

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate of this court who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate recommended this court grant respondents' motion to dismiss. Specifically, the magistrate found "relator retains a clear legal right in the form of an appeal from the judgments and orders of the probate court, or had such a remedy in due course when the orders issued." The magistrate further noted that mandamus cannot be utilized to compel the probate court to reach a certain outcome or to rule in his favor.

{¶ 3} Relator has filed an objection to the magistrate's decision, asserting he is not asking this court "to deliver judgment or ruling, nor compel [respondents] for favorable ruling as this decision implies." Rather, relator maintains, he is requesting this court to "compel Judge Robert Montgomery * * * to perform a judicial duty * * * and legally address a pleading before him." (Emphasis sic.)

{¶ 4} To the extent relator contends the probate court has failed to perform a judicial duty and address a pleading (i.e., rule on a Civ.R. 60(B) motion), he appears to seek relief more appropriate in procedendo than in mandamus. *See, e.g., State ex rel. Miley v. Parrott*, 77 Ohio St.3d 64, 65 (1996) ("A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment."). However, "[n]either procedendo nor mandamus may compel [a court] to perform a duty already performed." *Martin v. Judges of the Lucas Cty. Court of Common Pleas*, 50 Ohio St.3d 71, 72 (1990). Further, an appellate court "can take judicial notice that the requested act has been performed." *State ex rel. Stanley v. D'Apolito*, 7th Dist. No. 12 MA 218, 2013-Ohio-428, ¶ 8.

{¶ 5} Here, we take judicial notice of the fact the probate court has ruled on relator's Civ.R. 60(B) motion for relief from judgment which he filed with that court on March 5, 2018. Specifically, on May 24, 2018, the magistrate of the probate court issued an order denying relator's Civ.R. 60(B) motion. On June 4, 2018, relator filed a pro se objection to the magistrate's decision of May 24, 2018, asserting in part that the magistrate's decision was "deceptive." By judgment entry filed July 19, 2018, the probate court denied relator's objection to the magistrate's decision.

{¶ 6} Thus, the record indicates the "judicial duty" relator seeks to compel has already been performed by the probate court. As set forth above, neither procedendo nor mandamus will compel performance of a duty that has already been performed. *Martin* at 72. Finally, to the extent he may be dissatisfied with the order or decision of the probate court, relator has, as noted by this court's magistrate, an adequate remedy at law, and mandamus may not be utilized as a substitute for appeal. *State ex rel. Marshall v. Keller*, 15 Ohio St.2d 203, 205 (1968) ("Mandamus is not a substitute for appeal.").

{¶ 7} Upon review, we agree with the magistrate's determination that relator's complaint fails to state a claim on which relief in mandamus can be granted. We therefore overrule relator's objection and adopt the magistrate's findings of fact and conclusions of law, and grant respondents' motion to dismiss.

*Relator's objection overruled;
respondent's motion to dismiss granted; action dismissed.*

DORRIAN and LUPER SCHUSTER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. Thomas Robison III,	:	
Relator,	:	
v.	:	No. 18AP-591
State of Ohio,	:	(REGULAR CALENDAR)
Judge Robert Montgomery, et al.,	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on September 24, 2018

Thomas W. Robison III, pro se.

Ron O'Brien, Prosecuting Attorney, and Bryan B. Lee, for respondents.

IN MANDAMUS
ON RESPONDENTS' MOTION TO DISMISS

{¶ 8} In this original action, relator, Thomas Robison, III, requests a writ of mandamus ordering respondent Robert Montgomery, probate judge for Franklin County, and Robert Morris, a magistrate with the Franklin County Probate Court, to grant relator's motion for relief from judgment brought under Civ.R. 60(B). Relator asserts that in the course of probate proceedings, another party has, with the approval of the probate court, taken possession of certain property using a void quitclaim deed.

Findings of Fact:

{¶ 9} 1. Relator filed his complaint in mandamus on August 3, 2018.

