[Cite as *Marin v. Trumbull Cty. Probate Court,* 2012-Ohio-2011.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

MEL M. MARIN,	:	**PER CURIAM OPINION**
Relator,	:	**CASE NO. 2012-T-0016**
- vs -	:	
TRUMBULL COUNTY PROBATE COURT,	:	
Respondent.	:	

Original Action for Writ of Mandamus

Judgment: Petition dismissed.

Mel M. Marin, pro se, P.O. Box 80454, San Diego, CA 92138 (Relator).

Dennis Watkins, Trumbull County Prosecutor, and *James T. Saker*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent).

PER CURIAM.

{¶1} This matter is before the court pursuant to the "Petition for Writ of Mandamus and For Declaratory Judgment," filed by relator, Mel M. Marin, against respondent, Trumbull County Probate Court, and the motion to dismiss filed by respondent. For the reasons that follow, we dismiss Mr. Marin's petition.

Substantive and Procedural History

{¶2} While Mr. Marin's factual allegations are far from clear, from what we can decipher, he alleges he filed a medical malpractice complaint against the Cleveland

Clinic Foundation in 2009 in the Cuyahoga County Court of Common Pleas on behalf of his elderly mother. According to the petition, Mr. Marin's mother was at all relevant times a resident of California and died in October 2009. In December 2009, the trial court dismissed Mr. Marin's action against the Clinic for lack of standing. Mr. Marin appealed the trial court's ruling. The Eighth District dismissed the appeal in *Marin v. Kandpal*, 8th Dist. No. 94491, 2010-Ohio-4360, appeal not accepted, 127 Ohio St.3d 1534, 2011-Ohio-376.

{¶3} According to the Eighth District's opinion, Mr. Marin brought his mother to the Cleveland Clinic for testing and rehabilitation. A dispute arose between Mr. Marin and the staff as to whether his mother should be prescribed sleeping pills, prompting the staff to alert security. When the doctor in charge of his mother's care refused to give her sleeping pills, Mr. Marin attempted to remove his mother from the hospital. However, he was unable to do so because the Department of Senior & Adult Services indicated that they were conducting an investigation into whether the mother had been "abused, neglected, or exploited."

{¶4} The agency obtained a protective order from the probate court, which gave it authority to act on the mother's behalf regarding her care and ordered that the mother not be removed from the hospital.

{¶5} Mr. Marin filed his action due to the hospital's refusal to release his mother. In the Eighth District's opinion dismissing the appeal, dated September 16, 2010, the appellate court held that Mr. Marin had failed to assert any claim that was personal to him, and thus he lacked authority to maintain his action. *Id.* at ¶9.

{¶6} Mr. Marin alleges that he re-filed his action in the Trumbull County Court of Common Pleas in September 2011 in accordance with the savings statute, this time including claims against various Trumbull County officials, who, he alleged, allowed the Cleveland Clinic to kill his mother so she would not testify against the Clinic.

{¶7} Mr. Marin alleges that in the same month he attempted to file an application for authority to administer his mother's estate in the Trumbull County Probate Court. Mr. Marin also requested a waiver of the filing fee, and he now alleges that one of the clerks told him the court does not waive fees. Thus, unable or unwilling to pay the fee, Mr. Marin did not file his application to administer his mother's estate.

{¶8} Mr. Marin further alleges that he later became a permanent resident of Pennsylvania in order to prepare to run for public office in that state.

{¶9} In November 2011, the Cleveland Clinic moved to dismiss the case on the ground that Mr. Marin could not assert his mother's claims because he had not been appointed administrator of her estate.

{¶10} Thereafter, in January 2012, Mr. Marin again attempted to file his application to be appointed administrator of his mother's estate in the probate court. He once again sought a waiver of the filing fee. The clerk's response regarding the waiver is unclear from the petition. However, Mr. Marin alleges that the probate court's magistrate advised him that an applicant cannot be appointed administrator unless he or she is a resident of Ohio. Mr. Marin concedes that in January 2012, he was not a resident of Ohio.

{¶11} On February 21, 2012, the Trumbull County Court of Common Pleas entered summary judgment against Mr. Marin and in favor of the Cleveland Clinic and

certain individual defendants on all claims asserted against them by Mr. Marin and dismissed them with prejudice. The court also entered summary judgment on the Clinic's counterclaim against Mr. Marin alleging he is a vexatious litigator. The court noted that Mr. Marin had previously been found to be a vexatious litigator in California, and declared him to be a vexatious litigator pursuant to R.C. 2323.52. Appellant appealed this ruling, and that appeal is pending in this court under Case Number 2012-T-0025.

