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IN THE SUPREME COURT OF MISSOURI

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

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

TWENTY FIRST JUDICIAL CIRCUIT

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THE HONORABLE MARK D. SIEGEL, JUDGE,  
DIVISION NO 3 PRESIDING

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SUBSTITUTE BRIEF  
OF  
APPELLANTS JOHN J. LYNCH, III, et al

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TABLE OF CONTENTS

	<u>PAGE</u>
Jurisdictional Statement.....	1
Statement of Facts.....	2
Points Relied On .....	4
Argument .....	5
Conclusion.....	12
Appendix.....	14
Index to Appellants Appendix.....	15

## TABLE OF AUTHORITIES

	<u>PAGE</u>
<b>A.R.H. V. W.H.S.</b> , 876 SW2d 687,688 (Mo. App. E.D. 1994).	5
<b>ANGELO V. CITY OF HAZELWOOD</b> , 810 SW2d 706,707 (Mo.App. ) E.D. 1991)	5
<b>ESTATE OF DAVID</b> , 945 SW2d 374,379 (Mo.App. 1997)	11
<b>ESTATE OF GULAT</b> , 748 SW2d 79.82 (Mo.App. 1988)	11
<b>JARMAN V. EISENHAUER</b> , 744 SW2d 780 (Mo. Banc 1988)	8,9
<b>IMGRUND V. LARUE</b> , 851 SW2d 40,43-44) (Mo. App. E.D. 1993)	11
<b>MATTHEWS V. PRATT</b> , 367 SW2d 632 (Mo. 1963)	7
<b>MURPHY V. CARRON</b> , 536 SW2d 30,32 (Mo. Banc 1976)	6
<b>McHENRY V. BROWN</b> , 388 SW2d 797 (Mo. 1965)	8
<b>ROBERTSON V. ROBERTSON</b> , 15 Swd 407 (Mo.App. S.D. 2000)	9
<b>SWON V. HUDDLESTON</b> , 282 SW2d 18,19 (Mo 1995)	11
<b>STATE EX REL CLAY COUNTY, BANK V. WALTNER</b> , 346 Mo 1138,145 SW2d 152,154 (1940)	10
<b>STATE, EX REL JACKSON COUNTY LIBRARY DISTRICT V. TAYLOR</b> , 396 SW2d 623 (Mo. 1965)	5

<b>WHITE V. MULVANIA</b> , 575 SW2d 184,190 (Mo. Banc 1978)	12
<b>WALLACH V. JOSEPH</b> , 420 SW2d 289,295 9Mo. 1967)	10

<b>STATE STATUTES</b>	<u>PAGE</u>
§456.220 RSMo (2000)	11
§473.340 RSMo (1987)	6,7,9
§473.350 RSMo (2000)	7
§473.367 RSMo (2000)	8
§473.630 RSMo (2000)	8
§527.040 RSMo (2000)	9

<b>MISSOURI CIVIL RULES</b>	
Rule 55.27 (a)	2,4,5
Rule 87.02	9
Article 5, Section 10, Missouri Constitution	2

IN THE SUPREME COURT OF MISSOURI

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THE HONORABLE, MARK D. SIEGEL, JUDGE, PRESIDING

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SUBSTITUTE BRIEF  
of  
Appellants, John J. Lynch, III et al

**JURISDICTIONAL STATEMENT**

Appellants<sup>1</sup> filed suit against respondents for a (1) declaratory judgment to impose a constructive trust to reach assets due appellants but received and retained by respondents

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For clarity petitioners will be referred to as “appellants and respondents as “respondents.”

(unjust enrichment). The breach of contract claim., (Count II), has been abandoned.

Respondents filed a Rule 55. 27 (a) Motion to Dismiss alleging appellants had “no standing” or right to relief because appellants’ claim was time barred due to the statute of limitations and the lawsuit should have been filed in probate court, not equity. From the court’s order sustaining respondents motion, this appeal follows.

