

IN THE SUPREME COURT OF OHIO

STATE ex rel. CHESTER TOWNSHIP, *et al.*,)
)
 Relators,) Case No. 2015-0604
 v.) Original Action in Prohibition
)
 THE HONORABLE TIMOTHY J. GRENDALL,)
 GEAUGA COUNTY COURT OF COMMON)
 PLEAS, PROBATE DIVISION)
)
 Respondent.)

**BRIEF OF AMICI CURIAE OHIO PROBATE COURT JUDGES HONS.
RICHARD CAREY, JAMES CISELL, DENNY CLUNK, JAN LONG, PHIL MAYER,
BEV MCGOOKEY, ROB MONTGOMERY, JACK PUFFENBERGER, RANDY
ROGERS, KEN SPICER, TOM SWIFT, JAMES WALTHER, AND MARY PAT
ZITTER IN SUPPORT OF RESPONDENT AND URGING DENIAL OF WRIT OF
PROHIBITION**

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AMICI'S STATEMENT OF INTEREST

This Amicus Brief is being filed by thirteen (13) probate judges: nine (9) active probate court judges and four (4) retired probate court judges (Amici "Ohio Probate Court Judges") in support of Respondent, Geauga County Probate Court Judge Timothy Grendell. The Ohio Probate Court Judges urge this Court to deny the Petition for Writ of Prohibition sought by Chester Township and its Board of Trustees. These active and retired probate court judges have over 200 years of probate court experience and are located in counties throughout Ohio.

In particular, the Amici Probate Court Judges are:

1. Judge Richard Carey, Clark County, 12 years of probate court experience.
2. Ret. Judge James Cissell, Hamilton County, 12 years of probate court experience.
3. Ret. Judge Denny Clunk, Stark County, 40 years of probate court experience.
4. Judge Jan Long, Pickaway County, 18 years of probate court experience.
5. Judge Phil Mayer, Richland County, 12 years of probate court experience.
6. Judge Bev McGookey, Erie County, 18 years of probate court experience.
7. Judge Rob Montgomery, Franklin County, 4 years of probate court experience.
8. Judge Jack Puffenberger, Lucas County, 24 years of probate court experience.
9. Judge Randy Rogers, Butler County, 20 years of probate court experience.
10. Ret. Judge Ken Spicer, Delaware County, 12 years of probate court experience.
11. Ret. Judge Tom Swift, Trumbull County, 35 years of probate court experience.
12. Judge James Walther, Lorain County, 6 years of probate court experience.
13. Judge Mary Pat Zitter, Mercer County, 13 years of probate court experience.

Amici Ohio Probate Court Judges submit this Amicus Brief so that the Court does not restrict either the broad plenary power and jurisdiction granted to probate courts under Ohio law or the unique oversight power granted to probate courts over Park Districts as contemplated by

the General Assembly and codified in R.C. Chapter 1545. To be sure, probate courts are courts of limited jurisdiction as defined by statute and the Ohio Constitution. But, it is equally well-established that “[t]he probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court *unless the power is expressly otherwise limited or denied by a section of the Ohio Revised Code.*” R.C. 2101.24(C) (emphasis added).

In general, “[t]he laws relating to the jurisdiction of the probate court are remedial and must be liberally construed.” *In re Rauscher*, 40 Ohio App.3d 106, 108, 531 N.E.2d 745, 747 (8th Dist. 1987). Thus, unless a statute expressly limits or denies the probate court’s jurisdiction to grant a particular remedy, this Court has interpreted the probate court’s jurisdiction broadly to authorize any relief in law or in equity that may be required to fully adjudicate a matter. *See, e.g., State ex rel. Lewis v. Moser*, 72 Ohio St.3d 25, 29, 647 N.E.2d 155, 157 (1995) (holding that probate courts have the jurisdiction to award compensatory and punitive damages for breach of fiduciary duty claim, even though such a remedy is not expressly authorized by R.C. 2101.24). And once jurisdiction has attached “the decision of every question thereafter arising...whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force, and effect of the final judgment, when brought collaterally into question.” *Sheldon’s Lessee v. Newton*, 3 Ohio St. 494, 499 (1854)

In fact, under Ohio law, probate courts are often called upon to exercise jurisdiction over non-adversarial proceedings, such as the appointment, supervision, and removal of fiduciaries or guardians or, as in this case, the appointment and removal of park district commissioners. *See* R.C. 1545.05 and R.C. 1545.06. In such proceedings, this Court has recognized that the probate court has plenary authority to initiate its own investigations of the appointed guardian or official when necessary. *See, e.g., In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010-Ohio-

2471, 933 N.E.2d 1067, ¶ 54 (holding that probate courts have the plenary authority to investigate guardians). Thus, Ohio courts have long recognized that probate courts have the inherent power and authority to conduct their own investigations when necessary, regardless of how the matter comes before the court. *See, e.g., In re Estate of E. Gladys Howard*, 9th Dist. Lorain App. No. 05CA008730, 2006-Ohio-2176, ¶ 17 (holding that “it was within the probate court’s inherent powers and duties to consider the fiduciary’s circumstances regardless of the manner in which they come to the court”).