Relief Sought via an Original Action

{¶12} Three days after the trial court's dismissal of Mr. Marin's claims, petitioner filed his petition in this matter. He claims he is entitled to a writ of mandamus because the probate court has refused to exercise its jurisdiction to rule on his request to waive the fee. He also alleges he is entitled to a declaration that R.C. 2109.21(A), which requires an applicant to be a resident of Ohio in order to be appointed administrator of a decedent's estate, is unconstitutional. Mr. Marin requests that in the event we hold the statute to be constitutional, we should enter a declaratory judgment stating that he can comply with Ohio's residency requirement by temporarily residing in Ohio for the sole purpose of being appointed administrator while retaining his permanent residency in Pennsylvania.

Mr. Marin's Status as a Vexatious Litigator

{¶13} R.C. 2323.52, Ohio's vexatious litigator statute, provides, in pertinent part:

{¶14} "(D)(3) A person who is subject to an order entered pursuant to division (D)(1) of this section may not institute legal proceedings in a court of appeals, continue any legal proceedings that the vexatious litigator had instituted in a court of appeals

prior to entry of the order, or make any application, other than the application for leave to proceed allowed by division (F)(2) of this section, in any legal proceedings instituted by the vexatious litigator * * * in a court of appeals without first obtaining leave of the court of appeals to proceed pursuant to division (F)(2) of this section.

{¶15} "* * *

{¶16} "(F)(2) A person who is subject to an order entered pursuant to division (D)(1) of this section and who seeks to institute or continue any legal proceedings in a court of appeals or to make an application, other than an application for leave to proceed under division (F)(2) of this section, in any legal proceedings in a court of appeals *shall file an application for leave to proceed in the court of appeals* in which the legal proceedings would be instituted or are pending. The court of appeals shall not grant a person found to be a vexatious litigator leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of appeals unless the court of appeals is satisfied that the proceedings or application are not an abuse of process of the court and that there are reasonable grounds for the proceedings or application.

{¶17} "* * *

{¶18} "(I) Whenever it appears by suggestion of the parties or otherwise that a person found to be a vexatious litigator under this section has instituted, continued, or made an application in legal proceedings without obtaining leave to proceed from the appropriate court of common pleas or court of appeals to do so under division (F) of this section, the court in which the legal proceedings are pending *shall dismiss* the proceedings or application of the vexatious litigator." (Emphasis added.)

{¶19} It is axiomatic that when used in a statute, the word "shall" denotes that compliance with the command of that statute is mandatory unless there appears a clear and unequivocal legislative intent that it receive a construction other than its ordinary usage. *Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534 (1992).

{¶20} Here, after having been found to be a vexatious litigator, petitioner filed his petition for writ of mandamus and for declaratory judgment without obtaining the leave to proceed from this court to do so as required by R.C. 2323.52(F)(2). For this reason alone, Mr. Marin's action must be dismissed.

{¶21} Further, even if petitioner had not previously been declared a vexatious litigator, we would still be required to dismiss his petition for mandamus. The record in this action reflects that the petition was not filed in compliance with R.C. 2731.04, which governs the proper form for an application for a writ of mandamus. It states: "Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit."

{¶22} This court has held that the requirement that the writ of mandamus be brought in the name of the state on the relation of the person applying for the writ is mandatory. *Ezzone v. Bruening*, 11th Dist. No. 96-L-105, 1996 Ohio App. LEXIS 5941, *9 (Dec. 31, 1996), citing *Maloney v. Court of Common Pleas*, 173 Ohio St. 226 (1962); *Alls v. McKay*, 11th Dist. No. 93-T-4956, 1993 Ohio App. LEXIS 5887 (Dec. 10, 1993).

{¶23} Further, while Mr. Marin states in his petition that the facts asserted therein are represented as being true under penalty of perjury, the Supreme Court of Ohio has held that unsworn written statements that are signed under penalty of perjury

may not be substituted for an affidavit. *Toledo Bar Assn. v. Neller*, 102 Ohio St.3d 1234, 2004-Ohio-2895, ¶23. The court held that "only a written declaration made under oath before a proper officer qualifies as an 'affidavit.'" *Id*. at ¶24.

{¶24} Upon review of the record, petitioner has failed to bring this action in the name of the state on relation of the person applying for the writ. Moreover, he has failed to verify his application by affidavit.

{¶25} Further, this court does not have subject matter jurisdiction over Mr. Marin's claim for declaratory judgment. It is well settled that Ohio appellate courts do not have original jurisdiction to entertain an action for a declaratory judgment. *Williams v. Gilligan*, 10th Dist. No. 73AP-69, 1973 Ohio App. LEXIS 1577, *3 (May 22, 1973); *Dyar v. Bingham*, 100 Ohio App. 304, 306 (4th Dist.1955).

{¶26} In view of the foregoing analysis, we dismiss Mr. Marin's petition for writ of mandamus and for declaratory judgment at his costs.

TIMOTHY P. CANNON, P.J., CYNTHIA WESTCOTT RICE, J., MARY JANE TRAPP, J., concur.