

[Cite as *State ex rel. Abraitis v. Gallagher*, 2015-Ohio-1646.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101855 and 102246

**STATE EX REL. SARUNAS V. ABRAITIS, EXECUTOR
OF THE ESTATE OF
VLADA SOFIJA STANCIKAITE ABRAITIS**

RELATOR

AND

**STATE EX REL. SARUNAS V. ABRAITIS,
INDIVIDUALLY**

RELATOR

vs.

LAURA J. GALLAGHER, JUDGE, ET AL.

RESPONDENTS

**JUDGMENT:
COMPLAINTS DISMISSED**

Writ of Prohibition
Motion Nos. 479075 and 481428
Order No. 484148

RELEASE DATE: April 24, 2015

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TIM McCORMACK, J.:

{¶1} Relator, Sarunas V. Abraitis, in his individual capacity and as Executor of the Estate of Vlada Sofija Stancikaite Abraitis¹ (collectively referred to as “Abraitis” or relator herein), has filed multiple complaints seeking writs that prohibit respondents, Judge Laura J. Gallagher, Judge Anthony J. Russo, and Cuyahoga County Common Pleas Court, Probate Division, from continuing to exercise jurisdiction over the claims advanced in *Abraitis-Newcomer v. Abraitis*, Cuyahoga C.P. Probate No. 2014 ADV 195000 (the “Probate Court Action”).² Respondents have moved to dismiss the complaints, which relator has opposed. The complaints are dismissed for the reasons that follow.

¹Relator represents that he has been removed as executor of his mother’s estate, which is now pending separately in this court as 8th Dist. Cuyahoga No. CA-14-102403. Relator’s removal as executor of the estate is not at issue in these original actions.

²Despite his position that respondents patently and unambiguously lack jurisdiction over the Probate Court Action, relator, in his claims for relief, suggests that respondents have jurisdiction to continue to exercise jurisdiction over his counterclaim in the same matter.

Procedural History

{¶2} Relator has previously filed a complaint for a writ of prohibition in this court, seeking to prohibit Judge Laura J. Gallagher from proceeding in the Probate Court Action in *Abraitis, et al. v. Gallagher*, 8th Dist. Cuyahoga No. 101037, 2014-Ohio-2987 (“First Writ Action”). This court dismissed the complaint, and that matter is currently pending on appeal before the Ohio Supreme Court as Case No. 2014-1223. The First Writ Action was dismissed by this court on July 2, 2014. On August 28, 2014, relator filed a second complaint seeking a writ of prohibition against the current respondents, which is 8th Dist. Cuyahoga No. CA-14-101855. On November 24, 2014, relator filed a third complaint seeking a writ of prohibition against the current respondents, which is 8th Dist. Cuyahoga No. CA-14-102246. Since the second and third writs involve the same parties and same underlying litigation, the matters were consolidated for disposition. The court has considered the complaints, motions to dismiss, briefs in opposition, and all evidentiary materials submitted in support.

Facts

{¶3} Vlada Sofija Stancikaite Abraitis (“Vlada”) was relator Sarunas V. Abraitis’s mother. Vlada died on December 16, 2008. Sarunas had a brother, Vytautas T. Abraitis (“Vytautas”). Their father, Vincas Abraitis (“Vincas”) died on April 27, 1992.

{¶4} On October 4, 2011, Vlada’s will dated June 30, 1978, was admitted to probate and Sarunas was appointed as the fiduciary for his mother’s Estate in Cuyahoga

P.C. No. 2011 EST 172533 (“The Estate Matter”). Sarunas and Vytautas were the sole and equal beneficiaries under that will because Vincas had predeceased Vlada.

{¶5} Vytautas died on November 16, 2013. By that time, his mother’s estate was still pending and had been for two years. Vivian Abraitis-Newcomer (“Newcomer”) is the personal representative and sole beneficiary of Vytautas’s estate. Approximately one month after Vytautas died, relator presented a second will of Vlada, dated January 8, 1993, for admission to probate in Case No. 2011 EST 172533. Sarunas is the sole beneficiary under this later admitted will because he survived Vlada by 30 days.

