

IN THE SUPREME COURT OF MISSOURI

Appeal No. SC 88923

JOHN J. LYNCH, et al.

Appellants,

vs.

GEORGE A. LYNCH, Trustee, et al.,

Respondents.

**On Appeal from the Circuit Court
of the County of St. Louis, State of Missouri,
Twenty-First Judicial Circuit, Division 3
Honorable Mark D. Siegel, Circuit Judge**

SUBSTITUTE BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

Pursuant to the Notice of Appeal filed on December 18, 2006, Appellants appealed to the Missouri Court of Appeals for the Eastern District from the final Order/Judgment entered on August 9, 2006, by the Honorable Mark D. Seigel, Circuit Court of the County of St. Louis, Missouri, Twenty-First Judicial Circuit, Division 3, which granted Respondents George Lynch, Trustee, Marie Roam, Patricia Gallagher, Bernice Huber, Peggy Pearl, Judy Webb Kunz, Linda Neal, John Neal, Victoria Neal Stone, Richard Harrison Neal, and Marlene Slusser's ("Respondents") Motion to Dismiss John Lynch, III, Stephen M. Lynch, and Timothy Lynch's ("Appellants") Petition pursuant to Rule 55.27(a) of the Missouri Rules of Civil Procedure ("Judgment"). This appeal follows this Court's post-opinion transfer of that appeal from the Court of Appeals of the Eastern District pursuant to Rule 83.04.

This appeal does not involve the validity of any treaty or statute of the United States, the validity of any statute or provision of the Constitution of the State of Missouri, construction of the revenue laws of the State of Missouri, or title to any state office, and this Court has jurisdiction over this appeal pursuant to Article V, Section 10 of the Missouri Constitution. Mo. Const. Art. V, § 10.

STATEMENT OF FACTS

Harry Schoepp and Olivia Schoepp were married at all times relevant to this action. (Legal File (“LF”) 002). On August 28, 2002, Harry Schoepp executed his Last Will and Testament (“Will”). (LF007-LF010). The Will provides that Harry Schoepp’s entire estate is to be paid to Olivia Schoepp, unless she predeceases him, in which case, it was to be paid to “GEORGE LYNCH, as Trustee under a certain Trust Agreement dated August 28, 2002, entitled ‘HARRY H. SCHOEPP and OLIVIA C. SCHOEPP Joint Revocable Living Trust Agreement,’ executed by my said wife and myself . . . [to] be held, administered, invested, reinvested, and distributed as a part thereof in accordance with the terms thereof.” (LF007). The Will also specifically provides that no gift, bequest, or devise is made to Olivia Schoepp’s children – Marie Roam, Patricia Gallagher, Joann Neal, or George Lynch or to the children of her deceased son John Lynch. (LF007).

Also on August 28, 2002, Harry Schoepp and Olivia Schoepp executed the HARRY H. SCHOEPP and OLIVIA C. SCHOEPP Joint Revocable Living Trust Agreement (“Joint Trust”). (LF011-LF014). The Joint Trust provides that Harry Schoepp and Olivia Schoepp may transfer or convey assets to the Joint Trust to be administered by the trustees under the terms of the Joint Trust. (LF011). Harry Schoepp and George Lynch are named as the initial trustees, but George Lynch is to serve alone upon the death or incapacity of Harry Schoepp. (LF012). After the payment of the costs of the administration of the Joint Trust, the assets of the Joint Trust are to be distributed in equal shares to the then living children of Olivia Schoepp – Marie Roam, Patricia

Gallagher, Joann Neal, George Lynch and to the then living sister of Harry Schoepp – Bernice Huber. (LF012). Harry Schoepp and Olivia Schoepp specifically provided that “no portion of the trust estate shall go to the descendents of JOHN J. LYNCH” or any of the other descendents of any other predeceased beneficiary. (LF012). Appellants are the descendents of John J. Lynch. (LF003).

