

IN THE SUPREME COURT OF MISSOURI

IN THE ESTATE OF ELDEN)	
CHOISSER,)	
)	Missouri Court of Appeals Eastern
DECEASED)	District No. ED89162
)	
CYNTHIA KLEIM,)	Supreme Court No. SC88749
)	
PLAINTIFF-APPELLANT)	
)	
VS.)	
)	
GREGORY SANSONE,)	
)	
DEFENDANT-RESPONDENT)	

RESPONDENT'S SUBSTITUTE BRIEF

Party

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STATEMENT OF FACTS

I. THE PARTIES

Appellant Cynthia Kleim is the daughter of Elden Choisser, now deceased (“Choisser”) (Legal File “LF” 8). Respondent Gregory Sansone was a friend, and is the Personal Representative, of Choisser (Supplemental Legal File "SLF" at 3; LF 21).

II. PROCEDURAL BACKGROUND

Choisser was a resident of Washington County, Missouri (LF 6). On August 18, 2005, Choisser died at age 91 (LF 6). Prior to his death, Choisser executed his Last Will and Testament (the “Will”) (SLF 4). In his Will, Choisser made the following specific bequeaths:

1. All of my books which I own I direct to be bequeathed to the main public library located in Richwoods, Missouri, if any, and if not, to the main public library located in Potosi, Missouri.
2. All of my boats and all of my guns I bequeath to my friend GREGORY SANSONE.
3. My dog Queenie I direct be given to my Neighbor, MIKE ORVILLE, if he will accept

her, but if not, to my friend GREGORY

SANSONE.

4. All of the real estate which I own at my death I bequeath to my friend GREGORY SANSONE. It is my suggestion, but not my direction, that he seek to preserve the real estate by arranging with the Missouri Department of Conservation to take control thereof and to preserve the same as a park or wildlife setting.

5. All of the rest, residue and remainder of me estate, wherever situate [sic], and whether real, personal or mixed, I direct be divided into equal share and one such share I bequeath to my friend LORAYNE PLETTING of Chicago, Illinois and the other share to her daughter, CYNTHIA KLIEM, of Elgin, Illinois.

(SLF 3-4).

On September 12, 2005, Respondent filed an Application for Probate of Choisser's Last Will and Testament ("Application") in Washington County, Missouri (LF 6-8). The Probate Division of the Circuit Court of Washington

County, Missouri opened the Estate of Elden Choisser as Estate Number 05D9-PR00056 (the “Probate Action”), but did not immediately admit the Will to probate (LF 1-5).

On November 2, 2005, Appellant filed a “Petition to Contest the Last Will and Testament of Elden Choisser” in the Probate Action (the “Petition”) (LF 4). The Petition named Respondent as the only defendant (LF 10). Appellant did not serve any other person or entity with notice of the Petition (LF 10 & 4).

On April 28, 2006, the Probate Division admitted the Will and appointed Respondent as personal representative of Choisser’s estate (LF 21). Letters Testamentary were first published on May 4, 2006 (LF 22).

In July 2006, Appellant filed a discovery motion in the Probate Action (LF 3). At the October 16, 2006 hearing on the motion, the Probate Division *sua sponte* declined to hear the motion, indicating that the Circuit Court has exclusive jurisdiction over will contests under RSMo. §473.083(5) (LF 26-27). The parties filed a Memorandum in the Probate Action stating that Appellant’s Motion was “tabled until such time as motions heard by Div. II of this Circuit, subject to transfer or re-filing of this action with Div. II of this Court” (*Id.*).

Three weeks later, on November 9, 2006, and more than six months after the first publication of Letters Testamentary, Appellant filed a “Motion to Transfer Petition to Circuit Court Division” in the Probate Action (LF 28-29). On

November 17, 2006, Respondent filed a combined motion to dismiss Appellant's Will Contest or, in the alternative, to strike Appellant's Petition (LF 30-35).

Thereafter, as part of a series of procedural machinations, Appellant withdrew and then moved to reinstate her request for transfer (LF 36-38, 45-50). On December 26, 2006, the Probate Division dismissed Appellant's Petition for lack of subject matter jurisdiction (LF 56). Appellant moved for reconsideration, which the Probate Division denied (LF 57-58, 62). Appellant thereafter appealed to the Court of Appeals for the Eastern District of Missouri (LF 59-61). The Court of Appeals issued an opinion affirming the decision below and this Court accepted transfer (Appellant's Substitute Brief "A. Sub. Br.", Appendix A2 – A10).

