IN THE SUPREME COURT OF MISSOURI

In The Estate of Elden Choisser, Deceased	)	
Cynthia Kleim, Plaintiff-Appellant	)	Missouri Court of Appeals 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 BRIEF

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JURISDICTIONAL STATEMENT

Appellant filed a petition to contest the Last Will and Testament of Elden Choisser in the Probate Division of the Washington County Circuit Court. Respondent alleged that Appellant's will contest petition was misfiled in the Probate Division of the Circuit Court. Appellant requested the probate court to transfer the action to the Circuit Court of the same circuit as mandated by RSMo §476.410 (2000). The Probate Judge of Washington County then dismissed Appellant's action for lack of subject matter jurisdiction. The Eastern District of the Missouri Court of Appeals agreed that the probate court should have transferred Appellant's action. However, the appellate court dismissed Appellant's action on the grounds that RSMo §473.083.1 (2000) requires a condition precedent prior to the filing of a petition to contest a will. The appellate court's decision conflicts with the Western District of the Missouri Court of Appeals' decision in Estate of Schler v. Benson, 947 S.W. 2d 495 (Mo. App. 1997) and other Missouri cases. The resolution of this case requires the interpretation of RSMo §473.083 (2000) and RSMo §476.410 (2000). Thus, the action involves Missouri statutes concerning jurisdiction, venue and the Probate Code of this State. The Missouri Supreme Court has jurisdiction pursuant to Article V Section 3 of the Constitution of the State of Missouri, as amended 1982.

STATEMENT OF FACTS

This case involves a procedural matter of first impression, arising under and requiring the interpretation of RSMo §473.083.1 (2000) [1] concerning the time limitations in which a petition to contest a will must be filed.

Eldon Choisser (hereinafter "Decedent"), ninety-one years old, executed his alleged Last Will and Testament (hereinafter "Will"), drafted by the Respondent's attorney, in the hospital on the night before he died. (Legal File 6, 8). Decedent's Will left a small specific bequest to Appellant, Cynthia Kleim, but he expressed no intention to disinherit Appellant who was the Decedent's only child and sole heir. Decedent left ninety-nine percent of his estate to Respondent, Gregory Sansone, who was not a blood relative of the Decedent. (Legal File 6, Supplemental Legal File 1).

On September 12, 2005, Respondent filed Applications for Probate of Will and Letters Testamentary in the Washington County Probate Court. (Legal file 6, 8). Appellant filed her Petition to Contest the Decedent's Will in the Washington County Probate Court on November 2, 2005. (Legal file 10). Immediately, the Washington County Probate Court scheduled case status reports of Appellant's action continuing through October 2006. (Legal file 1). An Entry of Appearance and the Answer of Defendant Gregory Sansone **(**Respondent**)** was filed on January

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

6, 2006. (Legal File 15, 17). Respondent's Answer raised no jurisdictional objections or any affirmative defenses except failure to state a cause of action. (Legal File 17). Meanwhile Appellant initiated discovery and Respondent made an offer of settlement to Appellant. (Legal File 20). On April 28, 2006, eight months after Respondent filed his Applications for Probate of Will and Letters Testamentary, the Washington County probate court admitted Decedent's Will to probate. (Legal File 21). Notice of letters granted was first published on May 4, 2006 and Respondent filed his inventory on July 28, 2006. (Legal File 3, 24).

In July 2006, Appellant filed two motions to compel discovery, which were heard on October 16, 2006. (Legal File 3, 26). At the October 16, 2006 hearing, Probate Judge Hyde, for the first time, stated that he believed he could not hear the case, causing Appellant to file a Memorandum tabling her motions pending the transfer of her action from the Associate Division Probate Court of Washington County to the Circuit Court of Washington County. (Legal File 26). On November 9, 2006, Appellant filed a motion to transfer her action from the Probate Court of Washington County to the Circuit Court of Washington County. (Legal file 28). Respondent had not filed any motions prior to November 17, 2006, at which time Respondent filed a motion to dismiss Appellant's action. (Legal File 30). Respondent's motion incorrectly alleged for the very first time that Appellant must file her petition in the circuit court instead of the probate court of Washington

County and therefore the probate court lacked subject matter jurisdiction. (Legal File 30). Appellant then filed a motion to withdraw her request to transfer her action and asked the Probate Court to hear her action pursuant to the provisions of RSMo §473.083 (5) which allows Probate Judges to hear will contests. (Legal file 36). Respondent filed a motion opposing Appellant's motion to withdraw her request to transfer, citing an overruled case,[2] and re-alleged lack of subject matter jurisdiction (Legal File 39, 42). In response thereto, on December 8, 2006, Appellant filed a motion to reinstate her request for transfer of the action from the Probate Court Associate Division of Washington County to the Circuit Court of Washington County. (Legal File 45). Appellant's motion cited RSMo §476.410, RSMo §473.083 (5), and decisions of the appellate and Supreme Court of Missouri to support its argument that a misfiled petition should be transferred rather than dismissed. (Legal File 45). On December 18, 2006, Respondent filed a response to Appellant's motion for reinstatement. (Legal file 51). During these motions, the Washington County Probate Court held no hearings even though Plaintiff filed a notice requesting a hearing on December 21, 2006. (Legal File 2). On December 26, 2006, the Washington County Probate Judge entered an Order dismissing Plaintiff's petition for lack of subject matter jurisdiction. (Legal File 56). Said Order did not contain any memorandum, findings of fact or law