This appeal is within the general jurisdiction of the Supreme Court as provided by Article 5, Section 10 of the Missouri Constitution, as amended.

### **STATEMENT OF FACTS**

Harry and Olivia Schoepp were husband and wife . No children were born of this marriage. Olivia Schoepp died November 27th, 2003 and Harry Schoepp died May 6<sup>th</sup>, 2005. Prior to Olivia Schoepp’s marriage to Harry Schoepp, she was married to John J. Lynch, until his death. They, Olivia Schoepp and John J. Lynch, had five children, four of which are respondents in this lawsuit. They are: George A. Lynch, Marie Roam, Patricia Gallagher and Joan Neal. The fifth child, John Lynch II, died in 1982, and was survived by three sons, namely, appellants, John Lynch, III and Stephen M. Lynch, and Timothy Patrick Lynch who died in approximately 1988, survived by his son and appellant herein, Timothy J. Lynch.

Appellants alleged in Count I that during the marriage of Harry & Olivia Schoepp, they executed mutual Wills, date unknown, providing at their death their total estate would

be distributed, in equal shares, to the four surviving children of Olivia Schoepp (respondents here) and one share to be divided equally between the heirs of John Lynch II, (appellants here).

However, on August 28, 2002, the Schoepp's signed new Wills (A. 14-17)<sup>2</sup> and a living trust (A. 18-21) providing, at the death of the survivor, the total estate would go in equal shares to the four surviving children of Olivia Schoepp and Bernice Huber, Harry Schoepp's sister. The three appellants, the sole heirs of John Lynch, II, were specifically excluded from the estate.

Appellants alleged, in Count I of their petition, their grandmother, Olivia Schoepp, was incompetent because of Alzheimer's disease when she executed the living trust and Will in 2002. They further alleged that had she known the clause excluding appellants was in the trust, she would not have signed it. Appellants are now seeking a constructive trust for their share of the Schoepp Trust that they would have received under the terms of the preceding mutual Wills that the Schoepps signed while Mrs. Schoepp was alive and competent.

2

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“A” refers to appellants’ appendix attached to this brief. “Rule” refers to the Supreme Court Rules of Civil Procedure.

**POINTS RELIED ON**

**THE TRIAL COURT ERRED IN SUSTAINING RESPONDENTS' RULE 55.27 (a) MOTION DISMISSING APPELLANTS' PETITION FOR LACK OF "STANDING" AND FAILURE TO TIMELY FILE SUIT IN THE PROBATE COURT BECAUSE IT IS THE INHERENT JURISDICTION OF THE CIRCUIT COURTS TO ESTABLISH, DECLARE AND ENFORCE TRUST IN THAT WHILE THE CIRCUIT COURT AND PROBATE COURT HAVE CONCURRENT JURISDICTION TO HEAR APPELLANTS' CLAIM APPELLANTS HAVE THE RIGHT TO AND DID ELECT TO PROCEED IN THE CIRCUIT COURT.**

**MATTHEWS V. PRATT, 367 SW2d 632 (Mo. 1963)**

**McHENRY V. BROWN, 388 SW2d 797 (Mo. 1965)**

**JARMAN V. EISENHAUER, 744 SW2d 780 (Mo. Banc 1988)**

**WALLACH V. JOSEPH, 420 SW2d 289,295-296 (Mo 1967)**

## ARGUMENT

**THE TRIAL COURT ERRED IN SUSTAINING RESPONDENTS' RULE 55.27 (a) MOTION DISMISSING APPELLANTS' PETITION FOR LACK OF "STANDING" AND FAILURE TO TIMELY FILE SUIT IN THE PROBATE COURT BECAUSE IT IS THE INHERENT JURISDICTION OF THE CIRCUIT COURTS TO ESTABLISH, DECLARE AND ENFORCE TRUST IN THAT WHILE THE CIRCUIT COURT AND PROBATE COURT HAVE CONCURRENT JURISDICTION TO HEAR APPELLANTS' CLAIM APPELLANTS HAVE THE RIGHT TO AND DID ELECT TO PROCEED IN THE CIRCUIT COURT.**

## SCOPE OF REVIEW

Before addressing this issue on appeal, appellants wish to note the scope of review for this appeal.

