



Until the U.S. Supreme Court's decision in *Marshall v. Marshall*, the probate exception to federal jurisdiction perplexed many federal courts and probate practitioners. Indeed, before *Marshall*, the extent to which the probate exception barred U.S. courts from presiding over cases involving estates was unclear. This article discusses the *Marshall* decision and explains how its progeny have developed in the federal circuit courts throughout the country.

Marshall v. Marshall

In *Marshall v. Marshall*, the Supreme Court addressed the probate exception, the origins of which date back to the Judiciary Act of 1789, for the first time in more than 50 years. *Marshall v. Marshall*, 547 U.S. 293, 308 (2006). There, Vickie Lynn Marshall, more popularly known as Anne Nicole Smith, married J. Howard Marshall. Id. at 300. Although J. Howard lavished Vickie Lynn with gifts and money during their courtship and marriage, J. Howard also executed a will that effectively disinherited Vickie Lynn. Id. J. Howard did so despite Vickie Lynn's contention that J. Howard intended to provide for her through a "catch-all" trust. Id.

Following J. Howard's death, E. Pierce Marshall, "one of J. Howard's sons [and] the ultimate beneficiary of J. Howard's

will," petitioned to have J. Howard's will admitted to probate in Harris County, Texas. Id. During the probate proceeding, Vickie Lynn filed for bankruptcy under Chapter 11 of the federal Bankruptcy Code in the U.S. Bankruptcy Court for the Central District of California. Id. In opposition to Vickie Lynn's bankruptcy petition, Pierce filed a proof of claim with the bankruptcy court, claiming that Vickie Lynn defamed him when her attorneys accused him of engaging in "forgery, fraud, and overreaching to gain control of his father's assets." Id. at 300-01. Vickie Lynn responded by asserting truth as a defense and by filing several counterclaims, including one for tortious interference with an expected gift. Id.

The bankruptcy court initially granted summary judgment to Vickie Lynn on Pierce's defamation claim and, following a trial on the merits, also entered a judgment in Vickie Lynn's favor on her counterclaim for tortious interference. Id. Although Pierce filed a post-trial motion to dismiss on the ground that the federal courts lacked jurisdiction to adjudicate Vickie Lynn's tortious interference counterclaim, the bankruptcy court denied that motion because of Pierce's failure to raise his probate exception argument in a timely fashion. Id. at 301-02.

On review of the bankruptcy court's judgment, the U.S. District Court for the Central District of California rejected the bankruptcy court's finding on Pierce's waiver of his probate exception argument but also held that the probate

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exception did not apply to Vickie Lynn's counterclaim. *Id.* The district court did so because the bankruptcy court never asserted jurisdiction over the probate proceedings or otherwise took control of the assets in J. Howard's estate. *Id.* As a result, the district court awarded more than \$80 million in compensatory and punitive damages to Vickie Lynn. *Id.* at 302-04.

Pierce appealed the district court's determination to the U.S. Court of Appeals for the Ninth Circuit. *Id.* at 304. The Ninth Circuit reversed on the ground that the probate exception bars federal courts from adjudicating claims that involve "questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument," whether those questions involve "fraud, undue influence[, or] tortious interference with the testator's intent." *Id.* at 304-05. In addition, the Ninth Circuit explained that the "state-court delineation of a probate court's exclusive adjudicatory authority could control federal subject-matter jurisdiction" and bar federal courts from hearing probate matters. *Id.*

The Supreme Court granted Vickie Lynn's petition for certiorari and ultimately reversed the Ninth Circuit's judgment. *Id.* at 311-12. In doing so, 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. . . ." *Id.* At the same time, the probate exception "also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." *Id.* This is because a court must refrain from assuming in rem jurisdiction over a res, when another court is already exercising in rem jurisdiction over the same res. *Id.*

Referencing those principles, the Court reasoned that Vickie Lynn's claim did not "involve the administration of an estate, the probate of a will, or any other purely probate matter" and therefore was not barred by the probate exception. *Id.* at 312. The Court also noted that the subject of Vickie Lynn's claim was a "widely recognized claim" and that no "sound policy considerations"

necessitate the extension of the probate exception to Vickie Lynn's claim. *Id.* As a result, the Court reversed the Ninth Circuit's judgment and remanded Vickie Lynn's case to the circuit court for a decision in accord with the Court's opinion. *Id.* at 312-15.