[2] Black v. City Nat'l Bank & Trust Co., 321 S.W. 2d 477 (Mo. 1959).

supporting the court's refusal to transfer the action or state any reason for dismissing the action for lack of jurisdiction. (Legal File 56). Appellant filed a motion to reconsider on January 4, 2007 which was denied by the Probate Judge and entered as an Order on January 17, 2007. (Legal File 52, 57). Appellant then filed a motion on February 7, 2007 requesting the Probate Court to clarify its previous Order by entering a "Judgment" which the court did on that same day. (Legal File 63,65).

Appellant appealed to the Missouri Court of Appeals Eastern District. In her brief, Appellant claimed it was error for the probate court to dismiss her will contest on the grounds that the action had to be filed in the Circuit Court of Washington County instead of the Probate Court of Washington County and that the probate court lacked subject matter jurisdiction and the power to transfer her action. (Appellant's Brief). Respondent's brief alleged and raised, for the very *first* time, a new issue involving service and that Appellant's petition was misfiled and should be dismissed. (Respondent's Brief). Appellant filed a Reply Brief.

On July 10, 2007 the Eastern District of the Missouri Court of Appeals issued its opinion. The appellate court agreed with Appellant that the lower court erred as filing in the wrong division of the circuit court does not deprive the court of subject matter jurisdiction and that transfer was the proper procedure. Kleim v. Sansone, 2007 WL 1975919 (Mo. App. E.D. 2007). The Appeals Court then held

that subject matter jurisdiction never attached to Appellant's action because at the time her petition was filed, there was no final judgment admitting the Will to probate or rejecting it, which the court believed was a "condition precedent" for jurisdiction. Kleim at 2. For these reasons the appellate court denied points one and two of Appellant's brief. Kleim at 4. Thus, the appellate court dismissed Appellant's appeal on grounds neither raised nor briefed by either party hereto.

Appellant filed a Motion for Rehearing and an Application for Transfer both of which the appellate court denied. Appellant's Application for Transfer filed with this Court was granted resulting in this appeal.

POINTS RELIED ON

I. RSMo §473.083.1 Specifies The Last Date That A Petiton To Contest A Will May Be Filed Not The Commencement Date For Filing Such Actions.

As a matter of law, the Court of Appeals erred in its interpretation that RSMo §473.083.1 (hereinafter "Statute") specifies the *first* date on which petitions to contest a will may be filed. An examination of the precise words used in RSMo §473.083.1 finds that the Statute merely contains the date after which it is too *late* to file such a contest. Since no commencement date is specified in the Statute and since Appellant filed her petition to contest the Decedent's Will before the last date specified in this Statute, Appellant's petition was timely filed and the court of Appeals' decision should be reversed.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W. 2d 371 (Mo. En Banc. 1993).

Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

RSMo §473.083.1

Estate of Schler v. Benson, 947 S.W. 2d 495 (Mo. App. 1997).

In re Kruse's Estate, 170 Kan. 429, 226 P.2d 835 (1951).

State v. Griffin, 171 Conn. 333, 370 A.2d 1301 (1974).

II. "Premature" Filing Of Will Contest Does Not Cause Lack Of Subject Matter Jurisdiction.

As a matter of law, the Eastern District Court of Appeals erred in concluding that Appellant's "premature" filing of her will contest petition results in a lack of subject matter jurisdiction. An appellate decision by Judge Laura Denvir Stith and other state supreme court probate cases hold such "premature" filings valid. Therefore it was error to conclude that Appellant's alleged "premature" filing of her petition requires a dismissal for lack of subject matter jurisdiction.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W. 2d 371 (Mo. En Banc. 1993).

Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

Estate of Schler v. Benson, 947 S.W. 2d 495 (Mo. App. 1997).

Schwarzschild v. Binsse, 170 Conn. 2112, 365 A.2d 1195 (1976).

Park County Welfare Dep't v. Blackburn, 394 P.2d 793 (Wyo. 1964).

In Re Stitzer's Estate, 103 Col 529, 87 P. 2d 745 (1939).

Taylor v. Taylor, 271 S.E. 2d 506 (N.C. 1980).

Supreme Court Rule 81.05(b).

State Highway Commission v. Tate, 576 S.W. 2d 529 (Mo. En Banc 1979).

III. Condition Precedent Is Not Required For Subject Matter Jurisdiction.

As a matter of law, the Court of Appeals erred in concluding that acceptance or rejection of a will by the probate court is a condition precedent to the filing of a will contest. The court assumed and read into the Statute a requirement not contained therein. Since no such requirement exists, the absence of such a requirement mandates a reversal of the appellate court's decision to dismiss for lack of subject matter jurisdiction.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W. 2d 371 (Mo. En Banc. 1993).

Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

Brunig v. Humburg, 957 S.W. 2d 345 (Mo. App. 1997).

Gillman v. Mercantile Trust Co. Nat. Ass'n, 629 S.W. 2d 441 (Mo. App. 1981).

