

The Probate Exception to Federal Jurisdiction

By Eric W. Penzer and Frank T. Santoro

Federal courts are courts of limited jurisdiction, possessing only such power as authorized by the Constitution and by statute.¹ Whether a federal court has jurisdiction to entertain a matter is most often resolved by determining whether the action involves a federal question,² or whether there exists diversity between or among the parties.³ Once jurisdiction is established, the obligation of a federal court to exercise the jurisdiction given to it is "virtually unflagging."⁴ In making such jurisdictional determinations, however, there are certain jurisdictional exceptions that courts often have to consider.

One such exception to the jurisdiction of the federal courts is the probate exception. In the broadest sense, the exception excludes probate and certain probate-related matters from the federal courts.⁵ The exception has been described as "one of the most mysterious and esoteric branches of the law of federal jurisdiction."⁶ Recently, in *Marshall v. Marshall*,⁷ the Supreme Court revisited the probate exception, cautioning against its expansive application and stating that the probate exception is "narrow," and should not be used as an excuse for federal courts to decline to exercise jurisdiction over actions merely because they involve a probate-related matter.⁸

I. The History of the Probate Exception—*Markham* and Its Progeny

The probate exception is rooted in Congress' statutory grant of diversity jurisdiction to the federal courts in 1789.⁹ The Judiciary Act of 1789 was construed as limiting the grant of jurisdiction to those matters that would have been within the jurisdiction of the English courts of common law and the High Court of Chancery in 1789.¹⁰ Courts, including the Supreme Court in *Markham v. Allen*, expressed the view that neither the English courts of common law nor the High Court of Chancery were vested with the power to address certain probate-related matters, and thus the federal courts also lack such jurisdiction.¹¹

In *Markham*, the last Supreme Court case to address the probate exception before *Marshall*, the will of a California resident, which named German citizens as beneficiaries, was admitted to probate in state court.¹² The heirs of the decedent, American citizens, petitioned in state court, asserting that under state law the German legatees were ineligible as beneficiaries, and that petitioners, as United States citizens, were thus entitled to inherit the decedent's entire estate. The Alien Property Custodian, acting pursuant to the Trading With the Enemy Act, purported to vest himself as Custodian with all right, title and interest of the German beneficiaries,

and brought suit in federal district court against the executor of the estate and the American heirs for a determination that the American heirs had no interest in the estate and that the entire estate belonged to the Alien Property Custodian.¹³ Specifically, the Alien Property Custodian sought a declaration that he was "entitled to receive the net estate of the [decedent] in distribution, after the payment of expenses of administration, debts, and taxes."¹⁴

In *Markham*, the Court held that the federal district court had jurisdiction to hear the Alien Property Custodian's claim, setting forth a framework for the probate exception that drew various interpretations in the lower courts for more than sixty years, until *Marshall*. The Court explained that the federal courts lack jurisdiction to probate a will or to administer an estate.¹⁵ However, the Court held that beyond the probate of a will or administration of an estate, the "federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."¹⁶

The Court attempted to clarify this holding by explaining that the fact that the state probate court would be bound to recognize rights adjudicated in the federal court would not constitute an interference with the state probate proceedings.¹⁷ Thus, the effect of the declaratory judgment sought by the Alien Property Custodian would not be an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court. Instead, it would merely determine the Alien Property Custodian's right in the property, following administration by the state probate court.¹⁸

In the wake of *Markham*, courts employed various methods for determining the scope of the probate exception. While it was clear, after *Markham*, that federal courts could not probate or administer wills, the import of the Court's instruction that federal courts have jurisdiction "so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court" was subject to varying interpretations.¹⁹

Some courts examined the treatment of probate jurisdiction by the states. For example, in *Lamberg v. Callahan*, the Second Circuit was careful to cite the above-quoted language of *Markham*, but went on to hold

that "[t]he standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court; but where the suit merely seeks to enforce a claim *inter partes*, enforceable in a state court of general jurisdiction, federal diversity jurisdiction will be assumed."²⁰ Commentators have described this approach as the "route test."²¹ Under the route test, if a dispute could only be resolved by a probate court, and the state court of general jurisdiction had no subject matter jurisdiction, the federal court similarly had no jurisdiction.²²