ARGUMENT

I. STANDARD OF REVIEW OF THE PROBATE COURT'S DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

Respondent agrees with Appellant that the Court should review the lower court's decision *de novo* (A. Sub. Br. at 22-23). Under this standard, "[t]his Court is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it; the trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003).

II. SUMMARY

The probate court did not err in dismissing Appellant's purported will contest petition because it did not comply with statutory requirements for a will contest pursuant to §473.083.6 RSMo. by failing to name, join, and timely serve all necessary parties. For these reasons alone, the probate court's decision to dismiss the will contest should be upheld. This Court need not even address the issue of whether a will contest can be commenced prior to the probate court's acceptance or rejection of a will, though on this issue, Appellant cites no authorities that support the premature filing of will contests. For these reasons, as more fully explained below, the probate court's dismissal should be affirmed.

III. THE PROBATE COURT DID NOT ERR IN DISMISSING APPELLANT'S WILL CONTEST PETITION BECAUSE APPELLANT FAILED TO NAME AND SERVE ALL NECESSARY PARTIES WITHIN 90 DAYS OF THE FILING OF HER PETITION

Appellant's first six Points on Appeal all contend that the lower court somehow committed error in applying §473.083.1 RSMo. regarding the proper time frame in which to file a will contest. This Court does not need to address these issues, for even if we assume that Appellant's filing complied with §473.083.1, Appellant failed to comply with the §473.083.6 RSMo.'s requirement to name and serve all necessary parties.

Missouri law under §473.083.6 RSMo. requires the petitioner name and serve all necessary parties to a will contest within 90 days of filing the petition to contest a will. *Doran v. Wurth*, 475 S.W.2d 49 (Mo. 1971); *Romann v. Bueckman*, 686 S.W.2d 25 (Mo. App. 1984). *Gartenberg v. Gartenberg*, 1995 Mo. App. LEXIS 2099 (Mo. App. 1995). A necessary party is any interested person who will be adversely affected by a successful will contest action. *Zimmerman v. Preuss*, 725 S.W.2d 876 (Mo. banc 1987).

Section 473.083.6 is jurisdictional and the failure to name and serve all necessary parties thereunder requires dismissal of the action. *Brents v. Parrish*, 849 S.W.2d 63, 66 (Mo. App. 1993); *Foster v. Foster*, 565 S.W.2d 193, 195 (Mo. App. 1978). If any necessary party is missing from the case, the court has no authority to proceed. *State ex rel. Eagleton v. Hall*, 389 S.W.2d 798 (Mo. banc 1965).

Here, Appellant failed to name and, therefore, to serve several necessary parties in her purported will contest. Appellant's Petition only named Respondent as defendant (LF 10). A review of the lower court's docket sheet reveals that the only return of service was filed on behalf of Respondent (LF 1-5). The Will, however named the main public library of Richwoods, Missouri and/or

Potosi, Missouri, Mike Orville, and Lorayne Pletting as beneficiaries,¹ all of whom would be divested under Missouri's intestacy's laws if Appellant's purported will contest is successful. Obviously, Appellant sought to "adversely affect" their interests under the Will. *See, Zimmerman*, 725 S.W.2d at 877 (Mo. banc 1987). As such, each is a necessary party under §473.083.6. Appellant can point to no evidence in the record of her service of process on these necessary parties.

Instead, Appellant argues that service on Respondent, the Estate's Personal Representative, cures this jurisdictional defect under the doctrine of virtual representation (A. Sub. Br. at 42). In support of this novel argument, Appellant cites to *Gartenberg v. Gartenberg*, 1995 Mo. App. LEXIS 2099 (Mo. App. 1995). However the holding in *Gartenberg's* was that service on a *trustee* constituted service on the *beneficiaries of a trust*. The Court of Appeals limited its decision: "Central to this virtual representation is that the representative be duty bound to protect the interest of the represented. **Therefore, where the contested will is the trust creating instrument, joinder of the named trustees and the**

¹ Appellant may argue that these devisees are not worthy necessary parties due to the value of the property bequested. However, a necessary party's status does not turn on the monetary value of a bequest. *Langham v. Mann*, 801 S.W.2d 394, 396 (Mo. App. 1990); *See Jones v. Jones*, 770 S.W.2d 246, 248 (Mo. App. 1988) (Devisee of guns, dogs, and a jeep was a necessary party).