Estate of Johnson v. Powell, 708 S.W. 2d 783 (Mo. App. 1986).

Fletcher v. Ringo, 164 S.W. 2d 904 (Mo. 1942).

RSMo §§528, 529 and 537 (1929).

RSMo §§529,530 and 538 (1939).

RSMo §473.083.1

IV. Missouri Case Law And Other State Supreme Court Decisions Find Subject Matter Jurisdiction.

As a matter of law, the appellate court erred in dismissing Appellant's will contest action for lack of subject matter jurisdiction. Appellant's action was filed before the expiration of the Statute of Limitations, after Respondent filed applications for probate and letters testamentary, and in the same probate proceeding where the decedent's estate was being administered. Thus, the appellate decision must be reversed.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W. 2d 371 (Mo. En Banc. 1993).

Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

RSMo §473.083.1

Bosworth v. Sewell, 918 S.W. 2d 773 (Mo. 1996).

Burnett v. N.Y Central Railroad Co., 380 U.S. 424, 85 S. Ct. 1050 (1965).

V. A Probate Court Is A Division Of The Circuit Court And The Appellate Court's Denial Of Point One Of Appellant's Brief Was Error.

The appellate court acknowledged that the probate court erred in dismissing Appellant's petition for lack of subject matter jurisdiction because it was filed in the probate court instead of the Circuit Court of Washington County. Nevertheless, the appellate court denied point one of Appellant's Brief which presented this issue. It is well established by case law and statute that filing in the wrong division of the circuit court mandates transfer of the action instead of dismissal for lack of subject matter jurisdiction. Accordingly, the appellate court's denial of point one requires reversal.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W. 2d 371 (Mo. En Banc. 1993).

Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

Roher v. Roher, 700 S.W. 2d 879 (Mo. App. 1985).

State of Missouri v. Gaertner, 32 S.W. 3d 564 (Mo. En Banc. 2000).

Robinson v. Lohman, 949 S.W. 2d 907 (Mo. App. 1997).

VI. Transfer To Circuit Court Is Required And Appellate Court's Denial Of Appellant's Brief Point Two Is Error.

The Appellate Court erred in denying point two of Appellant's brief requesting transfer of Appellant's petition to the Circuit Court of Washington County, even though the appellate court agreed that transfer was the proper procedure. RSMo §476.410 (2000) requires "misfiled" petitions to be transferred to the proper division or circuit. The appellate court's denial of point two of Appellant's brief requires reversal.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W. 2d 371 (Mo. En Banc. 1993).

Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

State of Missouri v. Gaertner, 32 S.W. 3d 564 (Mo. En Banc. 2000).

RSMo §476.410 (2000).

Roher v. Roher, 700 S.W. 2d 879 (Mo App. 1985).

VII. Respondent May Not Raise New Issue On Appeal For First Time.

On appeal, Respondent argued for the *first* time that Appellant's case should be dismissed because of Appellant's failure to serve the specific devisees, the recipient of Decedent's books and dog, and Lorayne Pletting, Appellant's mother and recipient of one share of Decedent's estate. It is well settled that new issues may not be raised for the first time on appeal. Further, RSMo §472.300 holds that service on Respondent, the Personal Representative and primary beneficiary of Decedent's estate, constitutes service on all other parties, pursuant to the rule of virtual representation. Thus, this Court should deny Respondent's attempt to raise a new issue on appeal and uphold and apply the rule set forth in RSMo 472.300 to Respondent.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W. 2d 371 (Mo. En Banc. 1993).

Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

Waterway Gas 'N Wash, Inc., v. N.P. Sandbothe, 550 S.W. 2d 617 (Mo. App. 1977).

RSMo §472.300 (2000).

RSMo §473.083.3 (2000).

Zimmerman v. Preuss, 725 S.W. 2d 876 (Mo. En Banc. 1987).

Gartenberg v. Gartenberg, 1995 WL 757744 (Mo. App. December 26, 1995).

ARGUMENT

I. RSMo §473.083.1 SPECIFIES THE LAST DATE THAT A PETITON TO CONTEST A WILL MAY BE FILED NOT THE COMMENCEMENT DATE FOR FILING SUCH ACTIONS.

As a matter of law, the Court of Appeals erred in its interpretation that RSMo §473.083.1 (hereinafter "Statute") specifies the *first* date on which petitions to contest a will may be filed. An examination of the precise words used in RSMo §473.083.1 finds that the Statute merely contains the date after which it is too *late* to file such a contest. Since no commencement date is specified in the Statute and since Appellant filed her petition to contest the Decedent's Will before the last date specified in this Statute, Appellant's petition was timely filed and the court of Appeals' decision should be reversed.

a. **Standard of Review.**

Appellant suggests that the standard of review in this case is *de novo* as set forth in ITT Commercial Finance Corp. v. Mid-America Supply Corp., 854 S.W. 2d 371, (Mo. En Banc. 1993). Accordingly, the Appellant should be accorded the benefit of all reasonable inferences from the record, and this Court need not defer to the trial court's order dismissing appellant's action. Id. at 376. Where facts are uncontested, a question as to subject matter jurisdiction is a question of law which is reviewed *de novo*. Missouri Soybean Association v. The Missouri Clean Water

Commission, 102 S.W. 3d 10 (Mo. 2003).

b. Relevant Facts.

