

IN THE SUPREME COURT OF MISSOURI

JOHN F. LYNCH, et al)
)
 Appellants,)
 vs.) SC 88923
)
 GEORGE A. LYNCH, et al)
)
 Respondents.)

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

TWENTY-FIRST JUDICIAL CIRCUIT

THE HONORABLE MARK D. SIEGEL, DIVISION 3 PRESIDING

Substitute Reply Brief of

Appellants, John F. Lynch, et al

1. Respondents' failure to deny or properly brief Appellants' allegations of error.

Respondents acknowledge in their Substitute Reply Brief that they have not cited a Missouri case overruling appellants' cited cases on constructive trust. They admit, "... because of Appellants' failure to address the relevant issues (standing) **Respondents have not directly addressed Appellants' argument** (on constructive trust) ...Rather, Respondents focus herein on the legal authority and facts that demonstrates that Appellants have not and cannot plead that they have standing to pursue this matter." (p. 12) (emphasis added). Because Respondents

have not denied Appellant's legal authority on the central issue, all their defenses on standing, resulting trust and failure to file probate proceedings fail. Rule 55.09 provides in relevant part "... Specific averments in a pleading to which a responsive pleading is required...are admitted when not denied...(and) are admitted when not denied in the responsive pleadings." Further, Rule 84.13 (a) provides in relevant part, " ... Allegations of error not briefed or not properly briefed shall not be considered in any civil appeal."

Therefore, Respondents' first argument here on Appellants' lack of standing is to no avail. Since the cases cited by appellants are still controlling, the trial court could never get to respondents' defenses and cannot question appellants standing to sue. The only thing the trial court can do is to assess Appellants damages and impose a constructive trust on each Respondents' share of the estate. Appellants will still address, however, the grounds given by Respondents in their Substitute Reply Brief.

2. "Standing" of appellants to sue.

In support of Respondents' allegations that Appellants have no standing to sue, Respondents cite a number of cases, where "standing" was at issue. The following cases have been cited in their brief as examples of the type of interest or lack of it needed to proceed:

- **Bannum v. City of St. Louis** - a suit by operator of half-way house to determine rights of residence;
- **City of Wellston v. SBC, Inc.** - suit to determine validity of telephone tax;
- **Conseco - Financial v. Mo Dept Revenue** - suit to challenge constitutional issue of

statutes;

- **Dodson v. City of Wentzville** - suit challenging city's voluntary annexation of land;
- **Duval v. Lawrence** - suit against sheriff and others alleging § 1983 violations;
- **Farmer v. Kinder** - suit by State Treasurer against Circuit Court judges to collect

funds;

- **Healthcare Services v. Copeland** - suit by Home Health Care provider against former employee for alleged violations of covenants not to compete;

- **F.W. Disposal v. St. Louis County** - declaratory judgment suit to enforce certain ordinances;

- **Moynihan v. Gun, et al.** - suit questioning status of city attorney to serve; and,

- **Kehrer v. Correctional Medical** - inmate brought class action lawsuit (pp 11-14).

None of the above cited cases pertain to the facts of this case and are of no help on the issue of standing.

Respondents argue that even if Appellants set aside the Trust on the grounds pled in their petition, they still do not stand to gain because they have no personal stake in the outcome and their lawsuit fails as a matter of law. (p. 16). However, no cases are cited to support this conclusion.

Respondents believe the following cases cited by appellants are “inapposite” and “do not assist Appellants in their argument as in not one of those cases was the issue of standing ever raised.” (p. 16) Respondents agree that in each of the three cases appellants cited,

plaintiff there had standing. In each of the three cases cited by Appellants, their “interest” was the value of assets wrongfully taken by another, just as in Appellants’ case here, and therefore, Appellants respectfully maintain they are directly on point.

The first case Appellants cited, **Matthews v. Pratt**, was an equity claim filed in the circuit court to invoke a constructive trust on the deceased’s probate assets that had wrongfully been co-mingled with defendant’s assets. Defendant there argued, as Respondents here have argued, that plaintiff filed the wrong type of suit, in that Probate Court had exclusive jurisdiction in a discovery of assets proceeding to determine title to property. The Supreme Court reversed the trial court and held, “ probate jurisdiction could only be concurrent, for the inherent jurisdiction of our circuit courts to establish, declare and enforce trusts may certainly not be foreclosed by probate jurisdiction...” **Id** at 637.

The second case Appellants cited, **McHenry v. Brown**, was an action to establish a constructive trust on probate assets of the deceased who had falsely represented to plaintiff he was not married. No claims were filed in the probate proceedings. Defendant argued one of the counts, Count VII, should have been filed as a claim in the probate estate and thereby subject to time limitations. The court denied this argument, holding the claim was not time barred, as Count VII would be treated as an equitable claim and the Circuit Court had jurisdiction to hear such a claim.