The authority to appoint a special master commissioner is a critical part of the probate court’s ability to carry out this investigative function. R.C. 2101.06 expressly provides that “[t]he probate judge, upon the motion of a party *or the judge's own motion*, may appoint a special master commissioner in *any* matter pending before the judge.” R.C. 2101.06 (emphasis added). There is no statutory limitation on this broad grant of authority.

Indeed, this Court has recently determined that prohibition does not lie to contest an award of costs relative to a master commissioner. In *State ex rel. Hards v. Klammer*, 110 Ohio St.3d 104, 2006-Ohio-3670, 850 N.E.2d 1197, the Court refused to grant a writ of prohibition seeking to challenge an award of costs associated with the appointment of a special master commissioner. Most instructive here, the Court noted the venerable principle that probate courts have broad discretion in determining how the costs of a master commissioner should be assessed. *Id.* at ¶ 14. As here, where a party objects to the apportionment of costs, this Court has held that such an error cannot be corrected via a writ of prohibition because any such error “is, at best, an error in the exercise of jurisdiction rather than a want of jurisdiction.” *Id.* That this Court should reach the same conclusion in this case is patently clear for the additional reason that the cost award Chester Township seeks to negate is not even final.

As noted above, the Probate Court's power and jurisdiction is even more enumerated and acute in this case. Under R.C. Chapter 1545, probate courts have jurisdiction to conduct a hearing on the boundaries of a park district (R.C. 1545.04). Once a petition seeking to create a park district has been filed, the determination that the boundaries meet the requirements of R.C. 1545.01 and that the district's creation "will be conducive to the general welfare" is within the jurisdiction of the probate court. 1991 Op. Atty. Gen. No. 91-009, at 2-46. Probate courts have the power to appoint and to remove the park commissioners. R.C. 1545.05 and R.C. 1545.06. They have the power to dissolve park districts. R.C. 1545.35. And if money is to be donated to a park board, it cannot be accepted until the probate court approves it first. R.C. 1545.11; *see also* 1962 Op. Atty. Gen. No. 3233, at 659-60.

Finally, Amici submit this brief in order to urge this Court to fully recognize that probate courts, like all other courts, have the inherent power and authority to enforce their own prior orders, judgments, and decrees. This Court has long held that "[t]he power of a court to enforce its own proper orders is fundamental and inherent, as well as constitutional; necessarily so, to give it standing and afford respect and obedience to its judgment. This is upon broad ground of public policy, and without which the judicial edifice would fall." *Record Publishing Co. v. Kainrad*, 49 Ohio St.3d 296, 300, 551 N.E.2d 1286, 1290 (1990) (citing *Wind v. State*, 102 Ohio St.2d 62, 64, 130 N.E.2d 35, 36 (1921)).

This same principle applies especially to probate courts. They are called upon to exercise continuing jurisdiction over matters that are not the subject of an adversary proceeding, such as trusts, estates, guardianships, and park districts. Accordingly, Amici respectfully request that this Court apply these well-established principles so that probate courts can continue to invoke

their explicit and inherent power and authority to enforce their own prior judgments and orders and to carry out the mandates promulgated by the General Assembly.

STATEMENT OF FACTS

Amici incorporate by reference the Statement of Facts set forth in Respondent’s Brief as if fully restated herein.

LAW AND ARGUMENT

Proposition of Law No. I:

PROBATE COURTS HAVE PLENARY POWER TO FULLY ADJUDICATE ANY MATTER FALLING WITHIN THEIR JURISDICTION AND TO GRANT ANY RELIEF NECESSARY TO DISPOSE OF THE MATTER UNLESS EXPRESSLY LIMITED OR DENIED BY STATUTE.