On November 27, 2003, Olivia Schoepp passed away. (LF002). At the time of her death, Olivia Schoepp was survived by her husband and four of her five children from a prior marriage – George Lynch, Marie Roam, Joann Neal, and Patricia Gallagher. (LF042). Her fifth child – John Lynch (father and grandfather of Appellants herein) – predeceased her. (LF042). Seventeen months later, on May 6, 2005, Harry Schoepp died. (LF002). On May 26, 2005, Harry Schoepp’s Will was filed with the Probate Division of the Circuit Court of St. Louis County. (LF024). The Will was both admitted to probate and letters testamentary were issued to George Lynch as personal representative on July 25, 2005. (LF002). Those letters of administration were first published on July 28, 2007. (LF002). At the time of his death, Harry Schoepp had only one natural heir – his sister Bernice Huber. (LF043). The Will was duly probated and never challenged or contested. (LF032). No other will or evidence thereof has ever been filed. (LF032).

Harry Schoepp’s assets, including those he received at the death of his wife, were administered by the trustee of the Joint Trust and the personal representative of his estate according to the terms of the Will and the Joint Trust. (LF007-LF014). This included distributing all of the assets of Harry Schoepp’s estate to the Joint Trust per the terms of

the Will. (LF007). All of those assets were distributed to the beneficiaries of the Joint Trust, which included the four surviving children of Olivia Schoepp and the surviving sister of Harry Schoepp. (LF012).

Appellants, who are the descendants of the predeceased child of Olivia Schoepp, (John Lynch) filed an action below challenging the Joint Trust. (LF001-LF015). Although pleaded as seeking declaratory relief, that action seeks to contest and set aside the Joint Trust and have the assets of the Joint Trust placed into a constructive trust to which Appellants then claim (Count I). (LF004). The Petition also purported to seek recovery for breach of a contract to make a will (Count II). (LF005-LF006).

Respondents (Defendants below) filed a Motion to Dismiss Appellants' (Plaintiffs below) Petition and Memorandum of Law in Support of their Motion to Dismiss. (LF023-LF035). As grounds for the dismissal of Count I, Respondents stated that Appellants had not and could not plead that they had standing to bring this action. (LF024-LF025, LF030-LF032). Respondents asserted that even if Appellants succeeded in their claims, that they would not be entitled to anything as a matter of law. (LF024-LF025, LF030-LF032). Assuming Appellants prevailed and the Joint Trust was invalidated, Respondents argued that the assets of the Joint Trust would end up in a resulting trust in favor of the probate estate of Harry Schoepp, which would be administered pursuant to the terms of Harry Schoepp's duly probated Will of which Appellants were not legatees. (LF024-LF025, LF030-LF032). Because Appellants did not attempt to challenge the Will of Harry Schoepp or file evidence of their alleged purported prior will within the timeframes set forth in Mo. Rev. Stat. Chapter 473,

Appellants could not succeed. (LF024-LF025, LF030-LF032). Appellants, in fact, have never provided any evidence of a will upon which they would rely other than a twenty-year old note relating to alleged loan forgiveness by Olivia Schoepp to Timothy Lynch. That document was never even presented to the probate court. Petitioners' Brief, Appendix A-15.

Respondents moved to dismiss Count II on the basis that Appellants failed to plead or attach the alleged contract to make a will, which is required to be in writing, signed, and attached to the Petition under Mo. Rev. Stat. § 474.155 and Missouri Rule of Civil Procedure 55.22. (LF025-LF026, LF0032-LF034). After a hearing, Judge Seigel dismissed both counts of Appellants' Petition with prejudice. (LF039). Appellants filed a Motion for New Trial and Memorandum in Support that set forth their argument only as to why Count I should not have been dismissed.¹ (LF040-LF048). After a hearing, Judge Seigel denied the Motion for New Trial. (LF057).