In the instant case, Respondent filed Applications for Probate of Will and Letters Testamentary on September 12, 2005 (Legal File 6, 8). Appellant filed her petition contesting Decedent's Will on November 2, 2005 (Legal File 10). Letters Testamentary were issued on April 28, 2006 and first publication occurred on May 4, 2006 (Legal File 22, 24).

c. **Appellate Court Erred Interpreting RSMo §473.083.1.**

The appellate court's decision rests upon its interpretation of RSMo §473.083.1 which provides in part:

> "Unless any person interested in the probate of a will appears within six months after the date of the probate or rejection thereof … or within six months after the first publication of notice of granting of letters … whichever is later and by petition filed with the clerk of the circuit court … contests the validity of a probated will or prays to have a will probated which has been rejected … then probate or rejection of the will is binding."

According to the appellate court's interpretation, a petition to contest a will must be filed within a certain six month period, which commences on the date last to occur of acceptance or rejection of the will to probate or first publication of

letters and ends six months thereafter. Kleim, supra at 3. The Appeals court concluded that Appellant did not file her petition between the specified dates and therefore the lower court lacked jurisdiction. Id.

A more rigorous examination of the statutory language reveals that there is no statement as to when a will contest must be *initiated.* The statute only states an *ending* date after which it is too late to file a will contest. After parsing the Statute and reducing it to its plain language, the sentence reads "unless a person appears within six months after a, b, or c, which ever is later." Only *one* date is specified, the ending date and *not* a beginning date. If the legislature intended to restrict the filing of a petition to be between a beginning and an ending date, it would have provided that such contests must be filed "*after* (the last of) a, b, or c and *before* six months thereafter." However, the Statute contains no references whatsoever to two dates.

d. Missouri Appellate and Other State Supreme Court Cases Support Appellant's Interpretation of "within" in RSMo §473.083.1.

Judge Laura Denvir Stith interpreted just such wording and addressed the meaning of "within" in the Estate of Schler v. Benson, 947 S.W. 2d 495 (Mo. App. 1997):

> "The only reported cases on this or similar issues from other states have held that if notice is required to be given 'within' a certain time

> after a specified event, it simply means that notice must be given *not later [ital. added]* than the time specified; it does not invalidate notice given prior to the specified time." Estate of Schler at 499**.**

While Schler involved a notice provision, the language, sentence structure and principle interpreted there is the same as the instant case. In Schler and Kleim, action is required not *later* than the time specified and nothing is said about when the act may *first* occur. Schler supports Appellant's interpretation that RSMo §473.083.1 specifies only one date which is the date when it is too late to file an action. The principle articulated in Schler applies equally to the case at bar.

The court in Schler also reviewed other state supreme court decisions interpreting probate statutes with virtually the same wording as RSMo §473.083.1. Schler found that "the Kansas Supreme Court addressed the meaning of the word 'within' as used in a Kansas statute requiring that all claims against an estate be presented 'within' nine months after the date of first published notice." Schler at 499. The Kansas Supreme Court held that a claim filed more than a month prior to the date of published notice was valid. In re Kruse's Estate 170 Kan. 429, 226 P.2d 835 (1951). In "construing the meaning of the word 'within', the [Kansas] court stated that 'the only reasonable and logical interpretation of the word as used in the statute is that it is a word of 'limitation' and means a creditor must file his claim *not later than [ital. added]* nine months after the date of the first published notice to

creditors. " Schler at 499 quoting Kruse, supra.

The Connecticut Supreme Court, also cited in Schler, reached this same conclusion in State v. Griffin, 171 Conn. 333, 370 A.2d 1301 (1974). The Connecticut statute permitted the court to order a personal representative to require that claims against an estate be presented "within" a time period set by the probate court. The claimant notified the personal representative of its claim almost two months prior to the personal representative's appointment. The Connecticut Supreme Court held that this notice was valid, stating that the "the word 'within' as used in the statute means *not later than [ital. added]* the termination date of the limitation order, but does not require that claims be presented after the appointment of the fiduciary." Schler at 499 quoting Griffin, supra.

Other cases cited in Schler also interpreted probate statutes that required action to be taken "within" a certain time specified in the statute. All of these decisions concluded that such a phrase simply requires that action be taken no later than the specified date and nothing more. The very same word, "within", and the very same requirement that action must be taken "within" a specified date is also found in RSMo §473.083.1. Similarly, not a word appears in the Statute that refers to any other date. Schler, the other state supreme court probate decisions, the actual language used in the Statute and a plain reading of the Statute clearly hold that such a statute refers to only one date which is the last date for action to be timely.

II. "PREMATURE" FILING OF WILL CONTEST DOES NOT CAUSE LACK OF SUBJECT MATTER JURISDICTION.

As a matter of law, the Eastern District Court of Appeals erred in concluding that Appellant's "premature" filing of her will contest petition results in a lack of subject matter jurisdiction. An appellate decision by Judge Laura Denvir Stith and other state supreme court probate cases hold such "premature" filings valid. Therefore it was error to conclude that Appellant's alleged "premature" filing of her petition requires a dismissal for lack of subject matter jurisdiction.

a. Standard of Review.