Here, respondents filed a Rule 55.27 (a) Motion For Judgment on the Pleadings. Because of the motion filed, a trial court can grant a motion for judgment on the pleadings only if facts pleaded by petitioners, together with the benefit of all reasonable inferences drawn therefrom, show petitioners could not prevail under any legal theory. **A.R.H. v. W.H.S.**, 876 SW2d 687,688 (Mo. App. E.D. 1994) . A party moving for judgment on the pleadings admits, for purposes of the motion, all well-pleaded facts in the opposing party's pleadings. **Angelo v. City of Hazelwood**, 810 S.W.2d 706,707 (Mo. App. E.D 1991) . Conclusions of law and other matters not well-pleaded will be disregarded. **State ex rel, Jackson County Library District v. Taylor**, 396 S.W.2d 623 (Mo. 1965).

The trial court's order must be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence or the trial court has erroneously declared or applied the law. **Murphy v. Carron**, 536 S.W.2d 30,32 (Mo. Banc 1976).

## **ARGUMENT**

### **INTRODUCTION**

Appellants had a choice of two independent causes of action against respondents. One option was a "PETITION FOR DECLARATORY JUDGMENT AND THE ESTABLISHMENT AND IMPOSITION OF A CONSTRUCTIVE TRUST" that was filed here. (A 11-A13). The other choice was a statutory claim under §473.340 RSMo (1986) Discovery of Assets that can be filed only in probate court " by a person who claims an interest in property...claimed to be an asset of an estate." (A-22).

The Will of Harry A. Schoepp (A 14-17) provided that the assets probated "shall go to George A. Lynch, as trustee, ... to be added to the trust estate...and distributed as a part thereof in accordance with the terms therein."(A-11). Under the terms of the Schoepps' Trust (A-15), all of decedent's assets, at his death, were to be distributed, in equal shares, to the named respondents in this lawsuit and his sister, Bernice Huber. Appellants were specifically excluded from said Trust.

The bulk of the assets of this estate are in the trust. The value of the probated assets transferred to the trust was approximately \$75,000.00. The actual value of the trust assets are unknown but appellants believe that the total value is much greater than the probated assets. Further, the purpose of a Revocable Trust is to avoid probate. Since the trust assets

were never a probate asset, the only option appellants had was an equitable claim (Declaratory Judgment) that was filed here. Because the probate assets were transferred by decedent's Will, to the Trust estate for distribution, appellants never considered a §473.340 discovery of assets claim an option.

### **CONSTRUCTIVE TRUST**

The issue here is whether the appellants, as claimed by respondents, having failed to set aside the Will admitted to probate and file a § 473.340 claim for the Trust and Will assets, are now time barred from proceeding with their constructive trust claim in the Circuit Court?

This issue was addressed in **Matthews v. Pratt**, 367 S.W.2d 632 (Mo. 1963). Plaintiff, as executor of a probate estate, filed a suit in the Circuit Court alleging a claim in equity to declare and enforce a constructive trust and cancel documents, which, upon their face, created legal title in defendant as to joint bank accounts. Defendants argued the exclusive remedy of plaintiff was in the Probate Court in a proceeding for discovery of assets. § 473.340 - 473.350. <sup>3</sup>Defendant further argued this claim was not "a purely equitable matter" and the Circuit Court was without jurisdiction. The trial court sustained

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Unless otherwise noted all reference to the Missouri Statutes are 2000.

defendant's position and plaintiff appealed. The Supreme Court, in reversing, held, "the

Circuit Court had inherent jurisdiction... and... the petition properly stated a claim.” Id at 637. The Court concluded, “ the 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 or proceedings.” Id at 637.