named beneficiaries would be mandated." *Id.* It is interesting to note that in *Gartenberg*, the personal representative was actually served with the will contest petition. *Id.* If *Gartenberg*, actually supported Appellant's position that service of a will contest on the personal representative of the estate is effective service upon all necessary parties listed in the will, then the court would have stopped its discussion once it determined that the estate's personal representative was served. Instead, the *Gartenberg* decision went on in great detail to find that the necessary parties (the trust beneficiaries) could be served solely on the basis of service of the trustee. *Id.*

Appellant also argues that Respondent cannot raise the issue of subject matter jurisdiction for the first time on appeal and cites to a Court of Appeals decision holding in a breach of contract case that an appellant could not raise the defense of waiver for the first time on appeal to overturn a lower court's decision (*See A. Sub. Br. at 43*). Appellant is once again mistaken. As pointed out above under the standard of review "[t]his Court is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it; the trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground." *Mo. Soybean Ass'n*, 102 S.W.3d at 22 (Mo. banc 2003).

In addition, the only case found directly on point, this Court held more than a century ago that a party might raise the failure to join necessary parties in a will contest initially on appeal. *Wells v. Wells*, 45 S.W 1095 (Mo. 1898). Further, Respondent did raise this issue at the trial level, in his Answer to Appellant's Petition, pleading the affirmative defense of failure to state a claim (LF 18).

The defense of failure to state a claim on which relief can be granted calls into question the trial court's jurisdiction and may therefore be raised for the first time on appeal. Rule 55.27(g)(2).

Likewise, the issue is appropriately raised *sua sponte*, because it is the sound and uniform rule that parties may not create subject matter jurisdiction by agreement.

Commercial Bank of St. Louis County v. James, 658 S.W.2d 17, 21 (Mo. banc 1983).

The Court should affirm the decision of the trial court because Appellant did not name and serve all necessary parties and as such the lower court lacks subject matter jurisdiction to hear her will contest.

IV. THE PROBATE COURT DID NOT ERR IN DISMISSING APPELLANT'S PURPORTED WILL CONTEST BECAUSE

**APPELLANT FAILED TO COMPLY WITH THE TERMS OF
§473.083.1 RSMO.**

Appellant filed her will contest on November 2, 2005, six months *before* the Probate Division clerk published letters testamentary on May 4, 2006. Appellant did not file any petition to contest the Will between May 4 and November 4, 2006, the statutory window under §473.083.1 RSMo. Petitioner asks the Court to treat her 2005 filing as if it were filed within six months after the Probate Division accepted the Will.

No right to contest a will exists at common law. *Langham v. Mann*, 801 S.W.2d 394, 395-396 (Mo. App. 1990). The right is statutory and can only be exercised in strict compliance with the provisions of the statute. *Id.*

Missouri's will contest statute, §473.083.1 RSMo, provides the procedure for initiating a will contest in full as follows:

Unless any person interested in the probate of a will **appears within six months after the date of the probate or rejection thereof** by the probate division of the circuit court, or within six months after the first publication of notice of granting of letters on the estate of the decedent, whichever is later, **and**, by petition filed with the clerk of the

circuit court of the county, **contests the validity of a probated will**, or prays to have a will probated which has been rejected by the probate division of the circuit court, then probate or rejection of the will is binding. (emphasis added)

Despite Appellant's arguments to the contrary, the plain language of the statute requires that an interested person must meet two elements in order to contest a will. First, the petitioner must appear within six months after the date of probate or rejection of the will by the probate division. Second, the petitioner must contest a probated or rejected will, both written in the past tense. In other words, the probate court's action provides the trigger for subsequent contests--a person cannot "appear" under the statute until the probate court has acted.

While this Court has not specifically held that premature will contests are invalid, the Court has held that the six-month window in which to file a will contest does not "open" until the will has been probated and letters testamentary have been published:

Compliance with §§ 473.017 and 473.033 is particularly relevant to § 473.083. **The six-month window does not open until the rejection or probate of a will or the first publication of**

notice granting letters, whichever is later. §

473.083.1. The application for letters is the first step in probating a will. Issuing the letters triggers the first publication notice. § 473.033. Compliance with both statutes is essential **to begin** the six-month period to bring a will contest.

Bosworth v. Sewell, 918 S.W.2d 773, 776 (Mo. banc 1996)(emphasis added).