An appeal to the Court of Appeals for the Eastern District followed. Division Two of the Court of Appeals for the Eastern District unanimously affirmed the Circuit Court's dismissal of the Petition in a published opinion by Judge George W. Draper, III and

¹ Appellants expressly abandoned Count II and have failed to address Count II in their Brief. As they have not asserted any error in the dismissal of that count in their Brief, that argument is considered abandoned. *See* Rule 84.04; Kehrer v. Correctional Medical Services, 180 S.W.3d 9, 12 (Mo. App. E.D. 2005). As such, this Brief will not address this abandoned claim.

concurrent in by Judge Booker T. Shaw and Judge Robert G. Dowd, Jr. Appellants' Motion for Rehearing or, alternatively, for Transfer to this Court, was denied by the Court of Appeals for the Eastern District by way of an Order dated October 25, 2007.

Appellants thereafter filed a Motion for Transfer with this Court pursuant to Rule 83.04 on November 9, 2007, and that Motion was sustained and this matter was transferred to this Court on January 22, 2008.

ARGUMENT

DISMISSAL OF APPELLANTS' PETITION WAS APPROPRIATE IN THIS CASE IN THAT APPELLANTS FAILED TO DEMONSTRATE THAT THEY HAD STANDING TO CHALLENGE THE TRUST BECAUSE APPELLANTS HAVE NO INTEREST IN HARRY SCHOEPP'S WILL NOR DID THEY CHALLENGE THAT WILL OR FILE ANOTHER WILL DEMONSTRATING THAT THEY WOULD BE ENTITLED TO ANYTHING FROM HIS PROBATE ESTATE EVEN ASSUMING THE JOINT TRUST FAILED.

This section of Respondents' Brief addresses Appellants' sole Point Relied On.

A. Standard of Review.

This Court reviews the trial court's grant of a motion to dismiss *de novo*. Moynihan v. Gunn, 204 S.W.3d 230, 232-33 (Mo. App. E.D. 2006).² "When the trial court fails to state a basis for its dismissal, [the appellate court] presume[s] the dismissal was based on at least one of the grounds stated in the motion to dismiss." Id. The appellate court "can affirm the trial court's dismissal on any ground before the trial court in the motion to dismiss, even of that ground was not relied upon by the trial court in dismissing the claim." Id.

² Appellants incorrectly state that Respondents filed a Rule 55.27 Motion for Judgment on the Pleadings. Appellants' Brief, p.5. Respondents actually filed a Rule 55.27(a) Motion to Dismiss together with a Memorandum of Law in Support of that Motion. (LF023-LF035). This is the Motion that was granted by the trial court. (LF039).

“When reviewing the dismissal of a petition for failure to state a claim, appellate courts treat the facts contained in the petition as true and construe them liberally in favor of the plaintiffs.” Id. The appellate court “must determine whether the facts pleaded and reasonable inferences to be drawn from the allegations, as viewed in the light most favorable to the plaintiff, demonstrate any basis for relief.” Duvall v. Lawrence, 86 S.W.3d 74, 80 (Mo. App. E.D. 2002). “The petition must state allegations of fact in support of each essential element of the cause pleaded.” Id. “If the petition consists of only conclusions and does not contain ultimate facts or any allegations from which to infer those facts, a motion to dismiss is properly granted.” Id.

The appellate court’s “review of whether a litigant has standing is *de novo*.” F.W. Disposal South, LLC v. St. Louis County, 168 S.W.3d 607, 611 (Mo. App. E.D. 2005). The appellate court “determine[s] standing as a matter of law based on the petition and any other non-contested facts accepted as true at the time of the motion to dismiss.” Id. (internal citations omitted).

B. Appellants’ Petition Was Properly Dismissed.

A petition is properly dismissed if that petition, together with the non-contested facts accepted as true at the time of the motion to dismiss, demonstrates that the plaintiffs lack standing to assert the claims in the petition. *See* F.W. Disposal South, 168 S.W.3d at 611.

