

IN THE SUPREME COURT OF MISSOURI

In The Estate of Elden)	
Choisser, Deceased)	
)	
Cynthia Kleim,)	Missouri Court of Appeals
Plaintiff-Appellant)	Eastern District No. ED89162
)	
vs.)	Supreme Court No. SC88749
)	
Gregory Sansone,)	
Defendant-Respondent)	

Appeal From the Eastern District of the Missouri Court of Appeals

APPELLANT’S SUBSTITUTE REPLY BRIEF

Party

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ARGUMENT

I. APPELLANT NAMED AND TIMELY SERVED ALL NECESSARY PARTIES BY SERVING RESPONDENT, THE PERSONAL REPRESENTATIVE AND BENEFICIARY OF 99.59% OF THE DECEDENT’S PROBATE ASSETS, UNDER RSMo §472.300¹ PROVIDING FOR VIRTUAL REPRESENTATION.

Contrary to Respondent’s assertion, Appellant did name and serve all necessary parties within 90 days of filing her petition. Respondent has again relied on and cited outdated cases, misinterpreted cases, incorrectly cited holdings and ignored more recently enacted statutes that affect the common law rules of joinder.

Two statutes provide the rules for determining the necessary parties to a will contest. Section RSMo 473.083.3 provides the general rule for determining joinder in a will contest and contains an express reference to RSMo §472.300 which provides an exception to the general rule. Both statutes must be read together to ascertain the general rule and exceptions for determining rules of joinder. *See Zimmerman v. Preuss*, 725 S.W. 2d 876 (Mo. Banc 1987) and *Gartenberg v. Gartenberg*, No. 67218, Mo. App. E.D. December 26, 1995; 1995 WL 757744 (Mo. App. E. D. 1995).

¹ All statutory references are to Missouri Revised Statutes (2000) unless otherwise indicated.

In Zimmerman, the Missouri Supreme Court set forth the new rule governing who must be joined in will contests. The court first mentioned the old rule that "all necessary party defendants [must] be named and served within the prescribed period." Id. at 877. It continued "with few exceptions ... before subsection 3 became effective January 1, 1981 ... all 'interested persons' were deemed necessary parties." Id. The court then established the *new* rule for joinder referring to subsection 3 of 473.083 which became effective in Jan 1981:

"However, the new subsection 3 mandates joinder only of those persons whose interests will be affected adversely by the result of the will contest *or who are not virtually represented under §472.300*" [ital. added]. Id. at 877.

In articulating the new rule, Zimmerman looks to §473.083.3 and follows this statute's express reference to RSMo §472.300. Section 472.300 provides for "virtual representation", *i.e.* certain parties not only represent themselves but also represent others who are specifically associated with them and therefore the associated persons do not have to be named and served as parties. Gartenberg. Section 472.300 provides in part:

472.300 In judicial proceedings involving trusts or estates of decedents, ... the following apply....

(2) Persons are bound by orders binding others in the following cases

...

(b) to the extent there is no conflict of interest between them or among persons represented...*orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate (ital. added)....*"

(3) Notice is required as follows:

(a) Notice ... shall be given to every interested person, or to one who can bind an interested person as described in paragraph (a) and (b) of subdivision (2) above. "

Zimmerman and the new joinder rule were further elaborated on in Gartenberg. There the personal representative, a beneficiary under a contested pour-over will, and the trustee of the testamentary trust created thereunder were named party defendants. The personal representative-beneficiary and the trustee argued that the failure to serve the two other trust beneficiaries mandated dismissal. The appellate court disagreed, concluding that §473.083's reference to §472.300 permitted trust beneficiaries to be virtually represented by the trustee in a will contest. Gartenberg. In reaching its conclusion, the court commented:

"Section 473.083.3 provides the legislative rule for determining proper parties to a will contest, and reads:

'It is not necessary to join as parties in a will contest persons whose interests will not be affected adversely by the result thereof. Subject to the provisions of section 472.300 RSMo, persons not joined as parties in a will contest are not bound by the result thereof' " Id.

