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Marshall v. Marshall Rashômon Revisited

By Dominic J. Campisi

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The decision in *Vickie Lynn Marshall v. E. Pierce Marshall*, 126 S. Ct. 1735 (2006), is far from resolving the disputes that have titillated the legal and lay populations for more than a decade. Like Akira Kurosawa's classic 1950 movie *Rashômon*, every party (and court) has a different view of the facts and the law. Despite the death in June 2006 of E. Pierce Marshall, widow Vickie Lynn Marshall's stepson and litigation adversary, the litigation continues.

The widow had filed a bankruptcy proceeding in California shortly after her husband J. Howard Marshall's death. Attacks on the husband's will and trusts had been brought by her husband's other son, J. Howard Marshall III, in Texas probate court, including a claim for tortious interference against Pierce and others. Her stepson Pierce had sued her and others for defamation resulting from alleged statements that Pierce had interfered with his father's plans to make substantial gifts to his wife. Faced with a bankruptcy stay, Pierce nonsuited his stepmother in the Texas defamation action. He then intervened in the bankruptcy proceeding, seeking to deny her a discharge and raising his substantive defamation claims in a nondischargeability complaint in the bankruptcy. She then counterclaimed for tortious interference. *Marshall v. Marshall*, 264 B.R. 609, 629-30 (C.D. Cal. 2001).

The bankruptcy court and the district court found that Pierce failed to produce various estate planning documents, including the billing records and memoranda of his father's multiple attorneys in the probate proceeding.

Pierce's discovery infractions include four kinds of egregious discovery abuse. First, he failed

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to serve a written response within 30 days after the service of the request, as required by Rule 34(b) and incorporated by reference in FED. R. BANKR. 7034. Second, more than a year after the document production request (and after monetary sanctions had been imposed more than once), Pierce provided a privilege log which listed thousands of documents that were not produced based on claims of attorney-client privilege or work product. This privilege log was grossly insufficient for supporting his claim that the documents were not subject to discovery. Third, Pierce disobeyed altogether the court's order to submit these documents for examination in chambers to determine whether the documents qualified for discovery exemption. Fourth, Pierce destroyed a substantial quantity of documents that were subject to a pending discovery request. These egregious discovery abuses require that the court impose appropriate sanctions.

Marshall v. Marshall, 253 B.R. 550, 556 (Bankr. C.D. Cal. 2000).

The district court also found that Pierce had improperly claimed attorney-client privilege to conceal documents relevant to the tortious interference claim. On one communication with the former attorney for the decedent, the district court found the document admissible despite the assertion by Pierce of attorney-client privilege: "First, throughout the proceedings, Pierce has contended vehemently that [the attorney] did not represent him, and [the attorney] has testified to the same effect. Second, this document is admissible under the crime-fraud exception to the attorney-client privilege." *Marshall v. Marshall*, 275 B.R. 5, 10 (C.D. Cal. 2002). When he failed to produce such documents in the bankruptcy proceeding, he was sanctioned, with the bankruptcy court ultimately granting summary judgment against his affirmative claims and in favor of the widow's tortious interference claims, assessing \$449,754,134 in dam-

ages against Pierce, including \$25 million in punitive damages.

This judgment was appealed to the U.S. District Court for the Central District of California. The court treated the matter as a noncore bankruptcy proceeding and conducted a de novo review to determine if the bankruptcy court's "evidentiary sanctions were proper." *Marshall v. Marshall*, 271 B.R. 858, 862 (C.D. Cal. 2001). It then determined that evidentiary abuses had taken place and also "ordered Pierce to produce to Vickie in California several hundred boxes of documents previously withheld. On October 23, 2001, Pierce produced more than 400 boxes of documents. . . ." 275 B.R. at 10. Those documents disclosed attorney billing statements and memoranda and correspondence regarding a "catch-all" trust for Vickie and various other inter vivos transfers, aimed at protecting her for life and providing her with half of the increase in the value of certain assets during their marriage. After trial, the district court ruled on the merits without reaching the issue of sanctions: "After hearing evidence, the Court is able to make a determination of this matter on the merits and therefore does not reach the issue of evidentiary sanctions under Federal Rule of Civil Procedure 37(b)(2)(A). Therefore, except to the extent set forth in Footnote 17, the Court makes no findings on the issue of sanctions at this time." 275 B.R. at 11. The district court ruled on the findings proposed by the bankruptcy court: "Except to the extent that they are inconsistent with the findings of fact set forth in this order, this Court's de novo review upholds the findings of fact proposed by the bankruptcy court in its October 6, 2000 Original Decision. . . ." 275 B.R. at 50.

