §§473.050 RSMo (1986) and 473.070.1 RSMo (1989). In 1996, the General Assembly amended those statutes. All of the time limits for presentment of a will were placed in §473.050 RSMo (2000). This amendment is accorded great significance: “When the legislature amends a statute, that amendment is

presumed to change the law.” *Cox v. Director of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003). *See also Sermchief v. Gonzales*, 660 S.W.2d 683, 689 (Mo. banc 1983) (“An amended statute...should be construed on the theory that the legislature intended to accomplish a substantive change in the law.”) The change which occurred in 1996 with the enactment of §473.050 RSMo (2000) is at the very heart of this proceeding and is definitive of the proper result.

Until its repeal in 1996, §473.070.1 RSMo (1989) provided that no will could be admitted to probate nor could administration be granted on a decedent’s estate unless application was made therefor within one year after decedent’s death. *Matter of Adams*, 877 S.W.2d 263, 264 (Mo.App. W.D. 1994). Section 473.050 RSMo (2000) as enacted in 1996 basically retained the requirement that an estate must be opened within one year after a decedent’s death, but provided an entirely new statutory procedure in this regard if a decedent’s will was timely “presented” for probate. It is this new procedure which is at issue before this Court.

Section 473.050.4 RSMo (2000) provides that if a decedent’s will, in this instance the Purported Will, is “presented for probate within the time limitations provided in subsection 3,” then that will may be proved and an administration of the decedent’s estate commenced “at any time after such presentation.” If, however, the Purported Will is not timely “presented,” then it “is forever barred from admission to probate.” Section 473.050.5 RSMo (2000). Thus, resolution of the current proceeding is governed by §473.050.3 RSMo (2000) which sets forth the applicable time limitations for the Purported Will to be “presented.”

Subdivisions (1) and (2) of §473.050.3 RSMo (2000) set forth two alternative time limits, only one of which can be the “applicable time,” for the Purported Will to be “presented.” Subdivision (1) applies if “notice has *previously* been given in accordance with §473.033,” and subdivision (2) applies if “notice has not *previously* been given in accordance with §473.033” (emphasis added).

Clearly, the operative word in each of the two alternatives is “previously,” which raises the question, ignored by Respondent, previous to what? The answer to the question is clear: Previous to the will being “presented.” In this instance, Decedent died on March 5, 2006. The Purported Will was “presented” on September 12, 2008, over 1½ years after Decedent’s death. (Relator’s Ex. C). On the date the Purported Will was “presented,” notice “in accordance with §473.033” had not been given, and it would not be given until December 3, 2008. (Relator’s Ex. G). Thus, subdivision (1) of §473.050.3 RSMo (2000) cannot apply and, since subdivision (2) of that Section must therefore apply, this results in a one year statute of limitation which had expired prior to the Purported Will being “presented.”

Finally, Respondent argues it is against the public policy of Missouri to allow Relator to initiate probate proceedings “on the last day of the statutory period” and to assert Decedent died intestate “despite the known existence of a valid will.” (Respondent’s Br. at 15). This argument is both incorrect and misdirected.

Since Missouri became a state, the appellate courts have consistently held:

“The best indication of public policy is to be found in the enactment of our Legislature.’...[and] courts should exercise

extreme caution in declaring any act void as against public policy, unless it clearly appears that the transaction contravenes the Constitution, some positive statute, or some well-established rule of law announced by the judicial decisions of the state or nation.”

In re Rahn's Estate, 291 S.W. 120, 123 (Mo. 1926). This “best indication of public policy” is particularly strong in probate matters as the probate process is governed entirely by statute. Mo. Const. amend. Art. V, §27.3. *See also* John A. Borron, Jr., Missouri Practice Series: 5A Probate Law And Practice §488 (3d ed.) (“By eliminating the restrictions imposed upon the legislature by virtue of former § 16 of Article V, the Constitutional Amendment has given the legislature unlimited authority in determining the nature and extent of probate division jurisdiction.”). Essential to the process are the statutes which impose time limits, and particularly those “limiting the time for probating wills.” *State ex rel. Bier v. Bigger*, 178 S.W.2d 347, 351 (Mo. banc 1944).

Notwithstanding the validity of the probate statutes, and particularly the time limits imposed by §§473.020 and 473.050 RSMo (2000), Respondent argues that Relator acted improperly in stating in her Petition to Require Administration (Relator's Ex. B, Respondent's Ex. A1) that Decedent died intestate because Relator knew a “valid will” of Decedent existed. (Respondent's Br. at 15-16). This argument is incorrect.

The sole basis for Respondent's claim that Relator knew Decedent had a “valid will” is the following statement made in a letter (Respondent's Ex. A3) to Anna

Leighton, the duly appointed and serving conservator of Relator's estate from Richard A. Wunderlich, Esq. (Relator's Ex. A):

“It is my understanding from Gary Unnerstall, the trustee of Harry's trust, that he has previously had conversations with you about distributions pursuant to Harry's Will and Harry's Trust,....”