Appellant suggests that the standard of review in this case is *de novo* as set forth in ITT Commercial Finance Corp. v. Mid-America Supply Corp., 854 S.W. 20 371, (Mo. En banc. 1993). Accordingly, the Appellant should be accorded the benefit of all reasonable inferences from the record, and this Court need not defer to the trial court's order dismissing appellate action. Id. at 376. Where facts are uncontested, a question as to subject matter jurisdiction is a question of law which is reviewed *de novo*. Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

b. Other State Supreme Court Probate Cases Hold "Premature" Filing Timely.

Other cases cited in Schler also discussed "early" filings or action taken prior to the date specified in the probate statutes. Even if, arguendo, Appellant's filing is considered "premature," other state supreme court decisions have held such filings valid. The court in Schler, supra, referred to Schwarzschild v. Binsse, 170 Conn. 2112, 365 A.2d 1195 (1976), wherein the Connecticut Supreme Court held that notice of a claim against an estate was valid despite being presented to the decedent's surviving spouse after her application for administration had been filed but prior to her appointment by the court. Schler at 502 fn. 1. The Connecticut Supreme Court held that the word "within" means "not longer in time than" and "not later than." Schwarzschild at 1198. The court concluded that the claim was properly presented and satisfied the statute. The facts in Schwarzschild are almost identical to the facts at bar. In both cases probate proceeding had begun and letters applied for but not issued when both filings occurred. Since both cases involve probate statutes specifying action that must be taken "within" a specified date and since the facts are virtually identical the conclusion reached in Schwarzschild should apply to Kleim.

The supreme court of Wyoming has also found that notice is valid when given before letters were issued but after probate proceedings had been opened.

Park County Welfare Dep't v. Blackburn, 394 P.2d 793 (Wyo. 1964), cited by Schler at 502 fn.1. Similarly, the Colorado Supreme Court found that an election to take against a will was valid even though filed prior to probate or grant of letters. In Re Stitzer's Estate, 103 Col 529, 87 P. 2d 745 (1939). The facts in Park County and Stitzer are nearly identical to Kleim, and the principles of validating early filing is consistent with Schler and should be applied to the instant case.

The supreme court of North Carolina also found an election to take against a will was valid even though it was filed prior to the administrator's appointment. Taylor v. Taylor, 271 S.E. 2d 506 (N.C. 1980). Therein the court specifically stated that the statutory six month period is not a condition precedent but merely a statute of limitations which serves to cut off the time in which a spouse may resort to the courts. Taylor at 511. Schler and all of these state supreme court probate cases concluded that "premature" filing is timely and valid, rejecting the notion that the statutes require a "condition precedent".

c. **Kleim Cites Cases Inapposite to the Case at Bar.**

The appellate court in Kleim, cited cases clearly inapposite to the case at bar. Kleim cited no probate cases, but instead referred to cases involving driving while intoxicated, a public service commission's hearing requests and a municipal election case, to support its decision to dismiss based upon "premature" filing. Kleim at 3. The court in Kleim never mentioned Schler, any other probate cases or

statutes interpreting the word “within” or cases with similar facts as in Kleim. Other state supreme court probate cases and the Missouri Western District Court of Appeals considered "premature filing" and the meaning of "within" in similar probate statutes. All of these authorities held that such filing is timely. These cases are almost directly on point and are more analogous to the case at bar than the cases cited in Kleim. The same result reached in these other cases, validating early filing, should apply in the instant case.

d. Supreme Court Rule 81.05(b) Supports Timely Filing of Appellant’s Petition.

Schler noted and discussed Supreme Court Rule 81.05(b) that provides that premature filing of notice of appeal does not render the notice void or invalid. Schler at 500. Instead, notice is suspended until the judgment appealed from becomes final at which time notice becomes effective. Id. The rule’s rationale is to protect "litigants whose counsel in an abundance of caution or by mistake file premature notices of appeal in such situations." Schler at 500 citing State Highway Common v. Tate, 576 S.W. 2d 529, 531 (Mo. En Banc. 1979). The court stated that if filing is "premature," the filing should merely be suspended until first publication at which time the action becomes effective immediately. Schler at 500. Notice is considered given on the first day it could be given and is clearly timely. Id. In the instant case, this court should follow the well reasoned opinion in Schler,

the principle set out in Rule 81.05(b), and other state supreme court decisions interpreting virtually the same probate statutory language.

III. Condition Precedent Is Not Required For Subject Matter Jurisdiction.

As a matter of law, the Court of Appeals erred in concluding that acceptance or rejection of a will by the probate court is a condition precedent to the filing of a will contest. The court assumed and read into the Statute a requirement not contained therein. Since no such requirement exists, the absence of such a requirement mandates a reversal of the appellate court's decision to dismiss for lack of subject matter jurisdiction.

a. Standard of Review.