{¶ 10} 2. The estate of relator's father, Thomas Robison, II, is currently undergoing probate proceedings in Franklin County Probate Court.

{¶ 11} 3. The complaint alleges that both relator and his sister, designated executors under the will, were removed and replaced by a court-appointed administrator.

{¶ 12} 4. The decedent's will allocated his property among his son (relator), his daughter, and his widow, who is apparently not the mother of the children.

{¶ 13} 5. Relator objected in probate court to the administrator's action and distributions with respect to property located at 7780 Harlem Road, Westerville, Ohio, 43062.

{¶ 14} 6. Relator asserts that the decedent's widow, in 1991, with intent to defraud, obtained from her husband a quitclaim deed regarding the property.

{¶ 15} 7. Relator filed a motion under Civ.R. 60(B) for relief from the probate court's orders regarding the property.

{¶ 16} 8. Relator's complaint asserts that Judge Montgomery and Magistrate Morris have exhibited bias in the judicial administration of the estate.

Discussion and Conclusions of Law:

{¶ 17} A Civ.R. 12(B)(6) motion to dismiss a complaint in mandamus tests the sufficiency of the complaint. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94 (1995), citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545 (1992).

{¶ 18} In reviewing the complaint, this court must take all material allegations as admitted and construe all reasonable inferences in favor of the relator as the nonmoving party. *Id.* "In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus.

{¶ 19} The writ of mandamus will issue if the relator can demonstrate that the relator has a clear legal right to the relief prayed for, the respondent has a clear legal duty to perform the requested act, and the relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29 (1983). A complaint in mandamus will not be dismissed if it sufficiently states a claim that alleges the existence of the legal duty and the want of an adequate remedy at law so that the respondent is given a reasonable notice of the claim asserted. *Hanson* at 548, citing *State ex rel. Alford v. Willoughby Civil Serv. Comm.*, 58 Ohio St.2d 221, 223 (1979).

{¶ 20} "It is firmly established that the writ of mandamus will not issue '* * * where the relator has or had available a clear, plain and adequate remedy in the ordinary course of the law.' " *Berger*, at 30, quoting *State ex rel. Sibarco Corp. v. Berea*, 7 Ohio St.2d 85, 88 (1966). It is apparent that relator retains a clear legal right in the form of an appeal from the judgments and orders of the probate court, or had such a remedy in due course when the orders issued. Because relator has an adequate remedy at law, he cannot resort to mandamus. *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 478, 2003-Ohio-2061. "[M]andamus may not be employed as a substitute for a timely appeal." *Darnell v. Pub. Emps. Retirement Sys.*, 10th Dist. No. 98AP-303 (Dec. 31, 1998).

{¶ 21} Moreover, to the extent that relator seeks to compel the probate court to reach a certain outcome or rule in his favor, the writ of mandamus, like the writ of procedendo, will not lie. "Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the

manner of his action." *Interstate Commerce Comm. v. United States*, 289 U.S. 385, 394 (1933), citing *Interstate Commerce Comm. v. Waste Merchants Assn.*, 260 U.S. 32, 34 (1922); *Wilbur v. Kadrie*, 281 U.S. 206, 218 (1930); and *Interstate Commerce Comm. v. New York, New Haven & Hartford R.R.*, 287 U.S. 178, 204 (1932). "Procedendo is an order from a court of superior jurisdiction to proceed to judgment: it does not attempt to control the inferior court as to what the judgment should be." *State ex rel. Anderson v. Sheeran*, 10th Dist. No. 11AP-990, 2012-Ohio-2949, ¶ 8, citing *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 462 (1995).

{¶ 22} Based on this analysis, it is clear that relator's complaint fails to state a claim on which relief in mandamus can be granted. It is accordingly the magistrate's decision that this court grant respondents' motion to dismiss the action.

/S/ MAGISTRATE
MARTIN L. DAVIS

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