The district court, having reviewed the concealed documents and questioned the parties about them, concluded that:

Pierce and [the attorney]'s actions of slowly draining J. Howard of assets in order to prevent a gift to Vickie were egregious in nature. What is worse, however,

is that many of the documents at issue in the case were destroyed, backdated, altered, or prepared and presented to J. Howard under false pretenses. This was done in order to prevent Vickie from receiving funds, out of fear that J. Howard might sign a will or other gift instrument at Vickie's behest, and to avoid the legal consequence of important dates in J. Howard's final years including his marriage to Vickie and the appointment of a guardian ad litem to manage his affairs.

The backdating and altering of the documents was done with the full knowledge of Pierce. Most of the backdated documents were prepared by [the attorney], whose brilliant machinations on estate planning Pierce relied on to devise the necessary actions. Finally, many of the backdated documents were notarized by [the notary] who violated her oath by signing false notarial statements.

275 B.R. at 45.

The district court assessed \$44 million in actual damages and \$44 million in punitive damages, based on the newly produced documents and the related testimony at trial.

The Ninth Circuit reversed, finding no federal jurisdiction based on the probate exception, as articulated in *Markham v. Allen*, 326 U.S. 490 (1946), and various lower court decisions that had expanded its reach. It also ruled that a state had the power to restrict federal jurisdiction by giving a state court exclusive jurisdiction over probate and trust matters: "Where a state has relegated jurisdiction over probate matters to a special court and if that state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then the federal courts also lack jurisdiction over probate matters." *Marshall v. Marshall*, 392 F.3d 1118, 1136 (9th Cir. 2004). Given the registration and exclusive jurisdiction provisions in Uniform Probate Code §§ 7-101 and 7-201 and other probate codes, this raised major jurisdictional and federal supremacy

issues of concern to probate and trust practitioners and their clients. Given the complete chaos in the federal courts on the probate exception, the Supreme Court granted certiorari.

The Supreme Court unanimously overturned the Ninth Circuit, finding that lower courts had too expansively interpreted the probate exception doctrine, looking at its analogous decision on the domestic relations exception articulated in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). The Court reined in the host of lower court decisions

The Ninth Circuit ruled that a state had the power to restrict federal jurisdiction by giving a state court exclusive jurisdiction over probate and trust matters.

that had broadly interpreted the "enigmatic" interference language in *Markham*. It limited the rule: "[W]hen a court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*." 126 S. Ct. at 1748. The Court found:

Vickie's claim does not involve the administration of an estate, the probate of a will, or any other purely probate matter. Provoked by Pierce's claim in the bankruptcy proceedings, Vicki's claim alleged the widely recognized tort of interference with a gift or inheritance. She seeks an *in personam* judgment against Pierce, not the probate or annulment of a will. . . . Nor does she seek to reach a *res* in a state court's custody. . . . Trial courts, both federal and state, often address conduct of the kind Vickie alleges. State probate courts possess no "special proficiency" in handling such issues.

126 S. Ct. at 1740.

The Supreme Court remanded the case for consideration of issues relating to "core jurisdiction" in bankruptcy and claim and issue preclusion arising from the judgment regarding his will and trusts entered in her late husband's probate proceeding in the Houston probate court. 126 S. Ct. at 1750. One key question will be whether a tortious interference claim is a compulsory counterclaim under the Texas version of Fed. R. Civ. Proc. 13(a) and whether the bankruptcy court findings were *res judicata* or collateral estoppel against any implied findings in the will and trust claims adjudicated in Vickie's absence in the probate court. 271 B.R. at 863-64. This is complex because in Texas Pierce nonsuited his defamation claims, which had been based on alleged statements that he had tortiously interfered with his father's intentions. He filed these defamation claims in the bankruptcy proceeding, on which the bankruptcy court granted summary judgment. The bankruptcy court also granted summary judgment in favor of the widow's tortious interference claims. In the Texas court, after the widow nonsuited her claims, judgment was entered on a declaration action in her absence. The single jury interrogatory dealing with Vickie, Question 66, asked only whether she had an agreement with her husband to leave her one-half of his property. On appeal she had argued that the judgment went beyond any jury findings regarding tortious interference that could be asserted against her. A further issue is whether the probate court had jurisdiction over the issues and claims involved.

