

IN THE COURT OF APPEALS OF IOWA

BOYD GELHAUS,)

Plaintiff-Appellant,)

vs.)

STATE OF IOWA and IOWA)
DEPARTMENT OF REVENUE)
AND FINANCE,)

Defendants-Appellees.)

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Appeal from the Iowa District Court for Hardin County
(No. 73-244-987), Carl D. Baker, Judge.

Plaintiff appeals the district court's order on defendants' Iowa Rule of Civil Procedure 179(b) motion which rescinded and set aside an earlier order authorizing the issuance of a writ of certiorari. **AFFIRMED IN PART AND REMANDED IN PART.**

Michael A. Smith of Lundy, Butler & Lundy, P.C.,
Eldora, for plaintiff-appellant.

Thomas J. Miller, Attorney General, and Thomas M.
Donohue, Assistant Attorney General, for
defendants-appellees.

Considered en banc.

OXBERGER, C.J.

Plaintiff-appellant Boyd Gelhaus appeals the district court's order dismissing an earlier order granting Gelhaus a writ of certiorari to challenge defendant-appellee Iowa Department of Revenue and Finance's decision to appraise his property for inheritance tax purposes.

Appellant's grandfather left appellant's father a life estate in certain property remainder to his father's heirs. When his father died December 29, 1979, appellant was his sole heir and inherited the property. On September 28, 1987, an inheritance tax appraisal of \$331,650 was filed in the Hardin County clerk's office. Appellant sought and received a writ of certiorari. The trial court dismissed the writ pursuant to the department's Iowa Rule of Civil Procedure 179(b) motion.

Appellant's petition for writ of certiorari contended the appraisal was illegal due to a court order entered in his grandfather's estate indicating the estate was not subject to inheritance tax. As authority, he cited Iowa Code section 7345 (1939), which was in effect when appellant's grandfather died, and states:

Nontaxability - order of court. In all cases where the court finds that said estate is not subject to an inheritance tax, he shall enter an order of such finding upon said preliminary inheritance tax report, and no appraisal for inheritance tax purposes shall be made in that estate.

The department argued the appraisal decision was agency action and appellant had failed to exhaust administrative

remedies before seeking judicial review as required under Iowa Code section 17A.19(1) (1987).

The district court, citing Salsbury Laboratories vs. Iowa, Etc., 276 N.W.2d 830 (Iowa 1979), held the filing of a petition for judicial review pursuant to Iowa Code section 17A.19 (1987) was the exclusive means of remedy for appellant and dismissed his writ of certiorari.

On appeal appellant contends (1) the department's Iowa R. Civ. P. 179(b) motion was inappropriate and should be considered a motion to dismiss, (2) his writ of certiorari is the proper way to attack the department's illegal appraisal decision, and alternatively, (3) if the writ was an inappropriate attack the district court erred in not treating his petition for writ of certiorari as a proper petition for judicial review as he requested below his resistance to the department's motion.

We agree with appellant the department's 179(b) motion should be considered a motion to dismiss. Tindahl v. Norman, 427 N.W.2d 871, 872 (Iowa 1988). We affirm the trial court's determination that appellant's petition for certiorari was not the proper procedure in which to review the department's action. Iowa Code section 17A.19(1) (1987); Salsbury Laboratories v. Iowa Etc., 276 N.W.2d 830, 833 (Iowa 1979). However, the trial court's order dismissing the writ does not specifically address appellant's request to have his petition considered a

petition for judicial review. An agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy. Iowa Code § 17A.19(1). See also Tindahl at 872. When read together, appellant's petition for writ of certiorari and resistance to the department's motion adequately alleged such an intermediate review was appropriate. See generally Tindahl, at 873-74 and Salsbury, at 835-36. The record is incomplete as to the agency remedies available and the appropriateness of these remedies to appellant's claim which appears to be based solely on which inheritance taxing statute applies. Accordingly, this case is remanded to the district court for proper determination of intermediate judicial review and legal issues. On remand, parties shall be afforded the opportunity to recast their pleadings and present proper authorities. Tindahl, at 874.

AFFIRMED IN PART AND REMANDED IN PART.

Donielson, Schlegel and Habhab, JJ., concur; Sackett and Hayden, JJ., dissent.

SACKETT, J. (dissenting)

To me the real question that emerges from this procedural muddle is whether there was a deferral of inheritance tax on the property appellant inherited from his grandfather. In 1940 appellant inherited the property subject to his father's life estate. Consequently, the tax (if any) on appellant's interest could either have been paid in the grandfather's estate or could have been deferred until the death of his father. See Iowa Code section 7351 (1939). For the department to now have authority to appraise it must show at the time of appellant's grandfather's death the interest of appellant was subject to tax and the tax was not paid.

The State Tax Commission determined the property was worth \$11,200.00 when appellant's grandfather died. It determined appellant's father's life estate was worth \$8,155.46, making appellant's remainder interest worth \$3,044.56. Under the 1939 Code appellant as a lineal descendant had a \$5,000 inheritance tax exemption. See Iowa Code section 7312.1 (1939).

Finding no tax was owed on appellant's interest when his grandfather died, I would sustain the writ.

Hayden, J., joins this dissent.