The court further stated that "the second sentence of subsection 3 specifically subjects this section to the provisions of §472.300 which provides for virtual representation of parties by specified associated persons." Gartenberg. The Gartenberg court discussed and quoted extensively from Zimmerman:

"our Supreme Court stated §472.300 virtual representation may be considered in determining the parties to be joined in a will contest: subsection 3 mandates joinder only of those persons whose interests will be affected adversely by the result of the will contest or who are not virtually represented under §472.300" . Gartenberg quoting Zimmerman.

The Gartenberg court explained that "the explicit reference to §472.300 in the will contest statute was a clear indication of the legislative intent to provide for meaningful virtual representation of specified adversely affected persons in will contest proceedings." Gartenberg. Based upon Zimmerman and the statutory scheme the court stated "We ... *hold [ital. added]* it is not necessary under §473.083.3 to join and serve a party to a will contest where that person is virtually

represented under §472.300". Gartenberg. Respondent misstates the holding in Gartenberg, misunderstands how virtual representation applies to trusts and will contests and never mentions RSMo §472.300. (Respondent Substitute Brief 11). Respondent attempts to limit virtual representation to trustees and ignores RSMo §472.300's express reference to service on personal representatives. (Id.) Because Gartenberg involved a pour-over will and testamentary trust it was necessary to serve the trustee as well as the personal representative. However, in the case at bar, the decedent's will is not a pour-over will and it does not contain any trusts. Thus, there is no trustee to serve nor any reason to do so.

In the instant case, Respondent, the personal representative and primary beneficiary under the contested will, was served as a party defendant. Section 472.083.3 expressly refers to §472.300(2)(b) which provides that in judicial proceedings involving estates of decedents "orders binding a *personal representative [ital. added]* bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate." According to these statutes, Respondent as personal representative virtually represents the other three unnamed beneficiaries of the contested will. Respondent's Substitute Brief misstates the holding in Gartenberg by claiming that the rule only applies to trustees. (Respondent Substitute Brief 11). Furthermore, Respondent omits any reference what so ever to RSMo §473.200. The fact that Respondent stands to

inherit 99.59% of the decedent's assets virtually guarantees that he will vigorously fight to protect the interests of all beneficiaries in the estate, who are the recipient of Decedent's books and dog, and Appellant's mother, recipient of one share of Decedent's estate. This conclusion results from a plain reading of the statutes, makes for sound policy and promotes judicial efficiency.

II. NEW ISSUE MAY NOT BE RAISED ON APPEAL FOR THE FIRST TIME.

In Respondent's Brief to the Court of Appeals, Respondent alleged for the very first time that Appellant failed to serve and name necessary parties to the action. (Respondent's Substitute Brief 7). It is well established that a new issue, an affirmative defense, not pleaded, presented, or passed on in the trial court, cannot be presented for the first time on appeal. Gross v. Merchants-Produce Bank, 390 S.W. 2d 591 (Mo. App. 1965). In Respondent's Substitute Brief he again raises this issue and confuses subject matter jurisdiction, which may be raised at any time, with service, an element of procedural due process and part of personal jurisdiction, which may be waived.

a. Respondent Waived His Objection to Service Under Rule 55.27(g)(1)(C)(a).

One purpose of service is to provide notice. Notice and the opportunity to be heard comprise the core of procedural due process. Additionally, service is a method of obtaining personal jurisdiction over a party. However, service may be waived. Rule 55.27(g)(1)(C)(a). It is indisputable that Respondent was served, accepted service, entered an appearance, filed an Answer, made an offer of settlement, attended status conferences and filed at least five pleadings relating solely to the will contest before raising the issue of service for the first time in his

appellate brief. (Legal File 15, 17, 30, 39, 51, Respondent's Appellate Brief 7). At no time prior to the filing of his appellate brief did Respondent object in any way to service.