After its decision, the bankruptcy court ordered that her discharge injunction barred claims against Vickie in the continuing probate proceedings with the bankruptcy court, finding that

Pierce's counsel represented to the court at that hearing that Pierce would remove from the Texas litigation all matters relating to Vickie. On April 20, 2001 this court issued an order requiring Pierce to dismiss immediately any claim against Vickie and "any pleading on which Question No. 66 [the only one related to Vickie] is based and to desist from pursuing or seeking any award, judgment or determination

regarding such allegations" in the Texas litigation.

Marshall v. Marshall, 273 B.R. 822, 831 (Bankr. C.D. Cal. 2002).

With the death of the stepson, the Texas probate court is likely to become involved again, over the judgments rendered against the stepson for tortious interference with right to inherit. The creditor claim bars and spendthrift provisions in the various trusts may raise additional impediments to an easy resolution of this complex matter.

There are conflicting views of the facts of this case.

1. The district court referred to the fact that "she has often been portrayed to the Court as a gold-digger and predator. . . ." 275 B.R. at 23. A *Wall Street Journal* opinion page article on January 21–22, 2006 (at A9), was headed "In re Gold Digger," with a label on the widow's picture: "Ms. Smith: Good Will Hunting."
2. Following a trial in which records had for the first time been produced disclosing that the late J. Howard Marshall had caused two teams of his attorneys to draft a trust and pre-nuptial agreement to benefit his young wife, the U.S. District Court for the Central District of California found:

In sum, their lives were intertwined in need, driven by greed and lust. Nevertheless, the Court is convinced of his love for her. J. Howard referred to Vickie as the "light of my life," and the lady that saved his life. His relationship with her provided the happiest moments of his last few years. He considered Vickie his reason for living, and the joy that she brought him undoubtedly helped him live another four years. There is no question that he showered her with gifts, that he sought to protect her and provide for her.

The Court is more cautious about her love for him. J. Howard became Vickie's

knight in shining armor. His help propelled her to the highest levels of stardom, something unimaginable for a girl from her background. She cherished the protection and security that he afforded her and the lavish gifts that he gave to her in order to win her affection. J. Howard used his money to get Vickie to fall in love with him, and in her own way, Vickie loved J. Howard.

275 B.R. at 25 (district court decision).

The case presents, however, a variety of legal and factual questions of importance to practitioners generally.

Romance Driven by the GST

J. Howard Marshall had transferred over \$12 million to another bar dancer, Diane "Lady" Walker, before her untimely death from complications of facelift surgery. Despite his arguments, inter alia, that such payments were "consulting fees," the IRS initiated an audit regarding the alleged gifts. 275 B.R. 5, 16–18. With J. Howard facing gift tax and GST tax liability for his gifts to Vickie, marriage posed substantial tax (as well as personal) benefits:

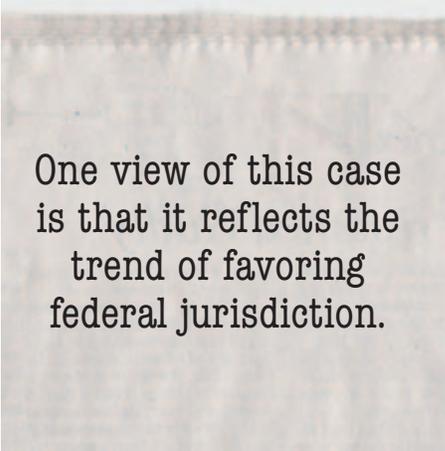
J. Howard's tax concerns, however, were always a short-term problem. He planned to marry Vickie, and once he did there would be no tax liability for the Generation Skipping Tax or the Gift Tax. At one point, [the attorney] told J. Howard that he would solve all of his gift tax problems related to Vickie if he simply married her. Indeed, when J. Howard first told [the attorney] of his marriage to Vickie, he told [the attorney] that he had done so on [the attorney]'s advice.