{¶6} On January 13, 2014, Vytautas’s estate commenced the Probate Court Action, which involves a complaint for a will contest and declaratory judgment. Vytautas’s estate is petitioning the court for relief, including a request for an order to set aside the alleged Last Will and Testament of Vlada Sofija Abraitis, dated January 8, 1993, as void and a declaration that a certain survivorship deed is invalid.

{¶7} In the complaints currently before this court, relator refers to numerous collateral proceedings including Vlada’s guardianship matter, federal and state tax proceedings, and federal case proceedings. Some of the tax proceedings involve a jeopardy levy on certain assets held in Sarunas’s name that resulted from his apparent failure to file income tax returns for several years. There is some indication that Sarunas disputed ownership of the levied asset throughout the federal income tax litigation and that he argued during his telephonic collection hearing appeal that

a levy against him was not appropriate because the Cuyahoga County Probate Court had ruled that all of the assets held by him originated from

and were the sole property of [Vlada] Abraitis. According to Abraitis, he was no longer the guardian of the assets being held under the levy, and those assets were not under his control. The settlement officer determined that the assets in question were in an account under Abraitis's name and social security number and that the levy action was a permitted collection action.

E.g., Abraitis v. United States, N.D.Ohio No 1:11-cv-2077, 2012 U.S. Dist. LEXIS 97350 (July 13, 2012).³ Sarunas's taxpayer suit against the IRS was dismissed for his failure to exhaust administrative remedies, which was affirmed on appeal to the Sixth Circuit Court of Appeals. *Abraitis v. United States*, 709 F.3d 641 (6th Cir.2013).

{¶8} Relator has also submitted a Certificate of Determination of Final Estate Tax Liability from the Ohio Department of Taxation, Estate Tax Unit that was “[b]ased on the Ohio estate tax return(s) filed for [the Estate].” The Tax Commissioner Agent presented a proposed journal entry for respondent Judge Gallagher's approval. An Ohio Tax Commissioner Agent signified her approval of the proposed judgment entry. Respondent Judge Gallagher, however, subsequently issued a journal entry without the proposed provision “that the estate can be considered finalized.” The journal entry, signed by Judge Gallagher, reflects that “all audit issues are resolved.” At the time these subject writs were filed, the estate was still open. There is no indication that it has been closed to date.

³The district court noted, “Abraitis alleges that eventually about \$660,000 in assets belonging to [Vlada] Abraitis were deposited in Abraitis's investment account, account number XXXX-XXXX-5202 (“the account”), at Stifel, Nicolaus, & Co., Inc.”

{¶9} On August 12, 2014, respondent Judge Gallagher conducted a hearing in the Estate Matter on relator's motion to correct inventory and the representation of insolvency. Essentially, relator sought to remove a sizable account that had previously been included on the estate inventory. At this hearing, relator, through counsel, argued that the taxing authorities had already determined the ownership of certain assets for tax purposes and that the probate court was precluded from finding otherwise. Newcomer, through counsel, asked the court to defer ruling on the motion to correct inventory and representation of insolvency to allow her to pursue a concealment of assets claim. The court granted this request.

{¶10} Relator indicates that Vytautas's estate did not respond to several of the motions filed in the Estate Matter and did not file exceptions or objections to the Certificate of Determination of Final Estate Tax Liability or a wrongful levy claim.

{¶11} Relator commenced these actions asserting that the probate court patently and unambiguously lacks jurisdiction to act on Newcomer's claims in the Probate Court Action based on determinations made in collateral proceedings.