Other lower courts attempted to apply the probate exception by examining whether the claim asserted in federal court would require the court to rule on the validity of a will. Essentially, while the federal court could not make a ruling which would affect the validity of the will, it could affect a right to share in the distribution of the estate. Under this approach, the federal courts could not invalidate a will for lack of capacity or undue influence, but could make a declaration as to the interpretation of a will.²³ Commentators have described this approach as the "nature of the claim test."²⁴

Still other courts employed what they perceived as the policy goals underlying the probate exception, namely, the judicial economy of resolving probate-related matters in a single forum, utilizing the expertise of state probate courts.²⁵

Ultimately, in *Marshall*, the Court rejected all of the tests employed by these lower courts.

II. *Marshall*—The Facts

In *Marshall*, the decedent, J. Howard Marshall II, died without providing for his wife, Vickie-Lynn Marshall, in his will. According to Vickie, Marshall intended to provide for her through a gift in the form of a "catch-all" trust.²⁶ E. Pierce Marshall, Howard's son, was the ultimate beneficiary of Howard's estate plan.²⁷

While the estate was subject to ongoing proceedings in the Texas probate court, Vickie filed for bankruptcy in California, and Pierce filed a proof of claim in the federal bankruptcy court alleging that Vickie had defamed him when her lawyers told members of the media that Pierce had engaged in forgery, fraud, and overreaching to gain control of Howard's assets.²⁸ Pierce sought a declaration that his claim was not dischargeable in bankruptcy, and Vickie answered and asserted counterclaims, including a counterclaim that Pierce had tortiously interfered with a gift she expected from Howard.²⁹ The Bankruptcy Court granted summary judgment for Vickie on Pierce's claim and, after a trial, entered judgment for Vickie on her counterclaim for tortious interference, awarding Vickie substantial compensatory and punitive damages.³⁰

Following the trial, Pierce filed a post-trial motion to dismiss for lack of subject matter jurisdiction, asserting that Vickie's tortious interference claim could be tried only in the Texas probate proceedings.³¹ The Bankruptcy Court and the District Court held that the probate exception did not encompass Vickie's counterclaim, and determined that Pierce had tortiously interfered with Vickie's expectancy by conspiring to suppress or destroy the *inter vivos* trust instrument Howard had directed that his lawyers prepare for Vickie, and to strip Howard of his assets by falsifying documents and presenting them to Howard under false pretenses.³²

III. *Marshall*—The Ninth Circuit Decision

Citing *Markham*,³³ the then most recent Supreme Court case addressing the probate exception, the Ninth Circuit reversed the district court.³⁴ In so holding, the court set forth a two-part test for applying the probate exception, which it adopted from the Second Circuit's decision in *Moser v. Pollin*.³⁵ The first prong of the test was whether "the matter is purely probate in nature, in that the federal court is being asked directly to probate a will or administer an estate."³⁶ For the second prong of the test, the Ninth Circuit analyzed whether federal jurisdiction would "(1) interfere with the probate proceedings; (2) assume general jurisdiction of the probate; or (3) assume control over property in custody of the state court."³⁷

The Ninth Circuit's decision in *Marshall* relied heavily on *Moser*. There, the Second Circuit explained that a federal court could only "assume control over property in the custody of the state court" where there are assets in the custody of a state probate court.³⁸ Additionally, in determining whether the federal court would be assuming "general jurisdiction of the probate court," the court followed a modified "route test."³⁹ Finally, the court in *Moser* explained that the "nature of the claim" test applied in determining whether federal courts were prohibited from "interfere[ing] with the probate proceedings."⁴⁰ The *Moser* court held that a decision in the federal court would have dictated the result of a pending petition to vacate a decree of probate in the Surrogate's Court, and was thus barred by the probate exception, as such a decision would interfere with probate proceedings.