Appellant suggests that the standard of review in this case is *de novo* as set forth in ITT Commercial Finance Corp. v. Mid-America Supply Corp., 854 S.W. 20 371, (Mo. En Banc. 1993). Accordingly, the Appellant should be accorded the benefit of all reasonable inferences from the record, and this Court need not defer to the trial court's order dismissing appellate action. Id. at 376. Where facts are uncontested, a question as to subject matter jurisdiction is a question of law which is reviewed *de novo*. Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

b. No Authority For Requiring Condition Precedent Prior to Filing a

Will Contest.

The appellate court's dismissal of Appellant's case for lack of subject matter jurisdiction is based on the notion that a probate court must accept or reject a will as a condition precedent to the filing of a will contest. Kleim at 3. For this proposition the appellate court cites Brunig v. Humburg, 957 S.W. 2d 345, 347-348 (Mo. App. 1997) and Gillman v. Mercantile Trust Co. Nat. Ass'n, 629 S.W. 2d 441, 445 (Mo. App. 1981). An examination of Brunig discloses that Brunig merely cites Gillman for this proposition and Gillman cites no authority whatsoever for this alleged requirement. See Brunig at 347-348 and Gillman at 445.

The appellate court also held that acceptance or rejection of a will is a prerequisite for subject matter jurisdiction, citing Brunig, supra, and Estate of Johnson v. Powell, 708 S.W. 2d 783 (Mo. App. 1986). Kleim at 3. As noted, this statement in Brunig is mere dicta with no supporting authority. Brunig at 347-348. Johnson in turn cites Fletcher v. Ringo, 350 Mo. 451, 164 S.W. 2d 904 (1942), for this alleged rule. Johnson at 785. However, Fletcher contains no such statement. Fletcher, supra.

Gillman, Brunig and all of the other cases that the appellate court cited contain no clear authority for the alleged requirement of a condition precedent. Confirming this lack of authority is Lopiccolo v. Semar, 890 S.W. 2d 754 (Mo.

1995) wherein the court stated "The Gillman case stated 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 quoting Gillman. The cases relied upon by the appellate court circuitously cite each other. The appellate court's own language manifests the tenuousness of its interpretation "Section 473.083 *presupposes [ital. added]* that the acceptance or rejection of the will … is a condition precedent for a will contest." Kleim at 3 citing Gillman, supra, which cites no authority for this proposition.

c. Appellate Court's Interpretation Based Upon 1929 and 1939 Predecessor Statutes Not RSMo §473.083.1.

The appellate court states that "The genesis of this rule [condition precedent] predates the 1976 amendments …" and refers to a case decided seventy-one (71) years ago under earlier statutes. Kleim at 3. However, these earlier statutes contain different language and requirements and posit obsolete probate procedures. The appellate court, like many before it, has applied an interpretation and perhaps an old common law rule that was based upon RSMo §§528, 529 and 537 (1929) and RSMo §§529, 530, and 538 (1939), the precursors to RSMo §473.083.1. (2000). The present Statute, RSMo §473.083.1, differs from these predecessor statutes and contains neither the same language nor the same requirements. No cases to date have rigorously examined and interpreted the language and requirements of the

current Statute.

d. <u>Appellate Court Superimposes Non-Existing Language and Requirements onto RSMo §473.083.1.</u>

In addition to finding a non-existent condition precedent, the Appellate Court also grafts language and a time requirement onto the Statute. The court states that "[T]he period of time for bringing a will contest *commences [ital. added]* on the date that the probate division orders rejection or probate of the will. Section 473.083.1." <u>Kleim</u> at 3. The Statute contains no such language or requirement as it merely contains *one* date, an ending date, and not a beginning and ending date. There is no authority for the notion that the date of probate, or rejection of a will or date of first publication is a condition precedent for filing a will contest.

IV. Missouri Case Law And Other State Supreme Court Decisions Find Subject Matter Jurisdiction.

As a matter of law, the appellate court erred in dismissing Appellant's will contest action for lack of subject matter jurisdiction. Appellant's action was filed before the expiration of the Statute of Limitation, after Respondent filed applications for probate and letters testamentary, and in the same probate proceeding where the decedent's estate was being administered. Thus, the appellate decision must be

reversed.

a. Standard of Review.

Appellant suggests that the standard of review in this case is *de novo* as set forth in ITT Commercial Finance Corp. v. Mid-America Supply Corp., 854 S.W. 20 371, (Mo. En Banc. 1993). Accordingly, the Appellant should be accorded the benefit of all reasonable inferences from the record, and this Court need not defer to the trial court's order dismissing appellate action. Id. at 376. Where facts are uncontested, a question as to subject matter jurisdiction is a question of law which is reviewed *de novo*. Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

b. Delay and Actions by Respondent and Probate Court and Unusual Facts Require Hearing.

Appellant filed her petition in the same court where the Decedent's estate was being administered and after Respondent initiated probate proceedings. Appellant's filing was prior to the expiration of the statute of limitations. Respondent appeared, answered Appellant's petition and made an offer of settlement. The probate court scheduled hearings and heard discovery motions. For some inexplicable reason the Washington County probate court delayed over eight (8) months from the date Applications and Letters were applied for until issuing Letters. Respondent waited for over a year before filing his motion to dismiss, citing old law and fallaciously

contending that Appellant's petition was filed in the wrong court. The appellate court found against Respondent on that point. Almost fourteen (14) months after Appellant's petition had been pending in the probate court, that court wrongfully dismissed the action instead of transferring it, as Appellant requested and which was mandated by statute. Prolonging proceedings and withholding objections and decisions about the procedural posture of a case prejudiced Appellant's position and allowed the Respondent to profit from such dilatory actions.