The Court's logic stems from the fact that a will contest, despite its name, is not thought of as an attack on the validity of a particular document. Rather, a will contest is an appeal of the probate court's decision to either accept or reject a document as being a valid "will":

[T]he jurisdiction of the circuit court to entertain a will contest is derivative, that is, **in the nature of an appeal from the probate court.**

...

Since the contest of a will, or a suit to establish a will in the circuit court after rejection in the probate court is to be considered, in effect, as an appeal from the probate court, it follows that there could be no jurisdiction in the circuit court to

entertain such suit or appeal until there is a judgment, probating or rejecting the will in the probate court.

Callahan v. Huhlman, 339 Mo. 634, 638 (Mo. 1936)(internal citations omitted; emphasis added). *See also, Kinder v. Brune*, 754 S.W.2d 946, 948 (Mo. App. 1988)("it has always been held, in the early and late cases, that when a suit to contest a will is filed in the court . . . the suit operates in the nature of an appeal").

Therefore, prior to a probate court's decision to accept or reject a will, there simply is nothing for a will contest to attack. One could just as well, under Appellant's reasoning, file a "will contest" before the testator had died.

The Court of Appeals for the Eastern District has stated that the probate court's rejection or acceptance of a will is a precondition to a will contest. In *Gillman v. Mercantile Trust Co. Nat'l Ass'n*, 629 S.W.2d 441 (Mo. App. 1981), the petitioner was not an interested party under the decedent's 1970 will, but was entitled to take under a 1967 will. The petitioner filed an action contesting the 1970 will without attaching the 1967 will. The petitioner never "presented" the 1967 will to the probate court under RSMo §473.050 and otherwise lacked standing as an interested party to challenge the 1970 will. The trial court dismissed the will contest for lack of subject matter jurisdiction and the Court of Appeals affirmed, drawing on its construction of §473.083 as follows:

The will contest section, §473.083 RSMo 1978, lends further force to our conclusion. The period of time within which an action to contest a will or to establish a rejected will is based upon the time within which the probate division of the circuit court orders probate or rejection of the will. The action of the probate division is a condition precedent to the bringing of a suit to set aside a will or to establish a will that has been rejected.

Id., at 446. See also, *Hawkins v. Lemasters*, 200 S.W.3d 57 (Mo. App. 2006); *Brunig v. Humburg*, 957 S.W.2d 345 (Mo. App. 1997)

As Appellant points out, the Court of Appeals for the Eastern District later characterized its comments in *Gillman* as dicta. See *Lopiccolo v. Semar*, 890 S.W.2d 754 (Mo. App. 1995). However, the Court of Appeals did not disavow its construction of §473.083.1 in *Lopiccolo*. There, the interested party filed an action contesting a 1989 will (that *had been* accepted) within the six month period under §473.083.1. In the will contest, the petitioner sought to establish a 1987 will. The probate court did not reject the 1987 will until after six month period relating to the 1989 will ran. The respondent claimed that the petitioner could not challenge the 1989 will until the probate court rejected the 1987 will. Therefore, the probate

court's failure to timely act on the 1987 will deprived the trial court of jurisdiction to hear petitioner's otherwise timely contest of the 1989 will. The proponents of the 1989 will cited *Gillman* for the proposition that the will contest seeking to substitute the 1987 will for the 1989 will could not be filed until the probate court rejected the 1987 will.

Without rejecting its construction of §473.083.1 in *Gillman*, the Court of Appeals pointed out that it did not address or decide whether timely presentment of a competing will satisfied the statutory period as to the challenged will because the petitioner in *Gillman* had never presented the competing will to probate—i.e., was not an “innocent” victim of judicial delay: “The facts of *Gillman* are different from the case at hand. There, the proponent of the will in question never presented the will to the probate court; therefore, that person had no standing to challenge the other will.” *Id.*, at 758.

The fundamental question presented here is whether this Court should allow litigation over a will before the probate court has acted to probate or reject the will—i.e., should an interested party be allowed to appeal a decision that has yet to or may never occur? The trial court correctly answered no. Such a result is not consistent with the orderly administration of decedents' estates under the Probate Code. The Code contemplates a two step process, the presentation of a will or competing wills under §473.050, followed by the initiation of will contests

under §473.083.1 once the probate court has acted. In this case Appellant file a petition to contest the acceptance of a will by the Probate Court, before the court even had a chance to accept or reject the will.

Appellant argues that rejecting her premature will contest works a harsh result. However, Appellant had many opportunities to timely filed her will contest. The Probate Division actually directed her to file the Petition in the Circuit Court three weeks prior to the expiration of the six month period under §473.083.1.