Since the filing of their Petition, Appellants have failed to ever present any evidence as to how they have standing in the current lawsuit. In their Petition, they allege only the fact that they “have the right to bring this action as interested persons because

petitioners were named legatees in a prior Will executed by the Decedents. (Date of prior Will unknown).” (LF003). As is set forth in detail below, however, this fact is insufficient as a matter of law to provide Appellants with standing to assert this action and as such, dismissal of their petition was and remains proper.

In their Brief, Appellants continue to present the same irrelevant analysis of the merits of their claims. As is evident from the following authorities, Appellants must plead and prove that they have standing to present a claim before a court even addresses the merits of that claim. Indeed the crux of Respondents’ Motion to Dismiss at the trial court and their Brief to this Court will be that irrespective of the merits of this case (and conceding them for these purposes only), Appellants do not stand to gain anything even if they could somehow prove their allegations. As such, they lack the required personal stake to give them standing and create a justiciable controversy in this matter.

Because of Appellants’ failure to address the relevant issues, Respondents have not directly addressed Appellants’ arguments. Rather, Respondents focus herein on the legal authority and facts that demonstrate that Appellants have not and cannot plead that they have standing to pursue this matter.

For Appellants to have standing in this matter, they would have to demonstrate that they have an interest in the probate estate of Harry Schoepp since the failure of the Joint Trust would, as a matter of law, create a resulting trust in favor of his probate estate. This interest can be demonstrated by: (1) showing that they have a current interest in the Will; (2) showing that they can benefit by timely and successfully contesting the Will; or (3) showing that they can benefit by timely and successfully filing their own will. Since

Appellants failed to do any of these things and the timeframes for now making these challenges have passed, dismissal of Appellants' Petition by the trial court was warranted and that dismissal should be affirmed.

“Standing to sue evaluates the sufficiency of a plaintiff’s interest in the subject of the lawsuit.” City of Wellston v. SBC Comm., Inc., 203 S.W.3d 189, 193 (Mo. App. E.D. 2006). “It is a concept used to ascertain if a party is sufficiently affected by the conduct complained of in the suit.” Id. “Standing is a jurisdictional matter antecedent to the right to relief.” Healthcare Serv. of the Ozarks v. Copeland, 198 S.W.3d 604, 612 (Mo. 2006) (discussing Farmer v. Kinder, 89 S.W.3d 447, 451 (Mo. 2002)). “Reduced to its essence, standing roughly means that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight or remote.” Moynihan, 204 S.W.3d at 233; F.W. Disposal South, 168 S.W.3d at 611 (internal citations omitted). “This ‘personal stake’ is shown by alleging threatened or actual injury resulting from the challenged action.” Moynihan, 204 S.W.3d at 233. “The party seeking relief must show that he is sufficiently affected by the challenged action to justify consideration by the court and that the action violates his particular rights and not those of some third party.” Id.

“Standing relates to the jurisdiction of the court, and to have standing a plaintiff must show she has some actual and justiciable interest susceptible of protection by her suit.” Dodson v. City of Wentzville, 133 S.W.3d 528, 533 (Mo. App. E.D. 2004) (internal citations omitted). “Persons seeking relief have no right to do so in the absence of standing.” Conseco Fin. Serv. Corp. v. Mo. Dep’t of Revenue, 98 S.W.3d 540, 544

(Mo. 2003). “To determine whether a party has standing is to ask ‘whether the persons seeking relief have a right to do so.’” Bannum v. City of St. Louis, 195 S.W.3d 541, 545 (Mo. App. E.D. 2006) (citing Farmer, 89 S.W.3d at 451). “Whether a party has standing is determined by the particular facts of each case.” F.W. Disposal South, 168 S.W.3d at 611.

“[C]ourts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented.” Farmer, 89 S.W.3d at 451; *see also* Healthcare Serv. of the Ozarks, 198 S.W.3d at 612. “Without standing, a court has no power to grant relief.” Singer v. Siedband, 138 S.W.3d 750, 752 (Mo. App. E.D. 2004).