Once the Decedent's Will was admitted to probate, the court had jurisdiction over the action as the petition was on file as of that date. To require Appellant to dismiss her petition that was filed in the probate court of Washington County, where the Decedent's estate was being administered, and to re-file in the circuit court of Washington County defies common sense. Here, Appellant filed her petition after Respondent initiated probate proceedings, filed an answer and offered to settle and the court scheduled hearings, heard motions and entertained Appellant's petition for over one year before refusing to transfer her case and wrongfully dismissing it. Appellant's only fault was to file "early" and for this reason the appellate court deprived Appellant of her only day in court. Denying Appellant the opportunity to be heard for "premature filing" or failure to comply with unstated and at best ambiguous statutory language is a travesty. Allowing Appellant to proceed in the probate court on the merits does not prejudice the

Respondent.

c. Fulfillment of Statutory Purpose and Frustration of Statute.

Section 473.083.1 of RSMo is a statute of limitation rather than one of jurisdiction**.** Bosworth v. Sewell, 918 S.W. 2d 773 (Mo. 1996). The purpose of this Statute is to provide for expeditious administration of estates. Dismissing a will contest on the grounds of "premature" filing is counter to the principles of judicial economy. Early filing can only hasten the administration of estates. Holding that *premature* filings are a nullity neither accomplishes this Statute's purpose nor manifests good judgment. Statutes of limitations and procedural rules should apply to sanction parties who file *late* not early.

Additionally, these statutes should not prevent a party, moving diligently, from having his or her case heard on the merits. Burnett v. N.Y Central Railroad Co., 380 U.S. 424, 85 S. Ct. 1050 (1965). The court's dismissal of Appellant's action opposes the fundamental principal of law that courts should resolve disputes on the merits rather than on the basis of procedural rules. Finding procedural defects and inferring requirements in an ambiguous statute, in combination with the court's and Respondent's unusual delays, should not prevent Appellant from having her case decided on the merits. Courts favor substance over form. Strict adherence to an unstated and ambiguous procedural requirement, leading to a final dismissal, defeats the purpose of the Statute and is repugnant to justice. Neither

statutory language nor common law requires such an interpretation. Appellant's interpretation of the Statute is based upon the Statute's plain language. If one reads the Statute without inferred preconceptions it is clear that the statutory language does not support the appellate court's decision.

There is no authority for requiring a condition precedent before filing a will contest. This alleged requirement is incorrect and has been repeated like mantra, circuitously and seriatim. Requiring a condition precedent is also unnecessary. Once a will contest is filed the will must be proved in solemn form and the probate court's order of admission is vacated. Consequently, whether a will was admitted to probate becomes moot. Requiring a condition precedent is superfluous and redundant since no one files a will contest unless there is a proponent of a will in the first place.

Strong policy reasons and common sense mandate a different conclusion herein. A more sensible view is for the court to allow this action to be heard by the trial court, and allow that court to examine the circumstances surrounding the execution of the Decedent's Will. This approach furthers the purpose of the law of wills and estates. It is just as important to uphold a "premature" filing of a will contest as it is to uphold "premature" filing of claims. To hold otherwise is repugnant and contrary to the spirit of justice especially when neither party is prejudiced. Depriving Decedent's only child from contesting a will procured by a

stranger, executed in the hospital while heavily medicated on the eve of death and which inexplicably leaves ninety-nine percent of the Decedent's estate to the stranger, for merely filing "early" is certainly an unduly harsh result and egregious miscarriage of justice.

V. A Probate Court Is A Division Of The Circuit Court And The Appellate Court's Denial Of Point One Of Appellant's Brief Was Error.

The appellate court acknowledged that the probate court erred in dismissing Appellant's petition for lack of subject matter jurisdiction because it was filed in the probate court instead of the circuit court of Washington County. Nevertheless, the appellate court denied point one of Appellant's Brief which presented this issue. It is well established by case law and statute that filing in the wrong division of the circuit court mandates transfer of the action instead of dismissal for lack of subject matter jurisdiction. Accordingly, the appellate court's denial of point one requires reversal.

a. Standard of Review.

Appellant suggests that the standard of review in this case is *de novo* as set forth in ITT Commercial Finance Corp. v. Mid-America Supply Corp., 854 S.W. 20 371, (Mo. En Banc. 1993). Accordingly, the Appellant should be accorded the benefit of all reasonable inferences from the record, and this Court need not defer

to the trial court's order dismissing appellate action. Id. at 376. Where facts are uncontested, a question as to subject matter jurisdiction is a question of law which is reviewed *de novo*. Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

Appellant filed her petition to contest a will in the Probate Division of the Circuit Court of Washington County. Respondent contended that a petition to contest a will must be filed in the Circuit Court of Washington County and therefore the probate court lacked subject matter jurisdiction. Roher v. Roher, 700 S.W. 2d 879 (Mo App. 1985), addressed and is dispositive on this issue:

> "There is no basis under our presently existing law for a finding of lack of jurisdiction because a case is erroneously delineated as brought in, or is filed, in the wrong division of the circuit court. The need to transfer a case from one division to another does not amount to a lack of jurisdiction of the circuit court over the case. " Roher at 880.

