

Summary of SC89982, *State ex rel. Luanne S. Unnerstall, Protectee, by Anna Leighton, her Conservator v. The Honorable John B. Berkemeyer*

Proceeding originating in the Franklin County circuit court, Judge John B. Berkemeyer
Opinion issued Nov. 17, 2009

Attorneys: Luanne Unnerstall was represented by Clifford S. Brown and Emily J. Kembell of Carnahan, Evans, Cantwell & Brown P.C. in Springfield, (417) 447-4400; Gary Unnerstall was represented by Richard A. Wunderlich and Sarah Mullen-Dominguez of Lewis, Rice & Fingersh L.C. in St. Louis, (314) 444-7600; and Harold Unnerstall's children were represented by Kurt A. Voss of Zick, Voss & Politte P.C. in Washington, Mo., (636) 239-1616.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A widow challenges the probate division's judgment admitting her late husband's purported will to probate and granting his nephew letters of administration in accordance with that purported will. In a unanimous decision written by Judge Michael A. Wolff, the Supreme Court of Missouri makes permanent its writ directing the probate division to vacate its previous judgment and instead enter its order declaring that her husband died without a will and granting her letters permitting her to administer the estate. The nephew failed to present the purported will within one year of the husband's death, as the relevant statute requires. The fact that he did not believe there were assets subject to the will does not change this requirement, as the statute permits letters of administration to be granted at any time assets are discovered, as long as the will was presented in a timely manner.

Facts: In March 2007, on the first anniversary of the death of her husband (Harold Unnerstall), Luanne Unnerstall filed a petition in the probate division of the circuit court to administer his estate in accordance with state law for one who dies without a will. About a month later, the husband's nephew, Gary Unnerstall, presented to the probate division a will naming him as executor that he alleged his uncle executed during his life. On the day of the probate division's May 2007 hearing on the widow's petition, the nephew filed an affidavit stating he had not opened a probate estate on his uncle's behalf because he believed all his uncle's assets at the time of his death were held in a revocable living trust that was not subject to probate administration. The probate division gave the parties time to submit memoranda of law, and the probate division judge later recused himself from the case without making a decision. In September 2008, the nephew filed an application to probate the purported will. Under the new judge, the probate division in November 2008 entered an order and judgment – over the widow's objections – admitting the purported will and granting letters testamentary to the nephew (giving the nephew the power to execute the terms of the will). The widow seeks this Court's writ

requiring the probate division to vacate its orders admitting the purported will and instead grant letters testamentary to her and enter an order declaring that her husband died without a will.

WRIT MADE PERMANENT.

Court en banc holds: (1) In the past, this Court has used different terminology for its writs based on whether the case involves an issue in prohibition (an original remedial writ to prohibit a court from exercising jurisdiction it does not possess or exceeding its jurisdiction) or mandamus (an original writ to compel courts and others to exercise judicial or ministerial powers invested in them). In an action for prohibition, this Court initially issued a “preliminary writ” that it later quashed or “made absolute.” In an action for mandamus, this Court initially issued an “alternative writ” that it later quashed or “made peremptory.” Parties often are confused about the difference between the two actions and, as a result, seek writs of prohibition “and/or” mandamus, leaving this Court or the court of appeals to choose the one it thinks applies. To facilitate greater clarity, from this point forward this Court will change its terminology so that all initially issued writs will be labeled “preliminary writs” of mandamus or prohibition that, on final determination, will be quashed or “made permanent.”

(2) Although the widow argues the probate division acted in excess of its jurisdiction, there is no question here that the circuit court has subject-matter jurisdiction to admit or reject a will to probate. Under article V of the Missouri Constitution, circuit courts have plenary subject-matter jurisdiction, including jurisdiction over probate matters. Instead, the proper issue is whether, under section 473.050, RSMo 2000, the probate division correctly admitted the husband’s purported will.

(3) The probate division abused its discretion in admitting the husband’s purported will and granting letters testamentary to the nephew in accordance with that will because it was not presented within the one-year time limit of section 473.050. All parties agree the purported will was not “presented” within the meaning of the statute until the nephew’s application to probate the will was filed in September 2008, more than two years after the husband died. Before 1996, when the legislature changed the time limits to their current state, it was well-settled – based on the prior statutes – that no will could be admitted or administered unless application to do so was made within one year of the decedent’s death. With the 1996 amendments to section 473.050, however, the legislature provided in subsection 4 that, as long as a will is admitted within the time limits of subsection 3, an application to administer the will may be granted “at any time” after the will is presented, allowing the will to be administered at any time if assets are found later. This change does not mean, however, that the legislature changed the time limitation for both administration and presentment. If the legislature had intended to do away with the statute of limitations for presentment – which has existed since 1955 – it would have been clear. Instead, keeping the one-year language of section 473.050.3(2) and using the

word “previously” in reference to giving notice through publication that letters have been granted in the estate indicate legislative intent to keep a one-year time limitation for presenting a will. Here, publication of the notice that letters being issued did not occur within one year of the husband’s death, and the nephew did not present or even deliver the will to the court until more than a year had passed from the date of the husband’s death. As such, the probate division must distribute the husband’s property in accordance with the law as though he died without a will.