“In the context of a declaratory judgment action, the plaintiff must have a legally protectable interest at stake in the outcome of the litigation.” F.W. Disposal South, 168 S.W.3d at 611 (internal citations omitted). “Standing may be raised at any time by a party or *sua sponte* by the court.” Singer, 138 S.W.3d at 752. “Lack of standing cannot be waived.” Farmer, 89 S.W.3d at 451. Lack of standing is appropriately raised on a motion to dismiss. *See* F.W. Disposal South, 168 S.W.3d at 611. A petition is properly dismissed if that petition, together with the non-contested facts accepted as true at the time of the motion to dismiss, demonstrates that the plaintiffs lack standing to assert the claims in the petition. *See id.* at 611.

Appellants claim below, although styled as an action for declaratory judgment and constructive trust, was in substance a claim seeking to set aside the Joint Trust and should

be construed as such. *See Weber v. Weber*, 908 S.W.2d 356, 359 (Mo. 1995). They sought to have the Joint Trust declared void and unenforceable and that a constructive trust be imposed in their favor and against Respondents. (LF004).

It is Appellants' apparent position that the Joint Trust is invalid because Olivia Schoepp allegedly lacked the capacity to execute the Joint Trust. (LF003). In their Petition, Appellants argue that "Olivia Schoepp . . . lacked the necessary testamentary capacity to execute a valid Trust" and that she "was subservient to and trusted her husband." (LF003). According to Appellants, this was caused by "Alzheimer [sic] disease." (LF003). Appellants continue to espouse this position in this appeal. Appellants' Brief, p. 3.

It is fundamental that in order to validly execute a trust, the settlor must have the requisite level of testamentary capacity. *See* Mo. Rev. Stat. § 456.4-402.1(1) ("a trust is created only if: (1) the settlor has capacity to create a trust") *and* Mo. Rev. Stat. § 456.6-601 ("The capacity required to create . . . a revocable trust . . . is the same as that required to make a will."). If the settlor lacks that capacity, a trust (and all parts thereof) cannot be validly created. In addition, if the execution of a trust is procured by undue influence, that trust is void. *See* Mo. Rev. Stat. § 456.4-406 ("A trust is void to the extent its creation was induced by . . . undue influence."). Taken as true for purposes of the motion, Respondents concede that those allegations (if proven by a party with standing) could invalidate the Joint Trust under Missouri law.

In order to even pursue this claim, however, Appellants must demonstrate that they stand to gain if they prevail in invalidating the Joint Trust – thus possessing the

“personal stake” Missouri law clearly requires to have standing to assert such an action. If they stand to gain by the direct failure of the Joint Trust, then they would have standing to assert this claim. If they do not stand to gain regardless of the outcome of this action, however, they would have no personal stake in the outcome of this matter and their lawsuit fails as a matter of law. It is with this issue that Appellants’ Petition fails, and as such, it was properly dismissed. Nothing in Appellants’ argument in this appeal requires or even suggests that a contrary result is proper.

The cases cited by Appellants in their Brief are inapposite and do not assist Appellants in their argument as in not one of those cases was the issue of standing ever raised. In Matthews v. Pratt, 367 S.W.2d 632 (Mo. 1963), the action was brought on behalf of the executor of an estate. There was no question that the successful prosecution of the case would lead to a recovery that would flow to the estate and as such, there was no issue or question that the executor stood in the shoes of the allegedly damaged party and had standing. Similarly, in McHenry v. Brown, 388 S.W.2d 797 (Mo. 1965), there was no doubt or issue that the plaintiff was the real party in interest and was the one that stood to gain by the successful prosecution of her lawsuit. Finally, in Jarman v. Eisenhauer, 744 S.W.2d 780 (Mo. banc 1988), the plaintiff that was trying to recover property was a joint tenant trying to recover joint property in which he had an interest and as such, there was no question as to whether that plaintiff stood to gain from the outcome of that action. Quite simply, Appellants have failed to cite one case, statute, or anything else that suggests they have standing to even assert this action. For the reasons set forth

below, it is clear they do not have the required standing and dismissal was therefore appropriate and should be affirmed.