Respondent mistakenly claims that he raised this issue in his Answer by pleading the affirmative defense of failure to state a claim. Here, Respondent confuses failure to state a claim on which relief may be granted, which invokes substantive rights and subject matter jurisdiction, with procedural due process and personal jurisdiction. While Respondent cites Rule 55.27(g)(2) that failure to state a claim refers to jurisdiction which may be raised for the first time on appeal, the sentence immediately following and that is part of Respondent's quotation expressly refers to *subject matter* jurisdiction. (Respondent's Substitute Brief 13). Appellant agrees that *subject matter* jurisdiction may be raised at any time. However, service is a procedural matter subject to waiver and Respondent's actions clearly evidence waiver. Additionally, Rule 55.27(g)(C)(B) provides that defenses of insufficiency of process and/or service of process are waived if they are not made by separate motion or stated in responsive pleadings. Respondent filed seven pleadings, consisting of Applications for Probate of Will and Letters, Entry of Appearance, Answer, Motion to Dismiss, Motion opposing Appellant's motion for probate court to hear case, and a Reply to Plaintiff's Response to Respondent's Motion to Dismiss, and none contain any objections to lack of

service or insufficiency of process. (Legal File 6-9, 15-19, 30-34, 39-44, 51-54). Respondent has clearly waived his right to contest service under Rule 55.27(g). State of Missouri, ex rel. Uptergrove v. Russell, 871 S.W. 2d 27 (Mo. App. W.D. 1993), discusses waiver where a defendant responded to the merits of a petition, his answer raised one Rule 55.27 defense of failure to state a claim, without combining other 55.27 defenses and discovery had been initiated prior to defendant's objection. The court held that there was a clear waiver of objection to service. Uptergrove at 30.

III. APPELLANT TIMELY FILED HER PETITION AND MET THE REQUIREMENTS OF RSMO §473.083.1.

a. Interpretation of RSMo §473.083.1.

Although Respondent's claims that a "person must meet two elements in order to contest a will" under RSMo §473.083.1., he cites no authority what so ever in support thereof. (Respondent's Substitute Brief 15). Section 473.083.1. of RSMo is a statute of limitation and only provides for the determination of the date *after* which it is too *late* to file a will contest. The statute does not contain any express language indicating when a will contest must be *initiated*. Only one date is specified, an *ending* date, which is calculated by reference to the date which is the last to occur of three specified events contained in the statute. According to the statute, a person must appear "within six months after" the last to occur of the three specified events. The key word is "within" and it has been interpreted as meaning not later than the ending date provided in the statutes under examination. *Accord. Estate of Schler v. Benson*, 947 S.W. 2d 495 (Mo. App. 1997) and the cases cited therein. Since Appellant filed her petition *before* the last to occur of admission or rejection to probate or the date of publication her petition was timely filed under RSMo §473.083.1.

b. Respondent Misinterprets Cases and Incorrectly Cites Holdings.

Respondent claims that there is a "six month window" in which to file a will contest and cites Bosworth v. Sewell, 918 S.W. 2d 773 (Mo. 1996). This interpretation not only conflicts with the plain language of the statute but also is not the holding in Bosworth, which concerned the lack of notice to heirs, who contested a will after the expiration of the statute of limitations. There the court found that failure to provide the information required in the Application for Letters under §473.017, resulting in faulty notice under §473.033, precluded the running of the statute of limitations while the estate was open. Id. The court stated:

"We hold that the requirements of §§473.017 [Application for Letters] and 473.033 [Publication] must be followed before the statutory bar of §473.083 may be exercised to exclude a will contest in an open estate." Bosworth at 776.

In fact the court specifically limited its ruling, stating that:

"We condition our holding in this case to contest actions brought *after* [*ital. added*] the six-month time period described in §473.083, but before the final Disposition of the estate." Bosworth at 777.