Based upon Roher, the probate court did not lack jurisdiction over Appellant's petition and the denial of point one in Appellant's brief by the appellate court was error. State of Missouri v. Gaertner, 32 S.W. 3d 564 (Mo. En Banc. 2000), and Robinson v. Lohman, 949 S.W. 2d 907 (Mo. App. 1997), are in accord on the issue of transfer.

VI. Transfer To Circuit Court Is Required And Appellate Court's Denial Of Appellant's Brief Point Two Is Error.

The Appellate Court erred in denying point two of Appellant's brief requesting transfer of Appellant's petition to the Circuit Court of Washington County, even though the appellate court agreed that transfer was the proper procedure. RSMo §476.410 requires "misfiled" petitions to be transferred to the proper division or circuit. The appellate court's denial of point two of Appellant's brief requires reversal.

a. Standard of Review.

Appellant suggests that the standard of review in this case is *de novo* as set forth in ITT Commercial Finance Corp. v. Mid-America Supply Corp., 854 S.W. 20 371, (Mo. En Banc. 1993). Accordingly, the Appellant should be accorded the benefit of all reasonable inferences from the record, and this Court need not defer to the trial court's order dismissing appellate action Id. at 376. Where facts are uncontested, a question as to subject matter jurisdiction is a question of law which is reviewed *de novo*. Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

This Supreme Court's decision in State of Missouri v. Gaertner, 32 S.W. 3d 564 (Mo. En Banc. 2000) addresses the issue of transfer. Therein the Supreme Court found that RSMo §476.410 grants limited jurisdiction to the court to transfer

cases wrongly filed to a circuit court with jurisdiction to hear the particular matter. Gaertner at 567. This decision, RSMo §476.410 and Roher, supra, mandate transfer of Appellant's case.

VII. Respondent May Not Raise New Issue On Appeal For First Time.

On appeal, Respondent argued for the *first* time that Appellant's case should be dismissed because of Appellant's failure to serve the specific devisees, the recipient of Decedent's books and dog, and Lorayne Pletting, Appellant's mother and recipient of one share of Decedent's estate. It is well settled that new issues may not be raised for the first time on appeal. Further, RSMo §472.300 holds that service on Respondent, the Personal Representative and primary beneficiary of Decedent's estate, constitutes service on all other parties, pursuant to the rule of virtual representation. Thus, this Court should deny Respondent's attempt to raise a new issue on appeal and uphold and apply the rule set forth in RSMo 472.300 to Respondent.

a. Standard of Review.

Appellant suggests that the standard of review in this case is *de novo* as set forth in ITT Commercial Finance Corp. v. Mid-America Supply Corp., 854 S.W. 20 371, (Mo. En Banc. 1993). Accordingly, the Appellant should be accorded the benefit of all reasonable inferences from the record, and this Court need not defer

to the trial court's order dismissing appellate action. Id. at 376. Where facts are uncontested, a question as to subject matter jurisdiction is a question of law which is reviewed *de novo*. Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo. 2003).

Appellant is not raising this issue but is merely responding to Respondent's attempt to raise a new issue that was plead in Respondent's Appellate Brief. It is well established that new issues may not be raised for the first time on appeal. Waterway Gas 'N Wash, Inc., v. N.P. Sandbothe, 550 S.W. 2d 617 (Mo. App. 1977). The issue of non-service on other legatees is disposed of by RSMo §473.083.3, RSMo §472.300, Zimmerman v. Preuss, 725 S.W. 2d 876 (Mo. En Banc. 1987) and Gartenberg v. Gartenberg, 1995 WL 757744 (Mo. App. December 26, 1995). Those statutes and cases hold that service upon the personal representative of an estate constitutes service upon other devisees and legatees. Id. The Committee Comment to RSMo §472.300 states that this section "[I]s designed to make it clear that equitable rules as to virtual representation and representation by fiduciaries may be relied upon in probate proceedings." RSMo §472.300.

CONCLUSION

WHEREFORE, Appellant prays for an order from this honorable Court reversing the decision of the Eastern District Missouri Court of Appeals dismissing Appellant's appeal; and further, directing that Appellant's action be remanded to either the Probate Court of Washington County Missouri with an order of transfer to the Circuit Court of Washington County Missouri for trial or alternatively remanded directly to the Circuit Court of Washington County Missouri for trial; and for such further and other orders as this court deems meet and just in the premises.

CERTIFICATE OF SERVICE

The undersigned hereby certify that on this 1st day of November 2007, one true and correct copies and one disk of the foregoing Appellant's Substitute Brief were delivered by hand delivery to Joseph R. Dulle, 7733 Forsyth, Ste. 500, Clayton, Missouri 63105.

CERTIFICATION OF COMPLIANCE WITH RULE 84.06

The undersigned certify that the foregoing Appellant's Substitute Brief complies with the limitations contained in Rule 84.06(b) and that the brief contains less than or 9,192 words.

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

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