If it is assumed (as it must be solely for purposes of this appeal) that the Joint Trust would fail as a result of Appellants' pleaded cause of action, the relevant question for standing purposes then focuses on what would happen to the assets of the Joint Trust upon that failure? As a matter of Missouri law, if the Joint Trust was to fail, then the assets that were contained therein would revert to the grantor of the trust or the grantor's probate estate if the grantor is deceased. The vehicle for this reversion is a resulting trust, not a constructive trust. *See* Theodore Short Trust v. Fuller, 7 S.W.3d 482, 493 n.14 (Mo. App. S.D. 1999) (discussing Restatement (Second) of Trusts § 411); Estate of McReynolds, 800 S.W.2d 798, 801 (Mo. App. E.D. 1990). As such, even assuming that the Joint Trust fails, the assets contained therein would be returned to the grantors of the Joint Trust in a resulting trust. Thus, if the Joint Trust was to fail, the assets of the Joint Trust would have properly ended up with Harry Schoepp and in his probate estate at his death. *See* Fuller, 7 S.W.3d at 493; Brandin v. Brandin, 918 S.W.2d 835, 840 (Mo. App. E.D. 1996) ("A successful trust contest would have resulted in the trust property passing into the decedent's estate to be distributed under his will.").

As such, the only persons that would have standing to challenge the Joint Trust are those with an interest in the probate estate of Harry Schoepp. The next issue is to determine who has such an interest. This would certainly include his personal representative as well as the legatees under Harry Schoepp's last valid and properly probated Will. But Appellants admit that they do not fall into either category. (LF003).

Appellants attached a copy of this Will to their Petition, and that document clearly provides that George Lynch is the personal representative of the probate estate and that the sole beneficiary of Harry Schoepp's probate estate if Olivia Schoepp predeceases him is "GEORGE A. LYNCH, as Trustee, under a certain Trust Agreement dated August 28, 2002 . . . [to] be held, administered, invested, reinvested, and distributed as a part thereof in accordance with the terms thereof." (LF007). Appellants are not beneficiaries of the Joint Trust. (LF012). As such, they have no current interest in the probate estate of Harry Schoepp.

Additionally, if and only if the Will was invalidated, then those with standing could also include those with an interest under a prior will or Harry Schoepp's heirs at law, but only if additional legal steps were taken within the required timeframes. If a person wishes to challenge someone else's trust, but is not interested in the probate estate of that person (and therefore stands to gain nothing from the resulting trust created in that estate), that putative beneficiary must also file an action to challenge the probate of that will under Mo. Rev. Stat. § 473.083; *See Brandin*, 918 S.W.2d at 841. That statute provides that any person wishing to challenge the will of a deceased person must do so by filing a petition with the circuit court "within six months after the date of the probate or rejection thereof by the probate division of the circuit court, or within six months after the first publication of notice of granting of letters on the estate of the decedent, whichever is later." Mo. Rev. Stat. § 473.083.1. Any successful trust contest by someone who has no interest must include a timely filed will contest as well and the failure to do so bars the trust contest. *See Brandin*, 918 S.W.2d at 841.

In this case, the Will was accepted to probate and letters testamentary were issued on July 25, 2005, to George Lynch and those letters were first published on July 28, 2005. (LF002). As such, any challenge to the probate of the Will would need to have been brought by no later than January 30, 2006. Mo. Rev. Stat. § 473.081.1. Respondents filed no such challenge and the jurisdictional timeframe for so filing elapsed more than two (2) years ago and as such, the probate of the Will is binding and can no longer be challenged. Mo. Rev. Stat. § 473.083.1. Any attempt to use this action to invalidate that properly probated and uncontested will would be an impermissible collateral attack on the judgment of the probate court. *See Brandin*, 918 S.W.2d at 841.