The issue and facts in Bosworth are very different from the instant case. In the case at bar, there was no faulty Application or Publication and Appellant's petition was filed before the expiration of the statute of limitations in the same court where the

estate was pending. While Bosworth contains *dicta* about a "six month window" that is neither the issue, focus nor holding of the case.

Similarly, Respondent repeats *dicta* from Gillman v. Mercantile Trust Co. Nat'l Ass'n, 629 S.W. 2d 441 (Mo. App. 1981). (Respondent's Substitute Brief 17). Respondent misconstrues the holding of that case by emphasizing *dicta* instead of analyzing the facts *vis-à-vis* the court's holding. The court in Gillman held that because the plaintiff never presented a will to the probate court within the meaning of §473.050 RSMo 1978, the Plaintiff lacked *standing* to bring the action and therefore the court lacked jurisdiction. Gillman at 446. In Gillman, the plaintiff was neither an heir of the decedent nor a beneficiary under the will admitted to probate. Plaintiff contested the will admitted to probate without presenting the prior will wherein plaintiff was a legatee. Thus, if plaintiff's contest was successful intestacy would result. Since Plaintiff was neither an heir at law of the decedent nor a beneficiary under the will admitted to probate the court found that plaintiff lacked standing and therefore could not bring suit. Gillman at 446. Thus, under the facts in Gillman, where plaintiff was neither an heir nor a legatee under the only will admitted to probate it was necessary for the plaintiff to request admission of the will to probate so that plaintiff would have standing to contest the first will admitted to probate. In Gillman, requiring a condition precedent to bring a will contest is not the holding or thrust of the case. In the instant case the issue is

not standing and Appellant is an heir and legatee. Therefore, Gillman, and particularly the *dicta* therein, is inapplicable to the case at bar.

Respondent also tries to validate Gillman by claiming that the court in Lopiccolo v. Semar, 890 S.W. 2d 754 (Mo. App. 1995), did not disavow Gillman's construction of §473.083. (Respondent's Substitute Brief 18). However, the court in Lopiccolo clearly recognized that "The Gillman case states in *dicta*, without supporting citation, that the 'action' of the probate court is a condition precedent to bringing a suit to set aside or establish a will." Lopiccolo at 758. Contrary to Respondent's claim, the result in Lopiccolo conflicts with Gillman. In Lopiccolo, the plaintiffs in a will contest argued that the trial court lacked jurisdiction to rule on defendants' third party petition and cross claim because they were filed *before* the probate court rejected a will. Lopiccolo at 757. However, the court in Lopiccolo disagreed and stated that "Presentment was complete when the will was filed together with the petition for probate of will and for letters testamentary." Lopiccolo at 757. "That the probate court did not rule on the will until after the statutory deadline for presentment is not relevant to the issue of timely presentment." Lopiccolo at 758. Thus, the court decided that as long as a will is timely presented for admission to probate that it is immaterial whether a petition to contest a will is filed before the court's decision. Therefore, under Lopiccolo, the court in Kliem had jurisdiction over Appellant's petition even though it was filed

prior to the will's admission to probate since the will was already properly before the court. See Lopiccolo at 758.

The above cases demonstrate that Respondent has repeatedly mischaracterized, misinterpreted and incorrectly quoted *dicta* as holdings. The cases cited by Respondent are factually very different from the case at bar. Additionally, some of Respondent's cases concern the filing of a will contest *after* the tolling of the statute of limitations. In the case at bar, Appellant filed her petition *prior* to the expiration date contained in the statute of limitations.

c. Respondent Waived the Affirmative Defense of the Statute of Limitations Under Rule 55.08.