Appellant's prematurely filed will content petition is not analogous, as Appellant argues, to the filing of a notice of appeal after a judgment but before the judgment has become final. First, such filings are expressly preserved by statute under Rule 81.05(b). Further, even without the statutory safe harbor, the analogy does not work. Obviously, the timing of a civil appeal contemplates the existence of a litigated judgment, the only issue being when it is “final” for purposes of appeal. In the case of Appellant’s will contest the corollary to a civil judgment—the acceptance or rejection of the Will—did not exist when she filed her petition.

Appellant's reliance on *Schler v. Benson*, 947 S.W.2d 495 (Mo. App. 1997) as permitting premature will contest filings is also misplaced. In *Schler*, the decedent provided her son with an option to purchase estate land as follows:

Said option shall be exercised by written notice of intent to do so delivered to my personal representatives within seven (7) months after the first publication of Notice of Letters granted upon my estate. In such event the purchase price shall be paid and the transaction closed within thirty (30) days after said notice is given. If any option is not so exercised within said time, that option shall be void and of no effect.

Id., at 497. The son exercised the option two weeks before the first publication of letters. After a meeting with his sister (the personal representative of the estate), the son sent a second notice and, within 30 days thereafter (but more than 30 days after the first notice) tendered the purchase price.

His *sister* argued that the first notice was valid, but premature, obviously looking to take advantage of the timing of the tender. The Court agreed that the first exercise was the operative one, but disagreed that it was defectively premature. The Court analogized the situation both to Rule 81.05(b) and to cases from other states involving premature filing of claims against an estate under statutes providing that such claims should be filed within a certain period after the issuance of letters. As indicated, Rule 81.05(b) does not provide support for

Appellant, and neither do the foreign decisions involving the timeliness of claims against an estate.

It makes sense that some leeway might be given in the case of early filed claims against the estate. In that case, there is no further adjudication required to ripen the claim—it either will either be proved or it will not when the time comes to address it within the estate administration.

Appellant also argues that the trial court's dismissal of her prematurely filed will contest for an alleged procedural defect frustrates the purpose of the will contest statute and that the result in this case is an "egregious miscarriage of justice" due to the trial "court's and Respondent's unusual delays." (A. Sub. Br. at 37-39).

Appellant's contention that courts should resolve disputes on the merits rather than on the basis of procedural rules is, in a broad sense, accurate, but is not applicable to the facts of this case. Section 473.083 is not a procedural rule, but rather it creates the cause of action where none otherwise exists. *Blatt v. Haile*, 291 S.W.2d 85, 88 (Mo. 1956)("The right to contest a will, whether of real estate or personalty, does not exist independently of statutory authority, and can be exercised only in accordance with and within the limits prescribed by statute."); *Ludwig v. Anspaugh*, 1989 Mo. App. LEXIS 663 (Mo. App. 1989). As such,

Appellant's failure to comply with §473.083 results in the lack of a cause of action and is not a mere procedural defect.

Appellant's argument that a "miscarriage of justice" would take place if the trial court's dismissal stands is equally without merit. Contrary to Appellant's baseless assertions of blame on everyone but herself, Appellant is solely at fault for both her premature filing and the failure to timely file her will contest when given the opportunity by the trial court more than three weeks before the running of the time period prescribed in §473.083 RSMo. (LF 26-27). Furthermore, far from "sandbagging" the Appellant, the trial court actually told the Appellant that she should file her will, with more than three weeks remaining before the expiration of the time limits in §473.083 RSMo. The trial court warned Appellant of the potential problems with her attempted will contest. Appellant chose not to heed this warning, but instead gambled that her premature filing would suffice (A. Sub. Br. at 36). Respondent and the trial court are not responsible for Appellant's poor judgment.

CONCLUSION

The probate court did not err in dismissing Appellant's Petition because it did not comply with statutory requirements for a will contest per § 473.083.6 RSMo. The purported will contest did not join all necessary parties, nor was process timely served. For these reasons alone, the probate court's decision to

dismiss the will contest should be upheld. This Court need not even address the issue of whether a petition purporting to contest a will can be filed prior to the probate court's decision to accept or reject the will. However, on this issue, none of the authorities cited by Appellant permit the premature filing of a will contest. For these reasons, the probate court's dismissal should also be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the requirements of Rule 84.06 and Local Rule 365.

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