This statement *may* constitute notice that a will exists, but it does not, and cannot, verify the will is a “valid will.” The determination of validity could only be made by the probate division after Decedent's death. Sections 473.013 and 473.050.1 RSMo (2000).

Further, whether Relator knew there was a will is irrelevant. The salient point is that Gary Unnerstall not only knew, but had possession of the Purported Will, and §473.043.1 RSMo (2000) required him to deliver the Purported Will to the appropriate probate division. That delivery did not occur, however, until April 12, 2007 (Relator's Ex. B), which was thirty-eight days *after* Relator filed the Petition to Require Administration (Relator's Ex. B).

In short, the death of Decedent triggered three relevant statutes:

1. Section 473.043.1 RSMo (2000), which required Gary Unnerstall to deliver the Purported Will to the Probate Division.

2. Section 473.020.2 RSMo (2000), which required Relator (or some other interested person) to file the Petition to Require Administration “within one year after the death” of Decedent.

3. Section 473.050 RSMo (2000), which required Gary Unnerstall to present the Purported Will to the Probate Division “within one year after the date of death” of Decedent in order for the Purported Will to be “effective as a will.”

Simply put, Relator chose to comply with the applicable statute, and Gary Unnerstall chose not to comply. The result was that, on the day Relator filed her Petition to Require Administration, which was the last day of the “one year after the date of death” of Decedent, there was absolutely nothing of record which even indicated, much less verified, that Decedent had a “valid will,” or for that matter even a Purported Will. Given that the one year period for the Purported Will to be presented had expired, Relator properly stated in her Petition to Require Administration that Decedent died intestate. That statement was, and remains, entirely accurate.

B. THE ISSUANCE OF A WRIT OF MANDAMUS IS APPROPRIATE BECAUSE RESPONDENT HAD NO DISCRETION TO ADMIT THE PURPORTED WILL OF DECEDENT TO PROBATE AND EXCEEDED HIS JURISDICTION BY ACTING IN CONTRAVENTION OF THE SPECIAL STATUTE OF LIMITATION SET FORTH IN §473.050.3(2) RSMo (2000).

Respondent argues that “the issuance of a Writ of Mandamus is inappropriate because the Probate Court properly exercised its discretion in admitting the Will.” (Respondent’s Br. at 17). In fact, Respondent had no discretion, and no jurisdiction, whatsoever to admit the Decedent’s Purported Will to probate after the special statute of limitation set forth in §473.050.3(2) RSMo (2000) limiting the time for probating the

Purported Will had run. Again, this special statute of limitation is clear and provides no room for discretion: If notice has not previously been given in accordance with §473.033 RSMo (2000) of the granting of letters, and it had not, then the presentment is only timely if made within one year after the date of death of the decedent.

By admitting the Purported Will to probate in contravention of this statute, Respondent committed an abuse of discretion because he acted “without authority and in excess of his jurisdiction.” *Wyers v. Arnold*, 147 S.W.2d 644, 648 (Mo. 1941). (Relator’s Br. at 8). 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). (Relator’s Br. at 9). Therefore, issuance of a Writ of Mandamus is appropriate.

Respondent argues that, as a matter of public policy, “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.” (Respondent’s Br. at 19). The key here is that admitting the Purported Will *was* “otherwise prohibited by law,” because it was admitted to probate by Respondent in contravention of the time limit set forth in §473.050.3(2) RSMo (2000).

C. RELATOR DOES NOT COME TO THIS COURT WITH UNCLEAN HANDS BECAUSE DECEDENT HAD NO EFFECTIVE WILL AND RELATOR CAUSED NO DELAY IN PRESENTMENT OF THE PURPORTED WILL OR IN PUBLICATION OF NOTICE.

Respondent argues that because Relator had “actual knowledge that the [Decedent’s] Will existed” as evidenced in a letter dated October 4, 2006, “Relator’s assertion that Decedent died intestate, contained in her Petition to Require

Administration, may constitute fraud under the probate code.” (Respondent’s Br. at 22). Respondent then concludes that Relator has “unclean hands” and should be denied relief (Respondent’s Br. at 22). Respondent’s argument that Relator comes to the Court with “unclean hands” is, however, absolutely incorrect. (Respondent’s Br. at 22).

Section 473.050.1 RSMo (2000) states that “a will, to be effective as a will, must be presented for and admitted to probate.” In this case, at the time Relator filed her Petition to Require Administration, no will had even been filed, much less presented for and admitted to probate. Thus, there was no *effective* will and, accordingly, Decedent is deemed as a matter of law to have died intestate. In short, the statement made in Relator’s Petition to Require Administration that Decedent died intestate is correct, and Relator has not committed any fraud upon the Court.