Given all of the foregoing, the *Marshall* decision is noteworthy because it limits the application of the probate exception to cases involving one of the three following circumstances:

"(1) where a federal court is asked to probate or annul a will; (2) where a federal court is asked to administer a decedent's estate; or (3) where the federal court's exercise of jurisdiction will result in the attempt 'to dispose of property that is in the custody of a state probate court.'" Eric W. Penzer & Frank T. Santoro, *Second Circuit Clarifies Scope of Probate Exception to Federal Jurisdiction*, 80 NYSBA J. 52, 54 (Jan. 2008).

Marshall's Progeny

Since *Marshall*, the Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits have addressed the probate exception. For example, in *Jones v. Brennan*, 465 F.3d 304 (7th Cir. 2006), the Seventh Circuit considered whether the U.S. District Court for the Northern District of Illinois properly dismissed the plaintiff's claims against a number of probate judges from Cook County, Illinois, Cook County's public guardian, the public guardian's deputies, and several guardians ad litem. *Id.* at 305. In the complaint, the plaintiff alleged that the probate judges "conspired to deprive her of property without due process of law in the course of probate proceedings involving her father's estate." *Id.* Specifically, the plaintiff asserted that "the probate judges received *ex parte* communications from the guardians, failed to require the guardians to file appearances or provide an accounting of their management of the estate, and denied the plaintiff notice and a hearing before replacing a previous guardian." *Id.* The plaintiff further alleged that one of the guardians illegally bargained with her siblings for property that belonged to the estate and conducted an illegal search of the

plaintiff's belongings, among other claims. *Id.*

After the district court dismissed the complaint, the plaintiff appealed to the Seventh Circuit. *Id.* at 308-09. On appeal, the Seventh Circuit vacated the district court's order and remanded the case to the district court, noting that the plaintiff's complaint may not have implicated the probate exception. *Id.* The Seventh Circuit did so, despite recognizing that federal courts and state probate courts should refrain from exercising jurisdiction over the same in rem proceedings and that state probate courts are presumed to be proficient in probate administration matters. *Id.* at 307.

The Seventh Circuit premised its decision on several factors. First, although the plaintiff's complaint primarily concerned the maladministration of her father's estate, it also contained allegations of estate mismanagement and fiduciary duty breaches, including self-dealing. *Id.* at 307-09. Second, the plaintiff's constitutional claims, namely, that the defendants infringed on the plaintiff's due process rights by depriving her of "a liberty interest in her relationship with her father" and that one of the guardians violated the plaintiff's Fourth Amendment rights by illegally searching her personal belongings, though dubious, warranted further examination by the district court. *Id.* Accordingly, having opined that the plaintiff's claims might not implicate the probate exception, the Seventh Circuit vacated the district court's judgment and remanded the case for further examination. *Id.* at 309.

Although the Seventh Circuit merely stated that the plaintiff's claims might not have implicated the probate exception in *Jones*, the Second Circuit went a step further in *Lefkowitz v. Bank of New York*, 528 F.3d 102, 104 (2d Cir. 2007). In *Lefkowitz*, the plaintiff, one of the decedents' three children and a 30% beneficiary of their estates, alleged that the Bank of New York (BNY), the executor of the decedents' estates, "improperly paid inflated and fraudulent legal bills [to the law firm that handled the administration of the decedents' estates]"; "refused to distribute to her certain personal property from [the decedents' estates]"; and "violated the terms of a

Hong Kong consent order [concerning one of the decedents' estates]." Id. at 104. The plaintiff commenced an action against BNY and the law firm in the U.S. District Court for the Southern District of New York, accusing the defendants of fiduciary duty breaches, fraudulent misrepresentation, fraudulent concealment, conversion, and unjust enrichment. Id. The plaintiff also sought the payment of monies allegedly owed to her, specific performance of consent orders from courts in Hong Kong, and "declaratory relief confirm-



ing entitlement to estate assets[.]" Id.

Invoking the probate exception, the district court dismissed the plaintiff's case for lack of jurisdiction. Id. at 105. The plaintiff then appealed the district court's dismissal to the Second Circuit. Id. On appeal, the Second Circuit explained that *Marshall* requires a federal court to exercise jurisdiction over a case, "so long as a plaintiff is not seeking to have the federal court administer a probate matter or exercise control over a res in the custody of a state court, if jurisdiction otherwise lies" Id. at 106.