Even assuming Respondents had filed and succeeded in such a challenge, they would still stand to gain nothing from the estate of Harry Schoepp, as Appellants affirmatively admit in paragraph 5 of their Petition that they are not heirs of Harry Schoepp, but rather have an interest in his estate because they “were named legatees in a prior Will executed by the Decedents. (Date of prior Will unknown).” (LF003). To have an interest in Harry Schoepp’s estate, therefore, they would have needed to not only succeed in contesting his properly probated Will (which they failed to do and are time-barred from attempting to do so now), but also to seek admission of their own alleged will in accordance with the terms of Mo. Rev. Stat. § 473.050 to demonstrate that they stand to gain from the estate and therefore the failure of the Joint Trust. Mo. Rev. Stat. § 473.050 requires that any will of a deceased person must be presented no later than six months after the publication of letters testamentary. Mo. Rev. Stat. § 473.050.3. In this case, that date was again on January 30, 2006 – more than two (2) years ago. Appellants

filed no will or evidence thereof and none can be presented now as Appellants are out of time since “[a] will not presented for probate within [this time frame] is forever barred from admission to probate in this state. Mo. Rev. Stat. § 473.050.3.

These additional steps are required because the failure of a trust that has no provisions that control its failure requires that the assets end up in a resulting trust in favor of the deceased grantor’s estate to be administered pursuant to his or her will. *See Brandin*, 918 S.W.2d at 841. If someone other than the personal representative or legatees under that will wishes to challenge the trust, they must also eliminate that will and posit a set of facts under which they would stand to benefit. *Id.* Otherwise, the failure of the Joint Trust would enrich the legatees of the Will, but no one else, and certainly not Appellants.

Appellants have not and cannot allege that they took the necessary steps to contest the probate of the Will within the jurisdictional timeframe contained in Mo. Rev. Stat. § 473.083.1. Moreover, Appellants have not and cannot allege that they took the necessary steps to seek to have their own purported will admitted to probate within the jurisdictional timeframe contained in Mo. Rev. Stat. § 473.050. Both of these required steps needed to be taken more than two (2) years ago and they were not. As such, the probate of the Will is binding and Respondents can no longer seek admission of their purported will to probate. Mo. Rev. Stat. §§ 473.083.1 and 473.050.3.

Without these required and now time-barred steps, their entire case is a nonstarter and fails as a matter of law because they stand to gain nothing even if they succeed in their pleaded cause of action and they can never plead a set of facts upon which they will

have standing. Rather, if the Joint Trust failed, the assets of the Joint Trust would fall to a resulting trust in favor of the estate of Harry Schoepp to be administered pursuant to the terms of Harry Schoepp's duly admitted and probated Will that was attached to the Petition and which demonstrates clearly that Appellants have no interest thereunder. Stated another way, when Appellants became time-barred to contest the will or file their own will and thus gain anything from the probate estate, their lawsuit became futile and their cause of action moot because its outcome no longer mattered.

Because Appellants stand to gain nothing even if they succeed in the prosecution of their lawsuit, they have no personal stake in the outcome of that litigation. As such, they lack standing to challenge the Joint Trust and the dismissal of Count I of their Petition was and remains appropriate.

CONCLUSION

For these reasons, the dismissal of Appellants' Petition was proper and this Court should affirm that decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

John M. Challis, the undersigned attorney for Respondents, hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Respondents' Brief:

1. Complies with Missouri Supreme Court Rule 55.03;
2. Complies with the limitations in Missouri Rules of Civil Procedure 84.06(b) and 83.08(b);
3. Contains 4,871 words, excluding the cover page, tables of contents and authorities, signature blocks, appendix, certificate of service, and this certificate, according to the word count feature of Microsoft Word software, with which it was prepared;
4. Contains zero lines of monospaced type in the brief (excluding the cover, the signature block, the certificate of service, and this certificate); and
5. The disk accompanying this Respondents' Brief has been scanned for viruses and to the best knowledge, information, and belief of the undersigned, it is virus-free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing pleading were served, together with a diskette containing this document, via Federal Express, this 5th day of March 2008, to:

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