Another case, **McHenry v. Brown**, 388 S.W.2d 797 (Mo. 1965) was an action filed in the Circuit Court to establish a constructive trust as to properties in the estate of decedent. It was alleged the decedent falsely represented to plaintiff that he was not married at the time of their marriage and he had fraudulently procured plaintiff’s money. Defendant further argued that one count, was treated by the trial court as an action at law and plaintiff should have filed a claim against the estate under §473.360 and § 473. 367. Defendant further argued the time to file the claim as a creditor had expired and therefore the claim was time barred. The Supreme Court held, “all counts of the petition are ones for the enforcement of a constructive trust of property ...procured from the plaintiff by fraud.” Id at 803. The Court concluded, noting that plaintiff asks that title be quieted to real estate, “ In that situation, jurisdiction to hear all the claims was in the Circuit Court and plaintiff was not required to file a copy of her claims in the probate court within nine months after notice of letters of administration.” Id at 803.

A later case on this same issue **Jarman v. Eisenhauer**, 744 S.W.2d 780, (Mo. Banc 1988), where a joint tenant brought a declaratory judgment action to determine ownership of certificates of deposit registered in the names of the deceased and plaintiff. The **Jarman** court noted that Section 473.340, RSMo (1986), **Discovery of Assets** had been amended in

1986, and “the current statute is much broader, but, as noted, is permissive, not mandatory. Chapter 527, RSMo (2000) and Rule 87.02 authorizes circuit courts to entertain jurisdiction of what are commonly denominated as suits for declaratory judgment.” Id at 781. The court concluded, “the Court holds the circuit court had jurisdiction to determine the ownership of the joint certificates of deposit, joint money market certificates, and jointly named securities, and that such jurisdiction is concurrent with the jurisdiction of the probate court in discovery of assets proceedings.” Id at 782.

A later decision, **Robertson v. Robertson**, 15 S.W. 3d 407, (Mo. App. S.D. 2000) observed that **Jarman**, supra, in interpreting the 1986 version of ( 473.340 RSMo ) noted, “ the statute was much broader and, by its provision that an authorized party ‘may’ bring such a proceeding, is permissive rather than mandatory.” Id at 420. “Consequently, the Supreme Court held the circuit court had concurrent jurisdiction with the jurisdiction of the probate court in discovery of assets proceedings to determine the ownership of certificates.” Id at 420.

## **DECLARATORY JUDGMENT**

Rule 87.02 and §527.040 RSMo (2000) provide, in relevant part, “Any person interested as or through...Trustee...or other fiduciary... in the administration of a trust, or of the estate of a decedent...may have a declaration of rights or legal relations in respect thereto to: (1) ascertain any class of ...legatees, heirs... (2) to direct the trustee...to do or abstain from doing a particular act in their fiduciary capacity; or (3) to determine any questions arising in the administration of ... the trust...” See also **State ex rel Clay County State Bank v.**

**Waltner**, 346 Mo 1138, 145 S.W.2d 152,154 (1940), where it was held, if a justiciable controversy exists, “the validity and construction of a trust, and the rights of the parties thereunder, are generally proper subjects of a declaratory judgment.” Id at 154.

Petitioners here are seeking equitable relief to construe the rights and obligations of all the parties having an interest in the estate of the Schoepps and they are asking for the imposition of a constructive trust on assets respondents are to receive.

### **FRAUD**

**Wallach v. Joseph**, 420 S.W.2d 289,295-296 (Mo. 1967) involved a suit in equity where a constructive trust was imposed so as to prevent defendants from being unjustly enriched. The court found, “there being fraud in this transaction giving rise to a constructive trust, plaintiff’s may not be denied equitable relief on the basis that they have an adequate and complete remedy at law... and the case as stated could be determined on its merits only in a court of equity.” Id at 295. The court concluded, “this Court, sitting in equity, de novo, must administer complete justice within the scope of the pleadings and evidence, even though plaintiff’s have mistaken the specific relief to which they are entitled. The doctrine is too well settled to admit to either a discussion or dispute, that when a court of equity once acquires jurisdiction of a cause it will not relax its grasp upon the res until it shall have avoided a multiplicity of suits by doing full, adequate and complete justice between the parties.” Id at 295- 296. Cases cited are omitted.