Applying that principle to the facts of *Lefkowitz*, the Second Circuit affirmed the district court's dismissal of the plaintiff's conversion, unjust enrichment, payment for monies allegedly owed to her, specific performance, and declaratory relief claims. Id. at 107. The circuit court did so because those claims pertained to the maladministration of the decedents' estates and related to property that was subject to the control of the Surrogate's Court in New York. Id. Accordingly, the Second Circuit concluded that the district court lacked jurisdiction over those claims, under the probate exception. Id.

Nevertheless, noting that the plaintiff also asserted breach of fiduciary duty, fraudulent misrepresentation, and fraudulent concealment claims, the Second Circuit reversed the district court's dismissal for these, on the theory that they were in personam claims and did not "directly implicate the *res* of either estate. . . ." Id. at 107–08. As a result, the court held that these claims did not implicate the probate exception, even though they were "intertwined" with the state court litigation concerning the decedents' estates. Id.

The Sixth Circuit applied the *Marshall* test in *Wisecarver v. Moore*, 489 F.3d 747, 748 (6th Cir. 2007). In this case, the decedent's nephew and nieces commenced an action against the primary beneficiaries of the decedent's estate and the executors of his will in the U.S. District Court for the Western District of Kentucky. Id. In their complaint, the plaintiffs alleged breach of fiduciary duty, breach of confidential relationship, undue influence, fraud, and misrepresentation. Id. The plaintiffs also accused the defendants of procuring the decedent's execution of his will by undue influence, fraud, and conspiracy. Id. The plaintiffs sought to enjoin the defendants from disposing of assets they received under the disputed will, to direct the defendants to account for all assets they received during the last two years of the decedent's life, to divest the defendants of all assets in which the plaintiffs claimed an interest as the decedent's next-of-kin, and to declare the decedent's will invalid. Id. at 749.

The district court dismissed the plaintiffs' claims for lack of jurisdiction, under the probate exception. Id. After *Marshall*, the plaintiffs filed a motion for reconsideration, arguing that their claims were not barred by the probate exception. Id. The district court denied the plaintiffs' motion, and the plaintiffs appealed to the Sixth Circuit. Id.

On appeal, the Sixth Circuit quoted the *Marshall* decision:

[T]he probate exception reserves to the 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.

Id. Despite recognizing that the plaintiffs' breach of fiduciary duty, breach of confidential relationship, undue influence, and fraud claims were based on in personam jurisdiction, the Sixth Circuit also concluded that "the majority of the relief [sought by the plaintiffs involved] disturbing [the decedent's] estate, which [had] already been probated." Id. at 750–51. Thus, the probate exception barred the district court from hearing those claims because the exception was intended to prevent federal courts from disposing of property in manners that are inconsistent with the distribution of assets by state probate courts. Id.

But, to the extent that the plaintiffs also sought an accounting of assets that the defendants received during the final two years of the decedent's estate and a monetary judgment for assets that the defendants removed, the Sixth Circuit explained that the plaintiffs' complaint contained prayers for relief that did not implicate the probate exception. Id. This was because "the removal of [those] assets from [the decedent's] estate during his lifetime [removed] them from the limited scope of the probate exception." Id. Accordingly, the Sixth Circuit reversed the district court's dismissal on the plaintiffs' causes of action for an accounting and monetary judgment. Id.

McAninch v. Wintermute, 491 F.3d 759 (8th Cir. 2007), is also illustrative. Joseph McAninch, the administrator of the estate of decedent Damian Sinclair, and Susan Wintermute filed an action against Kansas Bankers Surety Company (KBS) in the U.S. District Court for the Western District of Missouri. Id. at 761. McAninch and Wintermute alleged that KBS wrongfully failed to indemnify and defend them against federal criminal charges. Id. at 761–65.

The district court granted summary judgment in favor of KBS, and McAninch and Wintermute appealed to the Eighth Circuit. Id. at 765. McAninch argued that the district court committed

reversible error because it lacked jurisdiction over the matter in light of the probate exception. *Id.* The Eighth Circuit rejected that argument. *Id.*

As the Eighth Circuit explained, the probate exception does not bar a federal court from asserting jurisdiction over a case and controversy absent a claim that requires the court to probate or annul a will, administer a decedent's estate, or "dispose of property that is in the custody of a state probate court." *Id.* at 766. Applying that principle, the Eighth Circuit found that McAninch's claims pertained to KBS's breach of its duty to defend, not the probate or annulment of Sinclair's will, administration of Sinclair's estate, or property in the control of a state probate court. *Id.* Accordingly, the Eighth Circuit held that the probate exception did not preclude the federal courts from asserting jurisdiction. *Id.*

Most recently, in *Three Keys Ltd. v. SR Utility Holding Co.*, 540 F.3d 220 (3d Cir. 2008), the Third Circuit addressed the probate exception. The decedent left an estate worth more than \$58 million to his wife and children. In his will, the decedent also appointed Richard Basciano and Lois Palmer to act as executors of his estate. *Id.* at 222.