As this Court has previously held, “[i]t is a well-settled principle of law that probate courts are courts of limited jurisdiction and are permitted to exercise only jurisdiction granted to them by statute and by the Ohio Constitution.” *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010-Ohio-2471, 933 N.E.2d 1067, ¶ 46 (citing *Corron v. Corron*, 40 Ohio St.3d 75, 77, 531 N.E.2d 708 (1988)). This well-established rule does not mean, however, that probate courts may only grant the relief expressly set forth in the statute. Rather, the exact opposite is true.

After identifying the general categories of cases that have been delegated to probate courts in R.C. 2101.24(A) and 2101.24(B), R.C. 2101.24(C) further provides that “[t]he probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code.” R.C. 2101.24(C). As one appellate court recently explained, “R.C. 2101.24(C) confers broad authority to the probate court to address collateral matters,” including the plenary power “to exercise complete jurisdiction over the subject matter to the fullest extent necessary.” *In re Cletus P. McCauley and Mary McAuley, Irrevocable Trust*, 5th Dist. No. 2013 CA00237, 2014-

Ohio-3489, ¶ 43 (citations omitted). Moreover, as this Court has held, R.C. 2101.24(C) authorizes the probate court to grant “any relief” in law or equity that may be required “to fully adjudicate the subject matter within the probate court’s exclusive jurisdiction.” *State ex rel. Lewis v. Moser*, 72 Ohio St.3d 25, 29, 647 N.E.2d 155 (1995).

In this case, Relators’ petition for a writ of prohibition seeks to challenge the Probate Court’s exercise of jurisdiction over non-adversarial proceedings arising from the Probate Court’s appointment of a Master Commissioner to conduct an investigation of the Chester Township Park District Commissioners.

Unquestionably, the Probate Court has the jurisdiction to adjudicate the underlying subject matter. Once jurisdiction has attached “the decision of every question thereafter arising...whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force, and effect of the final judgment, when brought collaterally into question.” *Sheldon’s Lessee*, 3 Ohio St. at 499.

Under R.C. Chapter 1545, probate courts have been granted exclusive jurisdiction over the creation of park districts, including the continuing jurisdiction, among other things, to appoint and to remove park district commissioners, to approve all donations to park districts, to approve the sale of lands, and to decide whether to dissolve a park district. R.C. 1545.05; 1545.06; 1545.11; 1545.38; and 1545.40. Although the exercise of this jurisdiction often arises in non-adversarial proceedings and may involve issues that would often be considered political questions, this Court has long recognized that such matters may be constitutionally delegated to the probate court, and that “the question of existence of natural resources in any proposed district, and the further question of reasonable relation of proposed parks and natural resources to

the general welfare, are justiciable matters.” *State ex rel. Bryant v. Akron Metropolitan Park Dist.*, 120 Ohio St. 464, 476, 166 N.E.2d 407 (1929).

This exclusive jurisdiction over the operation of park districts, particularly when township trustees are involved, is further amplified by the Attorney General. In 1988, he concluded that the positions of township trustee and park commissioner are incompatible. Particularly applicable here, the Attorney General opined that “a township trustee who served as a commissioner of the park district would be subject to divided loyalties in determining the most beneficial distribution of tax proceeds,” and that “the county park district and the township may come into additional conflict with respect to the levying of taxes and the submittal of their budgets to the county commission.” 1988 Op. Atty. Gen. 88-033, at 2-150. The General Assembly has clearly determined that the probate court must protect and oversee the balance between these two political subdivisions. Absent probate court jurisdiction to enforce the statutory mandates concerning park district operations, the statutory regimen is meaningless.

Further evidencing this jurisdictional grant, the General Assembly has elected to confer the power of appointment upon probate courts in a number of instances. In cases where the appointment power has been granted to the courts, in fact, this Court has held that such jurisdiction includes the “authority to determine whether the continued appointment of the official is necessary, and upon determining that it is no longer necessary,” the court “can order the official’s discharge.” *State ex rel. Hamilton Cty. Bd. of Commrs., v. Hamilton Cty. Ct. Comm. Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 29; *State ex rel. Diehl v. Colwell*, 123 Ohio St. 535, 176 N.E. 117 (1931). Thus, in the absence of a statutory limitation, the power given to the probate judge to determine whether there is a necessity for the

appointment “is a power that exists after, as well as prior to, the approval of the officer.” *Diehl*, 123 Ohio St. at 542.

In this case, the General Assembly has expressly provided that probate courts have both the power to appoint under R.C. 1504.05 and the power to remove a park commissioner “at the discretion of the probate judge, either upon complaint filed with such judge *or upon his own motion.*” R.C. 1545.06 (emphasis added). Because probate courts have been delegated the power to remove a park commissioner on the court’s own motion, it necessarily follows that probate courts also have the inherent authority and power to investigate the operations of the park district when necessary to determine whether the park district commissioners are lawfully and properly exercising the statutory authority granted them by the probate court.