Even if Respondent’s claim that Relator had “actual knowledge” of the Decedent’s Purported Will is correct, Relator did not have possession of the Will and therefore lacked the ability to present it for probate. It must be kept in mind that Gary Unnerstall had possession of the Purported Will, and it was his responsibility (not Relator’s) to deliver the Will to the Probate Division pursuant to §473.043 RSMo (2000), which states: “After the death of the testator, the person having custody of his will shall deliver it to the probate division of the circuit court which has jurisdiction of the estate...” Again, Gary Unnerstall did not file the Purported Will with the Probate Division until April 12, 2007, one year and thirty-eight days after the date of Decedent’s death. (Relator’s Ex. B). Thus, it was Gary Unnerstall, not Relator, who failed to comply with the statute.

The second part of Respondent's argument that Relator comes to the Court with "unclean hands" is based on his assertion that Relator failed "to comply with the Probate Division's Order to cover costs and fees associated with publication of notice." (Respondent's Br. at 22). Again, this is incorrect—Relator submitted payment of \$112.00 by check #80400 to the Court on August 18, 2008, as evidenced by the November 20, 2008 docket entry "Publishing fee received". (Relator's Ex. B). According to the Court's docket entry, this amount was actually refunded to Relator on December 23, 2008. (Relator's Ex. B).

Notwithstanding a clear docket entry that the publishing fee was received, Respondent asserts "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 . . . a basis for her Petition in Mandamus." (Respondent's Br. at 23-24). This assertion is patently incorrect.

In his docket entry of January 25, 2008, Respondent stated that Gary Unnerstall would be "appointed Personal Representative upon proper application." (Relator's Ex. B). Gary Unnerstall did not file a "proper application" until October 30, 2008, on which date Respondent also heard arguments regarding admission of the Purported Will and other pending applications. (Relator's Ex. B). It was not until November 21, 2008 that Respondent ordered that Letters Testamentary be issued to Gary Unnerstall (Relator's Ex. F), and it is that order and judgment which triggers the publication of notice under Section 473.033 RSMo (2000). In short, Relator's payment of the fee for publication of notice, even if not made until November 20, 2008 (Relator's Ex. B), did not cause any

delay because the Order and Judgment Granting Letters Testamentary to Gary Unnerstall, which is the trigger for such publication, was not entered until November 21, 2008. (Relator's Ex. B, F).

But more importantly, the date of payment of the fee is immaterial to, and has no effect upon, the validity of a will not timely presented to probate. It is significant that nowhere does Respondent contend, much less establish, that any acts by Relator prevented delivery or presentment of the Purported Will to the Probate Division within one year of Decedent's death. Section 473.050.3(2) RSMo (2000).

D. RELATOR AGREES THAT RESPONDENT HAS JURISDICTION OVER PROBATE MATTERS, BUT THIS DOES NOT PRECLUDE HER FROM CHALLENGING THE COURT'S JURISDICTION TO ADMIT THE PURPORTED WILL BASED ON RESPONDENT'S ACTIONS IN WHICH HE LACKED JURISDICTION.

Respondent asserts that Relator is "estopped from raising a claim of a lack of jurisdiction" because she has "invoke[d] or accepted[d] the benefits and burdens of a court's jurisdiction." (Respondent's Br. at 24). With all due respect, this argument is nonsense.

Relator has always maintained that the Probate Division, and only the Probate Division, has subject matter jurisdiction over "all matters pertaining to probate business" pursuant to §473.013 RSMo (2000). It was for this reason that Relator filed the Petition to Require Administration (Relator's Ex. B) of Decedent's estate in the Probate Division. There were and are issues that require administration in the Decedent's estate regardless of whether he had a valid will or not. The fact that Respondent has this subject matter jurisdiction over the estate and its administration is not, however, a "blank check" that allows Respondent to exceed the jurisdiction he is given under the probate statutes.

Relator submits that Respondent did not have subject matter jurisdiction to admit the Purported Will to probate *after* the special statute of limitations set forth in §473.050.3(2) RSMo (2000) had run. This is quite different from submitting that Respondent has no jurisdiction whatsoever in probate matters, which Relator has never maintained. Therefore, although the Relator agrees that Respondent has jurisdiction over probate matters related to the Decedent's estate, Relator is not precluded from seeking the issuance of a Writ of Mandamus by this Court based on Respondent's actions in which he lacked jurisdiction.

CONCLUSION

For the reasons set forth herein and in Relator's initial brief, Respondent lacked jurisdiction to issue the orders and judgments admitting the Purported Will to probate, and the Writ of Mandamus should be made permanent directing Respondent to vacate those orders and judgments, and enter a judgment refusing to admit the time-barred Purported Will to probate, and for such other relief as this Court deems appropriate.

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 9th day of July, 2009.

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COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies that Relator's Reply Brief contains the information required by Rule 55.03, that the Reply Brief complies with the limitations contained in Rule 84.06(b) in that Relator's Reply Brief contains 4,207 words, as indicated by the word count of the word processing system used to prepare the Reply 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 Reply Brief filed herewith has been scanned for viruses and is virus free.

Respectfully Submitted,

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