The final case, **Jarman v. Eisenhauer**, was a declaratory judgment suit to determine ownership to certificates of deposit. Defendant there maintained that a §473.340 RSMo (1986) (Discovery of Assets) (A-22,23) claim should have been filed instead of an equity

claim. The court noted such a claim was permissive, not mandatory, and the equity suit was not time barred by the discovery of assets statute.

The three above mentioned cases, that Respondents argue are not helpful to Appellants, are factually almost identical to this case, in that each plaintiff had an equitable claim to recover assets wrongfully taken by the defendant. In each case, the defense argued the claim should have been filed in probate, just as here claimed by the Respondents, and in each case the court ruled for plaintiffs, holding plaintiffs had an election of remedies, either in Circuit Court or Probate Court and the choice was up to the plaintiff.

3. **Resulting Trust.**

Respondents argue, "... 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 grantors probate estate if the grantor is deceased... The vehicle for this reversion is a resulting trust, not a constructive trust. " (p.17) Respondents continue, that with a resulting trust, the Schoepp assets "...would have properly ended up with Harry Schoepp and in his probate estate at his death... As such, the only persons that would have standing to challenge the joint trust are those with an interest in the estate of Harry Schoepp ... which are the personal representative and legatees under Harry Schoepp's last valid and properly probated Will." (Respondents herein, p. 17)

Respondents seem to misunderstand a resulting trust and have misapplied here the consequences of its existence. The distinction between a resulting trust and a constructive trust has been noted in of **Matlock v. Matlock**, 815 SW2d 110, 114 (Mo. App. 1991) :

“ A resulting trust arises where property is transferred under circumstances that raise an inference that the person who makes the transfer or causes it to be made did not intend the transferee to take the beneficial interest in the property. On the other hand, a constructive trust is imposed where a person who holds title to property is under a duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. A constructive trust arises without regard to the intention of the parties. **Fratcher, Scott on Trusts § 440.1 (4th ed. 1989).**”

A resulting trust has been described “... a party who supplies the funds necessary to purchase a certain parcel of property has the intention to receive the benefits of that property.” **Dallas v. Dallas**, 670 SW 2d 535, 539 (Mo. App. 1984). Normally, a resulting trust results in a fact situation, like **Theodore Short Trust** cited by respondents. The transferor created a private trust and funds were left in the trust when the trust terminated. The court ruled the excess assets held in the resulting trust were to be distributed to the heirs at law of the Grantor. See **Theodore Short Trust**.

Here, the assets of the Schoepp will and trust, under the facts here stipulated to, created a constructive trust, not a resulting trust.

4. Appellants' claims are time barred pursuant to (§473.050.3 and §473.083.1 RSMo) (p. 20).

Appellants are not seeking to probate either of the Schoepps wills. Appellants have elected to proceed in the Circuit Court in equity. The choice of which claim to file against respondent is made by the appellants and therefore the time frames are governed by §456.220

RSMo. (A-21).

Respondents argue that “... 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 §473.083. See, **Brandin**, 918 SW2d at 841.” (Respondents’ herein, p. 18)

Brandin was a case where minor children filed suit against their step-mother for tortious interference with an inheritance expectancy. The court found the children’s pleadings were “inadequate” and ruled that the “ ... children had an available forum in which to seek the invalidation of the trust instrument on the grounds of wife’s undue influence ... (and) gave children an adequate remedy.” Id at 840. The court continued “... a will contest was necessary under the facts of this case, whether children would have contested the trust to have it set aside or through a tortious interference claim.” Id at 841. Therefore, since a will contest was not necessary here, **Brandin** does not apply here.

Respondents argue that the Schoepps’ first and second wills are not admissible in court because they were not timely offered, and contested in the probate proceedings. Having failed to do this, Respondents reason, appellants do not now have standing to pursue their declaratory judgment action in that, since the probate statute of limitations has expired, so have their claims. The Schoepps’ first will is admissible at trial, whether probated or not, to show the agreement and intent of the Schoepps on the distribution of their assets and to also show the

interest Appellants may have in their estate.

CONCLUSION

For the reasons stated in the original substitute brief and this substitute reply brief, the trial court order should be reversed and an Order entered for Appellants and against Respondents and this cause should be remanded to the trial court for trial on the merits.

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CERTIFICATE OF SERVICE

The undersigned states two copies of respondent's brief were mailed this 20th day of March, 2008, to John M. Challis, Attorney for Respondents, 7733 Forsyth, 12th Floor, Clayton, MO 63105.

Harold G. Johnson

**CERTIFICATION OF SERVICE AND OF
COMPLIANCE WITH RULE 84.06 (b) and (c)**

The undersigned hereby certifies that on the 20 day of March, 2008, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid to:

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The undersigned certifies that the foregoing brief complies with the limitations in Rule No. 84.06 (b) and that the brief contains 1968 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Harold G. Johnson

**APPENDIX
OF
APPELLANTS**

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