This statutory authority to appoint and to remove park district commissioners is similar to the authority of probate courts to appoint and to remove guardians. That authority includes the “plenary authority to investigate guardians” and “to act upon the information brought before [the court].” *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010-Ohio-2471, 933 N.E.2d 1067, ¶ 45; ¶ 54. It is undisputed that the Probate Court has subject matter jurisdiction to appoint a master commissioner to investigate the allegations of the 2013 Review Document relating to the operations of the Park District.

In their Merit Brief, Relators do not suggest that the Probate Court lacks the authority to appoint a master commissioner to investigate the Park District. Rather, they are seeking to challenge the Probate Court’s exercise of jurisdiction to grant a particular form of relief, which Relators believe adversely impacts their interests. This challenge to the Probate Court’s exercise of jurisdiction, however, ignores the plain language of R.C. 2101.24(C). The statute grants the Probate Court plenary power to provide any relief necessary to dispose of a matter that

has properly come before the court “unless the power is expressly otherwise limited or denied by statute.” R.C. 2101.24(C).¹ Thus, as this Court has held, R.C. 2101.24(C) “authorizes *any* relief required to fully adjudicate the subject matter within the probate court’s exclusive jurisdiction.” *State ex rel. Lewis*, 72 Ohio St.3d at 29 (emphasis added).

Under R.C. 2101.24(C), the subject matter jurisdiction of probate courts is not limited only to whether to remove the Park District Commissioners. Rather, it includes the authority to dispose of all of issues that may arise from a master commissioner’s investigation. And that is exactly where the Master Commissioner’s investigation led, uncovering Chester Township’s deep involvement in leading the Park District astray by taking away its inside millage levy money, attempting contractually to oust the Probate Court of its express power to approve all donations to the Park District, and otherwise frustrating the purposes for which the Park District was initially created by the Probate Court at Chester Township’s instigation! Chester Township fully participated in the Master Commissioner’s investigation and in the entire proceeding before the Probate Court, only belatedly arguing the lack of jurisdiction when it came time to consider how to pay for the master commissioner’s services.

In this case, the Probate Court’s jurisdiction includes the authority to enforce the original 1984 judgment entry which created the Park District as a separate political subdivision with all of the power and authority granted by the Ohio Revised Code. As this Court has explained, “[w]e have long held that ‘[t]he power of a court to enforce its own proper orders is fundamental and inherent, as well as constitutional; necessarily so, to give it standing and afford respect and obedience to its judgment. This is upon broad ground of public policy, and without which power

¹ *State v. Brown*, 142 Ohio St. 3d 92, 2015-Ohio-486, 28 N.E.3d 81, is completely consistent with this. There, this Court found that probate courts cannot issue search warrants in criminal cases because R.C. 2931.01 expressly excludes probate courts from the definition of “judges” granted such powers under R.C. Chapters 2931 and 2953. *Id.* at ¶ 8.

the judicial edifice would fall.” *Record Publishing Co. v. Kainrad*, 49 Ohio St.3d 296, 300, 551 N.E.2d 1286 (1990).

Accordingly, while the Probate Court in this case has not yet granted any specific relief as a result of the Master Commissioner’s investigation, Relators have nonetheless failed to establish that the Probate Court is “without *any* jurisdiction *whatsoever*” over the underlying subject matter. *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 329, 285 N.E.2d 22 (1972) (emphasis added) (a writ of prohibition should be granted only “[i]f an inferior court is without jurisdiction whatsoever to act,” and the Relators can establish “a total and complete want of jurisdiction by the lower court”).

Even if the Probate Court somehow erred in considering whether to grant certain relief, the remedy would not be a writ of prohibition. A writ of prohibition is an extraordinary remedy that “is not routinely or easily granted.” *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 336, 686 N.E.2d 267 (1997). Rather, “absent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging the court’s jurisdiction possesses an adequate remedy by appeal.” *Junkin*, 80 Ohio St. 3d at 337; *see generally Lingo v. State of Ohio*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.2d 1188, ¶ 41 (citing *State ex rel. Miller v. Lake County Court of Common Pleas*, 151 Ohio St. 397, 86 N.E.2d 464, paragraph three of syllabus (1949)).