The real issue in this case is whether a court has jurisdiction to hear a will contest that was filed in the same court where the Applications for Probate of Will and Letters Testamentary were already pending but before Letters Testamentary were issued. In this case, for some inexplicable reason the probate court delayed over eight and one-half months before issuing Letters. However, during this time Respondent filed an Appearance and Answer, made an offer of settlement and attended court status conferences and discovery had begun. Respondent waited for over one year before filing his motion to dismiss. Respondent's answer to Appellant's petition merely alleged failure to state a cause of action without citing any reasons therefore and raised no jurisdictional, venue or service objections. The

statute of limitations is an affirmative defense and must be plead with particularity. Rule 55.08. "A party desiring to avail himself of the statute of limitations must plead the particular statute upon which he relies." Ryan v. Spiegelhalter, WD58466 (Mo. App. 2001), *aff'd*, 64 S.W. 3d 302 (Mo. 2002). Even more stringent is the requirement that "one seeking to take advantage of the statute of limitations 'must plead the very provision on which he depends'". Id. Respondent's answer never even mentioned the statute of limitations. Accordingly, Respondent waived his right to this defense just as he raised his objection to service.

d. Respondent Waived Objection to Insufficiency of Process Under Rule 55.27(g)(C)(B).

Respondent never raised any questions about a "condition precedent" and it appears that he waived this objection as well. The claim of an alleged condition precedent constitutes nothing more than a claim of insufficiency of the legal process. The defense of insufficiency of process is waived if it is not made by separate motion or stated in responsive pleadings. Rule 55.27(g)(C)(B). Respondent filed five pleadings yet none contained any objections to insufficiency of process. (Legal File 6-9, 15-19, 30-34, 39-44, 51-54). Respondent has clearly waived his right to contest insufficiency of process under Rule 55.27(g).

IV. THE PROBATE COURT HAD JURISDICTION OVER APPELLANT'S PETITION WHICH WAS ON FILE THE DATE THAT THE DECEDENT'S WILL WAS ADMITTED TO PROBATE.

RSMo §472.020 bestows jurisdiction upon the probate division of the circuit court "to hear and determine all matters pertaining to probate business...". RSMo §472.020. The administration of an estate from the filing of the application for letters until final distribution and the discharge of the last personal representative is one proceeding for purposes of jurisdiction and is a proceeding in rem. RSMo §473.013. The probate code was not meant to be read in fragments, but as a single process governing the administration of a decedent's estate. Bosworth at 776. Based upon the above, the probate court had jurisdiction to hear Appellant's petition which was on file the date that decedent's will was admitted to probate. To require Appellant to dismiss her petition and then re-file in the same court where the decedent's estate was being administered defies common sense. The fact that the purpose of a will contest is to determine whether there is a valid will of the decedent virtually guarantees that litigants will not file such a contest unless there are already proponents of a will. The flood gates of litigation will not be opened when, as here, the petition is filed in the same court where the estate of the decedent is already pending.

a. Appellant's Citations Are Directly Applicable to the Instant Case.

The cases cited by Respondent are factually different from the case at bar and do not address the same issues as here. Schler and the cases cited therein interpret virtually the same language as that contained in RSMo §473.083.1. The cases cited in Schler are also factually more similar to the instant case and are almost directly on point. Those cases involve a decedent's estate and the filing of a creditor's or spouse's claim prior to the filing of an application to even open an estate and/or also before the issuance of Letters. In all of those cases the various state supreme courts upheld the "premature" filings or found no condition precedent required prior to the filing of the creditor's and/or spouse's claims.

b. Right to Contest a Will is a Constitutionally Protected Right Under the 14th Amendment.