Citing both *Markham* and *Moser*, the Ninth Circuit broadly interpreted the probate exception to apply to "not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument."⁴¹ In employing the two-part test as set forth in *Moser*, the court essentially held that the "route test" and the "nature of the claim" test precluded federal jurisdiction. The Court held that Vickie's claim, if successful, would "interfere

with probate proceedings," because it would in effect destroy the validity of Howard's will. The Ninth Circuit explained that the probate exception reaches not only to direct challenges to a will or trust, but also encompasses other issues traditionally determined by probate court such as fraud, undue influence, and tortious interference.⁴² Additionally, the Ninth Circuit held that where a state has relegated probate matters to a court of special jurisdiction, and stripped its state court of general jurisdiction of the jurisdiction to hear probate matters, as in Texas, that the federal courts also lack jurisdiction over probate matters.⁴³

IV. *Marshall*—The Supreme Court

The Supreme Court rejected the Ninth Circuit's opinion that the probate exception applies broadly to issues which would ordinarily be decided by a probate court. The Court explained that "the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court."⁴⁴ Thus, the Court held that the probate exception to federal jurisdiction did not apply to Vickie's claim, as her claim was not for the administration of an estate, the probate of a will, or any other purely probate matter, but was rather a tort claim, for which a judgment was sought against Pierce, and which did not interfere with a *res* in state court custody.⁴⁵

In so holding, the Court addressed *Markham v. Allen*,⁴⁶ which was relied upon by the Ninth Circuit in applying the probate exception. The Court clarified language in the *Markham* decision, which it perceived as ambiguous, in order to eliminate confusion in the lower courts as to the breadth of the probate exception.⁴⁷ In doing so, the Court reformulated the probate exception to federal jurisdiction, dispelling lower court interpretations of the appropriate scope and nature of the probate exception.

The Court addressed *Markham's* explanation of the probate exception, that federal courts of equity have jurisdiction to entertain suits "in favor of creditors, legatees and heirs' and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."⁴⁸ The Court further noted that *Markham* held that "[w]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, . . . it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court."⁴⁹

The Court noted that lower courts have incorrectly interpreted the first quoted passage to preclude federal jurisdiction where federal courts would "interfere with the probate proceedings," as precluding federal jurisdiction over a wide range of matters.⁵⁰ The Court held that this language should not be interpreted so broadly, and is merely a reiteration of the second quoted passage in *Markham*, that the probate exception is limited, and should apply where federal jurisdiction would "disturb or affect the possession of property in the custody of a state court."⁵¹ As the Court explained:

In short, we comprehend the "interference" language in *Markham* as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. . . . Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.⁵²

In its reformulated explanation of the probate exception, the Court declined to employ any of the tests that had developed in the lower courts following the *Markham* decision to determine the scope of the probate exception. For example, the Court rejected what commentators had described as the "route" test, the Ninth Circuit's determination that where a state has relegated probate matters to a court of special jurisdiction and stripped its state court of general jurisdiction to hear probate matters, the federal courts also lack jurisdiction over probate matters.⁵³ The Court similarly rejected the "nature of the claim test" that had been employed in the Ninth Circuit and in other lower courts.

The Court also declined to undertake an in-depth inquiry into the riveting dispute over the origins of the probate exception to federal jurisdiction. The Court noted that the probate exception has been linked to the Judiciary Act of 1789, which gave lower federal courts jurisdiction over suits in law and equity.⁵⁴ Rather than address the legitimacy of the supposed underpinnings of the probate exception, the *Marshall* Court merely stated that Vickie's claims fell far outside the probate exception described in *Markham*.⁵⁵

Justice Stevens, concurring in the judgment, would have gone further, as he explicitly stated that he does not believe that there properly exists any probate exception to federal jurisdiction. Justice Stevens expressed his

opinion that the origins of the probate exception as set forth in *Markham* is "an exercise in mythography," and cited cases where the federal courts exercised jurisdiction over matters which would fall within the probate exception recognized in *Marshall*.⁵⁶

V. Case Law Post-*Marshall*

The Supreme Court's decision in *Marshall* has reined in expansive decisions with respect to the boundaries of the probate exception following *Markham*. There have already been several cases decided since *Marshall* that have applied the new boundaries set by *Marshall*, and which provide some insight into how courts will address the question of whether federal jurisdiction will "disturb or affect the possession of property in the custody of a state court," warranting application of the probate exception.⁵⁷