Analysis

{¶12} In order for this court to issue a writ of prohibition, relator is required to demonstrate each prong of the following three-part test: (1) respondent is about to exercise judicial power; (2) the exercise of judicial power by respondent is not authorized by law; and (3) there exists no other adequate remedy in the ordinary course of the law. *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, ¶ 14. In addition, prohibition does not lie, if relator has or had an adequate remedy in the ordinary course of the law, even if the remedy was not employed. *State ex rel. Leshner v. Kainrad*, 65 Ohio St.2d 68, 417 N.E.2d 1382 (1981); *State ex rel. Sibarco Corp. v. Berea*, 7 Ohio St.2d 85, 218 N.E.2d 428 (1966).

{¶13} Prohibition does not lie unless it clearly appears that the court possesses no jurisdiction of the cause that it is attempting to adjudicate or the court is about to exceed its jurisdiction. *State ex rel. Ellis v. McCabe*, 138 Ohio St. 417, 35 N.E.2d 571 (1941). Also, prohibition will not issue to prevent an erroneous judgment, or serve the purpose of an appeal, or to correct errors committed by the lower court in deciding questions within its jurisdiction. *State ex rel. Sparto v. Juvenile Court of Darke Cty.*, 153 Ohio St. 64, 90 N.E.2d 598 (1950). Furthermore, prohibition should be used with great caution and not issue in doubtful cases. *State ex rel. Merion v. Tuscarawas Cty. Court of Common Pleas*, 137 Ohio St. 273, 28 N.E.2d 641 (1940).

{¶14} However, when a court is patently and unambiguously without jurisdiction to act, the existence of an adequate remedy at law will not prevent the issuance of a writ

of prohibition. *Zitter* at ¶ 16. Nevertheless, absent a patent and unambiguous lack of jurisdiction, a court possessing general jurisdiction of the subject matter of an action has the authority to determine its own jurisdiction. *Id.* at ¶ 15. A party challenging the court's jurisdiction possesses an adequate remedy at law through an appeal from the court's judgment that it possesses jurisdiction. *State ex rel. Rootstown Local School Dist. Bd. of Edn. v. Portage Cty. Court of Common Pleas*, 78 Ohio St.3d 489, 678 N.E.2d 1365 (1997); *State ex rel. Bradford v. Trumbull Cty. Court*, 64 Ohio St.3d 502, 597 N.E.2d 116 (1992). Finally, this court possesses discretion in issuing a writ of prohibition. *State ex rel. Gilligan v. Hoddinott*, 36 Ohio St.2d 127, 304 N.E.2d 382 (1973).

{¶15} We have already determined that respondent Judge Gallagher has basic statutory jurisdiction over the Probate Court Action in the First Writ Action pursuant to R.C. 2101.24(A)(1)(p) and 2101.24(A)(1)(l). *Gallagher*, 8th Dist. Cuyahoga No. 101037, 2014-Ohio-2987, ¶ 10; *see also*, R.C. 2107.71(A). Accordingly, we continue to find that respondents have basic statutory jurisdiction over the Probate Court Action.

{¶16} The First Writ Action involved allegations that Newcomer lacked standing. Notwithstanding relator's failure to present all of his claims and arguments in his initial original action, relator has not satisfied the requirements necessary for the writ in these later filed complaints.

{¶17} According to relator, the second complaint "argues that the trial court was divested of jurisdiction" in the Probate Court Action because Vytautas's estate did not file

exceptions to the Certificate of Determination of Final Estate Tax Liability that was filed in the Estate matter. Relator has not provided any authority that would support his position that the probate court lacks jurisdiction to administer the estate whenever there are no exceptions or objections filed to the tax authority's determination of estate tax liability. To the extent that relator is arguing that the tax authority's determination has some type of preclusive effect on matters at issue in the estate, the probate court has jurisdiction to make that determination and an appeal affords an adequate remedy at law to challenge it.