### **Time Limitation For Constructive Trust**

A beneficiary of or a person claiming an interest in a trust has five years after receipt

of the final account or statement to assert a cause of action against the trust. The maximum time any beneficiary has to assert a claim is twenty-two years. §456.220 RSMo (2000). Because petitioners have not received a final account or statement from the Trustee of the Schoepp Trust, the statute has not yet commenced to run. The statute of limitation does not begin to run and will not begin to run until the trust is repudiated by some word or act sufficient to give reasonable notice to the beneficiary. **Swon v. Huddleston**, 282 S.W.2d 18, 19 (Mo 1955).

#### **Definition of Constructive Trust.**

A constructive trust has been defined, “constructive trusts are technically not trusts at all. They are equitable devises employed by courts of equity to remedy a situation where a party has been wrongfully deprived of some right, title or interest in property as a result of fraud or violation of confidence or faith reposed in another. “**Estate of David**, 954 S.W.2d 374,379 (Mo. App. 1997), citing **Imground v. LaRue**, 851 S.W. 2d 40, 43-44, (footnote 2), (Mo. App. E.D. 1993). “A constructive trust is best understood as an equitable remedy used in a variety of circumstances to set aside wrongful ownership gained through real or constructive fraud.” Id at 44. One circumstance where a court may impose a constructive trust is where the defendant had “undue influence” over the grantor. Id. Another is where the defendant breaches a confidential relationship. Id. A third justifies a trial court to impose a constructive trust where the defendant is unjustly enriched.

#### **Innocent Third Party**

An innocent third party, (such as respondents here), who are not in the position of

a bona fide purchaser, also may be charged as a constructive trustee of property wrongfully procured for him or her by another. **White v. Mulvania**, 575 S.W.2d 184, 190 (Mo banc 1978).

### **CONCLUSION**

For the reasons herein given, appellants ask the court to set aside the judgment sustaining respondents' motion to dismiss and remand this case to the Circuit Court docket for trial.

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### **CERTIFICATE OF SERVICE**

I certify that two hard copies of this brief and one copy of the brief on a CD-ROM filed pursuant to Local Rule 362 were served on counsel identified below via U.S. Mail, postage prepaid, on February 14<sup>th</sup>, 2008.

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**.CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies that pursuant to Rule 84.06 ( c ), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 (b) and Local Rule 360; and (3) contains 2922 words, exclusive of the sections exempted by Rule 84.06 (b) and Local Rule 360 ( c ), determined using the word count program in Microsoft Word 2003. The undersigned counsel further certifies that the accompanying compact disk has been scanned and was found to be virus free.

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Harold G. Johnson  
Attorney for Appellants

**APPENDIX**  
**OF**  
**APPELLANTS**

**INDEX TO APPELLANT'S APPENDIX**

<u>DOCUMENTS</u>	<u>PAGE</u>
1. Petitioners Petition for Declaratory Judgment	A1-4
2. Last Will and Testament of Harry A. Schoepp	A5-8
3. Joint Revocable Living Trust Agreement of the Schoepps.	A9-12
4. Trial court judgment dated 8/9/06.	A13-
5. Trial Court judgment dated 12/6/06	A14

6. Note Signed by Olivia Schoepp dated July 11, 1984.	A15
7. Rule 55.27 (b).	A16-18
8. Rule 87.02	A19-20
<b>MISSOURI CONSTITUTION, ARTICLE 5, SECTION 10</b>	A27
<b><u>State Statutes</u></b>	
9. §456.220 RSMo (2000)	A21
10. §473.340 RSMo (1987)	A22-23
11. §473.367 RSMo (2000)	A24
12. §473.630 RSMo (2000)	A25
13. §527.040 RSMo (2000)	A26