Here, it is undisputed that the Probate Court has subject matter jurisdiction: (1) to appoint a Master Commissioner to investigate the Park District, (2) the statutory mandate (R.C. Chapter 1545) to govern and to monitor park board operations, and (3) the inherent authority to enforce its own prior orders and decrees. Accordingly, the Probate Court has the jurisdiction and discretion to determine how to dispose of the issues raised by the Master Commissioner’s report.

Any error that may have arisen in the exercise of jurisdiction is not the proper subject of an extraordinary writ. *See, e.g., State ex rel. West v. McDonnell*, 139 Ohio St.3d 115, 2014-Ohio-1562, 9 N.E.3d 1025, ¶ 24; *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, 866 N.E.2d 1070, ¶ 22. Accordingly, this Court should not grant a writ of prohibition.

Proposition of Law II:

PROBATE COURTS HAVE BROAD DISCRETION TO ASSESS COSTS ASSOCIATED WITH THE APPOINTMENT OF A MASTER COMMISSIONER, AND ANY ERRORS IN THE EXERCISE OF THIS DISCRETION SHOULD BE RECTIFIED THROUGH APPEAL, NOT EXTRAORDINARY WRIT.

Indisputably, probate courts have the statutory authority to “appoint a special master commissioner in any matter pending before the judge.” R.C. 2101.06. To that end, the General Assembly has further provided that the probate court should “allow the commissioner those fees that are allowed to other officers for similar services,” and “shall tax those fees with the costs.” R.C. 2101.07.

Ordinarily, in an adversarial proceeding, Civ.R. 54(D) provides that all court costs should be paid by the losing party “unless the court otherwise directs.” Civ.R. 54(D). As this Court has held, “[T]he court has discretion as to how the costs of an action shall be assessed,” including the costs associated with the appointment of a master commissioner. *State ex rel. Estate of Hards v. Klammer*, 110 Ohio St.3d 104, 2006-Ohio-3670, 850 N.E.2d 1197, ¶ 14 (citing *State ex rel. Fant v. Reg. Transit Auth.*, 48 Ohio St.3d 39, 548 N.E.2d 240 (1990)).

This case did not arise from an adversary proceeding involving a prevailing party. Rather, the appointment of the Master Commissioner arose from the investigation initiated by the Probate Court. The question of who should pay the costs associated with the appointment of the Master Commissioner therefore remains an open issue, ultimately to be resolved by the Probate Court in the exercise of its discretion under Civ.R. 54(B) and R.C. 2101.07.

Indeed, while the Probate Court initially determined that 75% of the Master Commissioner's costs should be borne by "Chester Township/Chester Township Park District," it has not yet determined the amount of the alleged costs. Nor has it entered any orders that specifically compel Chester Township – as opposed to the Chester Township Park District or the Probate Court – to pay the alleged costs. *In the Matter of Chester Twp. Park Dist.*, 11th Dist. No. 2014-G-3242, 2015-Ohio-1210, ¶¶ 7-8. Thus, the Eleventh District Court of Appeals properly dismissed Chester Township's appeal because it determined that "the trial court has not yet approved and ordered payment of the Master Commissioner's fees and costs." *Id.* at ¶ 8. Having not even entered a final order yet, there is nothing for this Court to "prohibit." At the time a final order is entered, the matter can then be appealed.

CONCLUSION

For these reasons, Amici urge this Court to deny the petition for writ of prohibition and re-affirm its prior holding in *Klammer*. The General Assembly vested the probate courts with special jurisdiction over park districts and their operations. To that end, the Probate Court has broad discretion to determine how the costs associated with the appointment of a special master commissioner should be apportioned and paid. Probate courts often need to appoint a master commissioner to handle matters that are not the subject of an adversary proceeding, where there is no prevailing or losing party. This Court should not restrict the Probate Court's discretion over cost apportionment. If need be, any error can be addressed by an appellate court, on a case-by-case basis, under an abuse of discretion standard.

Indeed, under R.C. 2101.24(C), the Probate Court has plenary authority to dispose of all collateral matters, such as the assessment of costs, unless there is a statute that "expressly limits or denies" the Probate Court's jurisdiction. R.C. 2101.24(C). As in *Klammer*, this Court should

conclude that the Probate Court “has the discretion as to how to assess the costs” of the special Master Commissioner, and hold that “any error by [the probate court] in this regard is, at best, an error in the exercise of jurisdiction rather than the want of jurisdiction.” *Klammer*, 110 Ohio St.3d 104, 2006-Ohio-3670, 850 N.E.2d 1197, at ¶ 14.

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