In *Hoffman v. Sumner*, a decedent's widow, the executor of his estate, alleged that she and the decedent owned all shares of stock of certain corporations as joint tenants with rights of survivorship.⁵⁸ However, the defendants relied upon an agreement executed by the decedent pursuant to which the decedent and the defendants each owned shares, and a right of first refusal for other shares, of one of the corporations that the plaintiff claimed passed to her by right of survivorship.⁵⁹ The plaintiffs alleged that the defendants did not own any shares in that corporation, and that the agreement was unenforceable for various reasons. The plaintiffs sought a declaratory judgment in state court that defendants had no rights or interests in the corporation, and a state tort claim for conspiracy to commit unlawful conversion.⁶⁰ The defendants removed the plaintiffs' state court action to federal court on the basis of diversity jurisdiction, and the plaintiffs argued that there was no jurisdiction under the probate exception. Citing *Marshall*, the court held that the case did not fall within the probate exception to federal jurisdiction.⁶¹ The court explained that its determination of the validity of the agreement and its effect on the decedent's ownership of the shares, and its determination of whether the defendants committed a tort against plaintiffs, would not interfere with the state court's administration of the decedent's estate.⁶²

By contrast, in *Tolosa-Taha v. Nilooban* the court applied the probate exception to bar a plaintiff's action to quiet title against the defendants and unnamed defendants.⁶³ In *Tolosa-Taha*, the plaintiff, the son of the decedent, sought to recover unpaid rent from the defendants, and quiet title on property owned by the decedent, against the defendants and other unnamed defendants for the same property.⁶⁴ The Court dismissed the case, explaining that if it gave the plaintiff quiet title in fee simple it would be making a finding that the plaintiff was the sole heir, and would disturb the possession of real property in the custody of the Guam probate court.⁶⁵ According to the Court, this would be an interference with a *res* of the decedent's estate in the custody of a state probate court as prohibited by *Marshall*.⁶⁶

As more lower courts address *Marshall*, different interpretations will likely emerge as to how and where the boundaries of the probate exception to federal jurisdiction should be drawn. However, practitioners should take note that *Marshall* has clearly reined in expansive views of the scope of the probate exception, and has rejected tests that were previously used in determining the application of the probate exception.

Endnotes

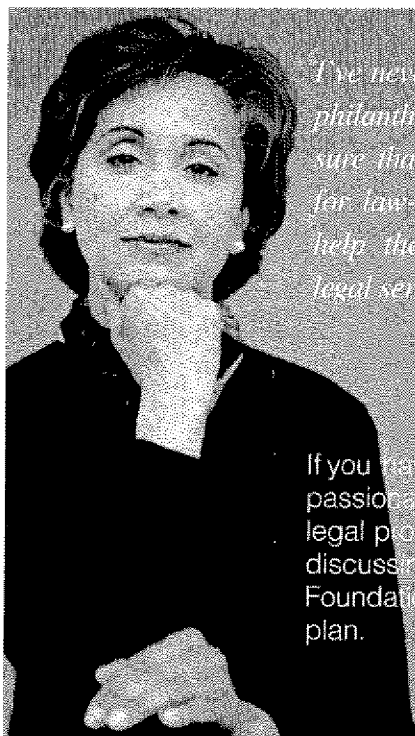
1. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).
2. *See* 28 U.S.C. § 1331.
3. *See* 28 U.S.C. § 1332(a)(1).
4. *Colorado River Water Con. Dist. v. U.S.*, 424 U.S. 800, 809 (1976).
5. *Marshall v. Marshall*, 126 S. Ct. 1735 (2006).
6. *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982).
7. *Marshall*, 126 S. Ct. 1735.
8. *Id.* at 1744.
9. *Markham v. Allen*, 326 U.S. 490, 494 (1946); *but see* Peter Nicholas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479 (2001) (arguing the historical justifications for the probate exception are generally inaccurate).
10. *Markham*, 326 U.S. at 494.
11. *Id.*
12. *Id.* at 492-493.
13. *Id.*
14. *Id.*
15. *Id.* at 494.
16. *Id.*
17. *Id.* at 495.
18. *Id.*
19. *See* Nicholas, *supra* n. 9, at 1489-1490; Christian J. Grostic, *A Prudential Exercise: Abstention and the Probate Exception to Federal Diversity Jurisdiction*, 104 MICH. L. REV. 131, 150 (2005).
20. *Lamberg v. Callahan*, 455 F.2d 1213 (2d Cir. 1972); *see also* *McKibben v. Chubb*, 840 F.2d 1525, 1529 (10th Cir. 1988).
21. *See* Nicholas, *supra* n. 9, at 1489-1490; Grostic, *supra* n. 19, at 150.
22. *Id.*
23. *Michigan Tech Fund v. Century Nat. Bank of Broward*, 680 F.2d 736 (11th Cir. 1982) (an action seeking an interpretation of a will is within federal court jurisdiction).
24. *See* Nicholas, *supra* n. 9, at 1489-1490; Grostic, *supra* n. 19, at 150 (2005).
25. *Dragan*, 679 F.2d at 713; *Storm v. Storm*, 328 F.3d 941 (7th Cir. 2003); Nicholas, *supra* n. 9, at 1490-1492.
26. *Marshall*, 126 S. Ct. at 1742.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1743.
32. *Id.*

