

**COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO**

ESTATE OF
SAMUEL B. WERNER

CASE NO. C-95643

ENTRY DENYING TAX
COMMISSIONER RELIEF
FROM JUDGMENT

This matter came before Judge Wayne F. Wilke on April 25, 1997, concerning the Ohio Tax Commissioner's motion for relief from this court's final order from March 14, 1997, denying him the right to intervene. Present were Robert C. Maier, representing the Tax Commissioner, and Daniel P. Randolph, Jon Hoffheimer, and John G. Cobey, who all oppose the Commissioner's motion.

The facts of this case have been described in this court's opinion and entry from March 14, 1997 and shall be incorporated by reference in this decision. On January 6, 1997, the Tax Commissioner of Ohio moved for an order permitting him to intervene in the will contest action between Sarah Werner and Marilyn Krug, et al, under Civil Rule 24(A)(2). This court, on March 14, 1997, denied that motion. Subsequently, the Tax Commissioner filed a motion for relief from the Court's order denying intervention. For reasons described below, that motion shall also be denied.

Pursuant to R.C. §5731.31, the probate court of the county has jurisdiction to determine all questions concerning the administration of the taxes levied by Chapter 5731 of the Ohio Revised Code. Revised Code §2101.24(C) provides that the probate court has plenary power, meaning full and complete, at law and in equity fully to dispose of any matter properly before the court unless the power is expressly otherwise limited or

denied by statute. *Wolfrum v. Wolfrum* (1965), 2 Ohio St.2d 237. Despite the Tax Commissioner's contention, the Court may *sua sponte* raise and adjudicate any relevant issue before it.

The Commissioner requested permission to intervene under Civil Rule 24(A) and this court denied that request. He then asked the Court for relief from that judgment under Civil Rule 60(B)(1) and (5). Those rules allow a court to relieve a party or his legal representative from a final judgment for, among others, mistake, inadvertence, surprise, excusable neglect or for any other reason justifying relief from the judgment. Ignoring for the moment that the Tax Commissioner is not a party to this will contest and therefore arguably has no standing to bring a Civ. R. 60 motion, the Commissioner's motion for relief may be denied upon other grounds.

As the Tax Commissioner well knows, the law in Ohio is well settled that an individual cannot have more than one domicile at the same time. *Grant v. Jones* (1883), 39 Ohio St. 506; *Snelling v. Gardner* (1990), 69 Ohio App.3d 196, 201. As previously stated, this court shall give full faith and credit to the New York Surrogate Court's determination that the decedent, Samuel B. Werner, was domiciled in New York at the time of his death. The decedent's domicile is no longer an issue and his estate shall be administered in New York. The decedent owned no real property nor business property situated in the State of Ohio. This court may not coerce a party to administer an estate where none exists.

This court did not err when it denied the Tax Commissioner's motion to intervene, contrary to the Commissioner's contention. Civil Rule 24(A)(2) requires intervention when the applicant claims an interest relating to the property or transaction

which is the subject of the action and the applicant is so situated that the disposition of the action may impair his ability to protect that interest. The standard set forth by this rule has not been met. The dismissal of the will contest action in no way impairs the Tax Commissioner's ability to protect whatever interest in the decedent's property he believes exists. Since the decedent's estate is to be administered in New York, conflict of law standards obviously require New York's law to apply to the administration of the estate. This court's earlier pronouncement that the Tax Commissioner may protect his interest in a surrogate court in the State of New York must be repeated. New York statutory law affords the Tax Commissioner a remedy.

Under CLS Tax Law §978 (1996 Supp.), where the State of New York claims that a decedent was domiciled in this state at the time of his death and the taxing authorities of another state makes a similar claim, the commissioner of taxation and finance may enter into a written agreement with the other taxing officials and the executor that New York will accept a certain amount as payment in full. Consequently, since the Commissioner may protect his interest in New York, there is no reason for intervention under Civ. R. 24(A)(2) in this case to be granted.

Last, as stated by the court in *Elyria Township Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, Civ. R. 60(B) relief is not available as a substitute for appeal; a party may not merely re-argue the same contentions that were rejected in the judgment. The Tax Commissioner, while attacking the Court's judgment on grounds raised *sua sponte* by the Court, has substantially re-litigated the grounds for his motion to intervene. For all of the above reasons, the Tax Commissioner's motion for relief from judgment is hereby denied.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: Robert C. Maier
Daniel P. Randolph
Jon Hoffheimer
John G. Cobey
D. Jeffrey Ireland
Steven I. Werner
Michael S. Insel
Stephen Hochhauser