The right to contest a will is a substantive property right protected by the 14th Amendment Due Process Clause. *See Kinsella v. Landa*, 600 S.W. 2d 104 (Mo. App. 1980). Courts should not hastily deprive persons of constitutionally protected rights. The probate court's unusual and inexplicable delay in issuing Letters and the hearing of Appellant's action for over a year in conjunction with the Respondent's participation and withholding of objections prejudiced Appellant's position. Certainly if a creditor's claim that is filed early is worthy of being upheld so is a petition to contest a will. To deny Appellant her only

opportunity to be heard for “premature filing” or failure to comply with unstated and at best ambiguous statutory language is a travesty, especially when no one was prejudiced. Summarily dismissing cases on the basis of hyper-technical procedural rules is repugnant to justice and breeds disrespect for the law. Statutes of Limitations are meant to sanction parties who file *late* not early. By hearing Appellant’s action a decision will be made on the merits, promoting the integrity of the laws of decedent’s estates. This Court should uphold Appellant’s action and grant her a day in court to contest her father’s will to avoid an egregious miscarriage of justice and an unduly harsh result.

V. RESPONDENT'S OMITTED FACTS AND DISTORTED THE DECISIONS OF THE PROBATE AND APPELLATE COURTS.

Respondent's Substitute Brief makes several incorrect statements and omissions of fact about the decisions of the probate and appellate courts which are not supported by the Legal File. At no time did the probate judge warn or even hint that Appellant's action was not timely filed. At the hearing to compel discovery called by Plaintiff, Probate Judge Hyde stated, for the first time, that he believed he could not hear the case and thought that only the circuit court was the proper forum. Judge Hyde did not step outside his judicial role and offer legal advice and/or strategy or tell Appellant to re-file. Judge Hyde was concerned with venue. Appellant's Memorandum, tabling her motions on discovery until such time as the Probate Court *transferred* her action to the Circuit Court of Washington County, is consistent with Judge Hyde questioning whether the probate court was the proper forum. (Legal File 26). Appellant's appeal to the appellate court claimed it was error for the probate court to refuse to transfer her case. (Appellant's Brief). Respondent argued otherwise in his appellate brief, a position abandoned in his Substitute Brief.

The court of appeals agreed with Appellant that a misfiled petition does not deprive a court of jurisdiction and merely requires transfer to the appropriate division and concluded that the probate court erred in dismissing the case for lack

of subject matter jurisdiction on this ground. Kliem v. Sansone, 2007 WL 1975919 (Mo. App. E.D. 2007) at 2. However, the appellate court inferred that a condition precedent, not stated in RSMo §473.083, required the probate court to first admit or reject the will to probate. Kleim at 2. Based on this inference, the appellate court denied points one and two of Appellant's brief. Kleim at 4. While the appellate court affirmed the probate's court decision it did so on issues that the probate court and the parties hereto neither considered nor briefed, facts omitted and contrary to the statements and impressions created by Respondent's Substitute Brief. (Respondent's Substitute Brief 8).

CONCLUSION

A condition precedent is not stated in nor required by RSMo §473.083 in order to file a will contest. Appellant's petition to contest the will of Eldon Choisser was filed within the statute of limitations, and Respondent and all necessary parties had actual or legal notice of this action. The Washington County Circuit Court Probate Division had subject matter jurisdiction and failed to transfer this action as requested by Appellant and mandated by RSMo 476.410. This Court should reverse the decision of the Eastern Division of the Missouri Court of Appeals, find that the Washington County Circuit Court has jurisdiction over this action and remand this case to that court for further proceedings not inconsistent with this Court's opinion.

CERTIFICATE OF SERVICE

The undersigned hereby certify that on this ____ day of December 2007 four true and correct copies and one disk of the foregoing Appellant's Substitute Reply Brief were hand delivered to Joseph R. Dulle and Paul J. Puricelli, at 7733 Forsyth, Ste. 500, Clayton, Missouri 63105.

CERTIFICATION OF COMPLIANCE WITH RULE 84.06

The undersigned certify that the foregoing Appellant's Substitute Reply Brief complies with the limitations contained in Rule 84.06(b) and that the brief contains less than or 7,750 words.

The undersigned further certify that the labeled disk, in Microsoft Word format, simultaneously filed with the hard copies of Appellant's Substitute Reply Brief, has been scanned for viruses and is virus-free.

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APPENDIX

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