{¶18} The third complaint appears to be contending that a failure to file a wrongful levy claim concerning a jeopardy levy issued by the IRS, coupled with the federal tax authority's resolution of Sarunas's outstanding income tax liabilities, divested respondents of jurisdiction to deny relator's motions to correct the inventory and representation of insolvency. Stated differently, the third complaint is based on relator's belief that the taxing authorities' determinations deprive respondents' of jurisdiction to resolve the claims and determine the assets of the estate. Although relator believes respondent Judge Gallagher may "reverse the ownership determination by the IRS," that is not the case. Contrary to relator's contentions, there is no indication that respondents are considering a wrongful levy claim. The evidence presented reflects that Judge Gallagher repeatedly acknowledged the probate court had authority to determine the merits of the claims within its jurisdiction such as a concealment of assets claim. R.C. 2109.50 confers jurisdiction on the probate court over concealment actions. Neither the

termination of Vlada’s guardianship nor any of the tax determinations would deprive respondents of jurisdiction to determine this claim. “Concealment actions under R.C. 2109.50 and 2109.52 could be applicable to recover certain assets wrongfully concealed, embezzled, or conveyed away before the creation of the estate.” *Goldberg v. Maloney*, 111 Ohio St.3d 211, 2006-Ohio-5485, 855 N.E.2d 856, ¶ 33. “R.C. 2109.52 expressly authorizes probate courts in concealment proceedings to resolve ‘questions of title’ for allegedly concealed, embezzled, or conveyed assets.” *Id.* at ¶ 36, citing *State ex rel. Lipinski v. Cuyahoga Cty. Common Pleas Court, Probate Div.*, 74 Ohio St.3d 19, 22, 655 N.E.2d 1303 (1995) (“a declaratory judgment action may be brought in the probate court to determine the validity of inter vivos transfers where the property transferred would revert to the estate if the transfers are invalidated”).

{¶19} At least one Ohio court has addressed the different duties of the probate court and the taxing authorities. *E.g.*, *In re Estate of Beasley*, 70 Ohio App.2d 131, 435 N.E.2d 91 (4th Dist.1980). In *Beasley*, the court explained the probate court’s duties include determining which claims against an estate are valid, while the state Tax Commissioner examines the final tax return and determines the validity of the return. The court in *Beasley* also refused to treat the executor’s failure to contest the federal tax return as an admission against interest in determining the state tax liability. *Id.* at 136-137, citing *In re Estate of Kaufman*, 53 Ohio St.2d 23, 374 N.E.2d 142 (1978) (noting that “the Supreme Court upheld a different valuation between the Ohio estate tax

and the federal estate tax” and recognizing that “differing results obtain in the separate jurisdictions”).

{¶20} The preclusive effect of any determinations regarding the ownership of various assets is properly determined by respondents and can be adequately challenged by way of an appeal.

{¶21} Relator has failed to establish that respondents patently and unambiguously lack jurisdiction over the Probate Court Action. Appeal is an adequate remedy at law to challenge any errors in the court’s exercise of its jurisdiction. Because relator has an adequate remedy at law by way of appeal, relief through an original action is inappropriate. *E.g., In re Scanlon*, 8th Dist. Cuyahoga No. 95264, 2011-Ohio-1097; *see also State ex rel. Davet v. Sutula*, 131 Ohio St.3d 220, 2012-Ohio-759, 963 N.E.2d 811, ¶ 2.

{¶22} Respondents’ motions to dismiss are granted.

{¶23} Relator to pay costs. The court directs the clerk of courts to serve all parties with notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶24} Complaints dismissed.

TIM McCORMACK, JUDGE

MARY J. BOYLE, P.J., and
EILEEN A. GALLAGHER, J., CONCUR

KEYWORDS:

Writ of prohibition' adequate remedy at law; tax determinations; probate court; preclusive effect. Respondents's motions to dismiss relator's complaints for writ of prohibition are granted where respondents have jurisdiction over claims for will contest, declaratory judgment, concealment of assets and the administration of the estate. Appeal provides an adequate remedy at law to challenge any alleged errors in the probate court's exercise of its jurisdiction and its determination of whether the ownership interest in various assets has been preclusively established by collateral court and tax proceedings.