The decedent owned all of the shares in SR Utility Holding Company, and those shares passed to his estate on the decedent's death. *Id.* Thereafter, Basciano arranged for the sale of nearly a quarter of the estate's shares in SR Utility to Three Keys Ltd., an entity that Basciano founded for the benefit of his children. *Id.* Palmer, Basciano's personal assistant, lover, and the person he appointed to act as the second executor of the decedent's estate, executed the stock purchase agreement for the decedent's estate. *Id.* Basciano and Palmer failed to secure court approval to negotiate the stock purchase agreement, as required by state law. *Id.*

The beneficiaries became suspicious of the estate's transactions with Basciano's companies and petitioned the Court of Common Pleas of Bucks County, Pennsylvania, Orphans' Court Division, to compel the executors to account. *Id.* After the executors filed a final accounting, the beneficiaries raised a number of objections, including

self-dealing. *Id.* The beneficiaries also petitioned the Orphans' Court for the removal of the executors. *Id.*

During the accounting proceeding, Basciano accepted a payment of \$220,000 to which the decedent's estate was entitled in connection with the sale of a shopping center that the estate owned. *Id.* at 223. Basciano did so in his individual, not fiduciary, capacity, and failed to obtain court approval for the transaction. *Id.* As a result, the beneficiaries petitioned for the immediate removal of the executors, and the Orphans' Court granted that relief. *Id.* Basciano eventually challenged his removal to the Pennsylvania Superior Court and the State Supreme Court, but both courts affirmed the Orphans' Court's decision to remove him as an executor of the decedent's estate. *Id.*

Before the executors' removal, Three Keys placed the dividends it earned on SR Utility shares into an escrow account. *Id.* at 224. Three Keys then sought to access the dividends, which amounted to approximately \$900,000, and commenced an action against SR Utility, the decedent's estate, the beneficiaries, Mellon Bank, and Carl Cordek in the U.S. District Court for the District of New Jersey. *Id.* In the complaint, Three Keys alleged that it owned an interest in SR Utility and asserted claims for minority shareholder oppression, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, civil conspiracy, and declaratory relief concerning the validity of the aforementioned stock purchase agreement. *Id.* at 224-25.

The defendants moved to dismiss Three Keys' complaint on several grounds, including lack of jurisdiction under the probate exception and issue preclusion. *Id.* at 225. Although the district court found that it had jurisdiction over the matter, it dismissed Three Keys' complaint on the basis of issue preclusion. *Id.* The district court premised its decision on the theory that "Three Keys could not relitigate the validity of the SR Utility Stock Transfer, an issue that had been resolved in the removal proceedings." *Id.*

Three Keys appealed the district court's dismissal to the Third Circuit

and the Third Circuit vacated the district court's order. *Id.* at 225-29. In its discussion of the probate exception, the Third Circuit explained that "the probate exception does not" bar a federal court from presiding over a case, "unless [that] federal court is endeavoring to (1) probate or annul a will, (2) administer a decedent's estate, or (3) assume *in rem* jurisdiction over property that is in the custody of the probate court" *Id.* Accordingly, noting that Three Keys' ownership interest in the SR Utility shares would not be resolved until the Orphans' Court determined the validity of the stock purchase agreement, the Third Circuit held that the disputed

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stocks remained in the custody of the probate court and prevented the district court from exercising jurisdiction. *Id.*

Conclusion

After the Supreme Court's decision in *Marshall v. Marshall*, it is now clear that the probate exception is not an absolute bar to federal subject-matter jurisdiction in cases involving decedents and the causes of action that the fiduciaries of their estates assert. Despite that principle the prudent practitioner will recognize the need to proceed in a state probate court when the client's claims for or against an estate are expected to require a federal court to probate or annul a will, administer a decedent's estate, or dispose of property that is in the control of a state probate court. The failure to do so may result in the dismissal of a federal action, given *Marshall* and its progeny. ■