

- [Cite as *State ex rel. Jackson v. Nau*, 2004-Ohio-564.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE ex rel.	)	
C. SCOTT JACKSON,	)	
	)	CASE NO. 03 NO 311
PETITIONER,	)	
	)	
- VS -	)	OPINION
	)	AND JOURNAL ENTRY
	)	
JUDGE JOHN W. NAU	)	
NOBLE COUNTY COURT OF	)	
COMMON PLEAS,	)	
	)	
AND	)	
	)	
ROGER SMITH, NOBLE COUNTY	)	
CLERK OF COURTS,	)	
	)	
AND	)	
	)	
ATTORNEY DAVID GORMAN,	)	
	)	
RESPONDENTS.	)	

CHARACTER OF PROCEEDINGS:

Petition for Writ of Mandamus.

JUDGMENT:

Respondents Motions for  
Summary Judgment Granted.  
Petition Dismissed.

JUDGES:

Hon. Joseph J. Vukovich  
Hon. Cheryl L. Waite  
Hon. Mary DeGenaro

Dated: February 5, 2004

APPEARANCES:

For Petitioner:

C. Scott Jackson, Pro-se  
#416-468  
Noble Correctional Institution  
15708 State Route 78 West  
Caldwell, OH 43724-8902

For Respondents:

Clifford N. Sickler  
Noble County Prosecutor  
409 Poplar Street, Suite A  
Caldwell, OH 43724  
(For Respondents Nau and Smith)

Attorney Robert C. Johns  
406 Adams Street  
Steubenville, OH 43952  
(For Respondent Gorman)

Per Curiam.

{¶1} Petition for Writ of Mandamus was filed on October 20, 2003 seeking an order to compel the named Respondents to fully adjudicate all matters relative to the divorce complaint Petitioner had filed in Noble County Common Pleas Court and which was assigned Case No. 203-0025, captioned C. Scott Jackson v. Marlene S. Jackson. Named as Respondents in this action are Judge John W. Nau of the Noble County Common Pleas Court, Roger Smith, Noble County Clerk of Courts and Attorney David Gorman of the Southeast Ohio Legal Aid Society.

{¶2} Pursuant to an order from this Court setting an answer date or otherwise plead, Respondents have filed separate motions to dismiss under Civ.R. 12(B)(6) for failure to state a claim upon which relief could be granted. Respondents Nau and Smith have also filed to dismiss on the grounds of res judicata, asserting that a divorce action initiated by Marlene S. Jackson against Petitioner in Belmont County under Case No. 03 DR 071 has been fully adjudicated and no appeal was filed from that final judgment. The 12(B)(6) motions were converted to motions for summary judgment as allowed by rule. The motions now come on for determination.

{¶3} Mandamus is an extraordinary writ issued in the name of the state to compel an inferior tribunal or person to perform an act which the law specifically enjoins as a duty resulting from holding a particular office. R.C. 2731.01. In order to prevail on such writ, a court must find that a petitioner has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that the relator has no plain and adequate remedy at law. State ex rel. Hodges v. Taft (1992), 64 Ohio St.3d 1, citing to State ex rel. Harris v. Rhodes (1978), 54 Ohio St.2d 41. It is the burden on the party bringing the action to establish all the elements demonstrating entitlement to the writ. State ex rel. Luna v. Huffman (1996), 74 Ohio St. 3d 486.

{¶4} Attached to the motion filed by Respondents Nau and Smith are copies of a June 2, 2003 judgment entry filed in Case No. 203-0025, which dismisses the Noble County complaint, as well as a copy of the judgment decree of divorce filed by a Belmont County magistrate and judge on May 19, 2003, in Case No. 03 DR 071, involving this Petitioner. The basis of the dismissal entry is that there was failure of service upon Marlene S. Jackson, that good service of her Belmont County complaint was had on C. Scott Jackson, Petitioner herein, and that her complaint went to final judgment. No appeal was taken from the final judgment of divorce entered on May 19, 2003 in the Belmont County case. The divorce decree notes that Petitioner has been incarcerated since August 4, 2001. The court then proceeded to award all personal property in her possession to Marlene S. Jackson. That is the sum and substance of the very brief two-page divorce decree. It makes no mention of any specific personal property, nor does it address marital debt.

{¶5} It is clear from the filings before this Court that Petitioner was aware of the judgment of divorce awarded by the Belmont County Common Pleas Court on May 19, 2003. He opted not to file a timely direct appeal from the judgment decree of divorce. It may be gleaned that Petitioner is attempting to have his divorce complaint heard, as it was apparently filed a month in advance of the one filed by his ex-wife in her county of residence. However, service of his complaint was not accomplished, as noted in the dismissal entry.

{¶6} Pursuant to R.C. 2731.05 "the writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law." Petitioner failed to avail himself of the available legal remedy of direct appeal from the decree of divorce entered in Belmont County Common Pleas Case No. 03 DR 071, or more importantly, the dismissal order filed in Noble County Case No. 203-0025. The

availability of an adequate legal remedy precludes the issuance of a writ of mandamus. State ex rel. Hastings Mut. Ins. Co. v. Merillat (1990), 50 Ohio St.3d 152, 553 N.E. 2d 646.

{¶7} It may be inferred from the filings before this Court that Petitioner is somewhat concerned about losing his personal property and that he would be responsible for any debt owed. Those kinds of issues, if they are substantive issues, should have been addressed in the Belmont County proceeding. Petitioner defaulted and the trial court awarded his ex-wife all the personal property in her possession. There was no mention of any marital debt. Again, if Petitioner was dissatisfied with the decree, he had every opportunity to file a direct appeal from that judgment, if he believed the Belmont County Court of Common Pleas lacked jurisdiction to enter the judgment. In like manner, he should have filed an appeal from the dismissal order entered on June 2, 2003 in Noble County Case No. 203-0025, if he believed that legal error occurred in the dismissal of his complaint. He cannot accomplish through an original action in mandamus that which he failed to do through an available legal remedy.

{¶8} As regards Attorney Gorman, it is established law that mandamus will not lie to enforce a private right against a private person. State ex rel Longacre v. Penton Publishing Co. (1997), 77 Ohio St.3d 266.

{¶9} Accordingly, Respondents are granted summary judgment and this Petition for Writ of Mandamus is dismissed. Costs taxed against Petitioner.

{¶10} Final order. Clerk to serve notice as provided by the civil rules.

Waite, P.J., Vukovich and DeGenaro, JJ., concur.