33. *Markham*, 326 U.S. 490.
34. *Marshall v. Marshall*, 392 F.3d 1118 (9th Cir. 2004).
35. *Id.* at 1133; see *Moser v. Pollin*, 294 F.3d 335 (2d Cir. 2002).
36. *Marshall*, 392 F.3d at 1133.
37. *Id.*
38. *Moser*, 294 F.3d at 341.
39. *Id.*
40. *Id.* at 342.
41. *Marshall*, 392 F.3d at 1133.
42. *Id.*
43. *Id.* at 1136.
44. *Marshall*, 126 S. Ct. at 1748.
45. *Id.* at 1748-1749.
46. *Markham*, 326 U.S. 490 (1946).
47. *Marshall*, 126 S. Ct. at 1747-1748.
48. *Id.* at 1747 (quoting *Markham*, 326 U.S. at 494).
49. *Id.*
50. *Marshall*, 126 S. Ct. at 1748 (citing *Mangieri v. Mangieri*, 226 F.3d 1 (1st Cir. 2000) (holding claim for breach of fiduciary duty against executor was barred by the probate exception); *Golden v. Golden*, 382 F.3d 348 (3d Cir. 2004) (holding claim for breach of fiduciary duty against executor was barred by the probate exception); *Lepard v. NBD Bank*, 384 F.3d 232 (6th Cir. 2004) (holding that probate exception applied to daughter's claim for breach of fiduciary duty against trustee of her mother and father's trust because claim fell within exclusive jurisdiction of Michigan probate courts); *Storm*, 328 F.3d 941 (7th Cir. 2003) (holding probate exception applied to claim that plaintiff's father tortiously interfered with plaintiff's inheritance by persuading his mother to change testamentary plan, because the practical

effect of such suit was to akin to a will contest); *Rienhardt v. Kelly*, 164 F.3d 1296 (10th Cir. 1999) (holding probate exception bars claim that defendants exerted undue influence on testator and thereby tortiously interfered with plaintiff's expected inheritance).

51. *Marshall*, 126 S. Ct. at 1748.
52. *Id.*
53. See *Bedo v. McGuire*, 767 F.2d 305 (6th Cir. 1985); see Nicholas, *supra* n. 9.
54. *Marshall*, 126 S. Ct. at 1746.
55. *Id.*
56. *Marshall*, 126 S. Ct. at 1750-1751 (Justice Stevens concurring in part and concurring in the judgment).
57. *Hoffman v. Summer*, Slip Copy, 2006 WL 1444677 (N.D. Ill. 2006).
58. *Id.* at 1.
59. *Id.*
60. *Id.*
61. *Id.* at 2.
62. *Id.*
63. *Tolosa-Taha v. Nilooban*, Slip Copy, 2006 WL 1805692 (D. Guam 2006).
64. *Id.* at 1.
65. *Id.* at 2.
66. *Id.*

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