275 B.R. at 28.

Federal Jurisdiction

One view of this case is that it reflects the trend of favoring federal jurisdiction. In *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 942 (2006), the Supreme

Court held that the citizenship of a national bank for purposes of diversity jurisdiction is the "State in which its main office, as set forth in its articles of association, is located." This decision gave national banks the ability to bring actions in federal court, or remove them to federal court, when the opposing parties are citizens of states other than that in which the national bank has its main office. With the rise of multistate banking and large footprint bank trust departments, this decision provided a federal forum for national banks in the face of lower court decisions, holding that



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the national banks were "citizens" for purposes of diversity jurisdiction wherever they conducted business.

The Supreme Court in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005), unanimously held that the lower courts had too expansively used the Rooker-Feldman doctrine to dismiss the case, authorizing parties to bring parallel or insurance cases in federal courts, despite the existence of a state court action involving some of the same facts. In that case, the court held that the preclusion doctrine would determine whether the federal or state court decision would prevail. Hence, the first court to grant a final judgment would control the outcome on common factual or legal questions. Although not mentioned in *Marshall*, the outcome of the case reflects the general principles of *Saudi*. It should be noted that the concurring opinion of Justice Stevens reflected the viewpoint of a decision

following *Saudi*: “Rather than preserving whatever vitality that the ‘exception’ has retained as a result of the *Markham* dicta, I would provide the creature with a decent burial in a grave adjacent to the resting place of the *Rooker-Feldman* doctrine. See *Lance v. Dennis*, 546 U.S. ___, ___ (2006).” 126 S. Ct. at 1752.

Marshall took place in the context of congressional efforts to restrict state class action litigation, placing restrictions on the ability of plaintiffs to bring class actions in state trial courts. See, for example, the Securities Litigation Uniform Standards Act

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(SLUSA), which was designed to prevent certain state private securities class actions involving fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4. Defendants have been able to use such restrictions to dismiss state class actions. On May 10, 2006, the U.S. District Court for the Southern District of Florida dismissed a class action involving claims that trust funds had improperly been invested in proprietary mutual funds, including claims of undisclosed and excessive fees in *Spencer v. Wachovia Bank, N.A.*, No. 05-81016-CIV-RYSKAMP/VITUNAC, 2006 U.S. Dist. LEXIS 52374 (S.D. Fla. May 10, 2006).

One way to interpret the *Marshall* decision is, in the words of Mr. Dooley, the Supreme Court pays attention to the “iliction returns.” Finley Peter Dunne, *The World of Mr. Dooley* (Collier 1962), at 89. The Supreme Court refused to find “sound

policy considerations” to deny federal jurisdiction based on any superior expertise of local courts, concluding, “Trial courts, both federal and state, often address conduct of the kind Vickie alleges. State probate courts possess no ‘special proficiency. . . .’ in handling [such] issues.” 126 S. Ct. at 1748–49.

The Court in *Saudi* reflected a recognition that the lower federal courts, overwhelmed with huge dockets, attempt to restrict access to federal jurisdiction. This mirrors the observation of the Sixth Circuit in *Rogers v. Girard Trust Co.*, 159 F.2d 239 (6th Cir. 1947), in which the court chided the trial court for dismissing a case based on an expansive reading of the probate exception. It cited the Supreme Court in *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943): “The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than the state courts.” *Marshall* follows this trend of affording parties their constitutional right to obtain access to the federal courts, despite the burden on overworked federal judges.

Supremacy Clause

Another way to view *Marshall* is that it reflects a return to basic federal supremacy power over the creation and administration of federal courts, particularly in bankruptcy and diversity. In *Markham v. Allen*, 326 U.S. 490 (1946), the Supreme Court articulated a probate exception to federal diversity jurisdiction looking to the language of the Judiciary Act of 1789, which conferred jurisdiction in “suits of a civil nature at common law or in equity.” (This language was subsequently changed by Congress.) This analysis was based on the “fact” that “matters of probate and administration were, in 1789, within the exclusive jurisdiction of the English ecclesiastical courts and outside the reach of the High Court of Chancery and the common law courts.” *Rice v. Rice Foundation*, 610

F.2d 471, 475 (7th Cir. 1979). As Justice Frankfurter observed: “[L]egal history still has its claims.” *Federal Power Comm’n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 609 (1942) (Frankfurter, J., concurring).

But what claims, precisely? As Judge Posner pointed out in *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982):

One does not have to be an expert historian to spot the flaws in this reasoning. First, there was no ecclesiastical court in America, and it is not obvious why the language of the Judiciary Act of 1789 should be taken to refer exclusively to English rather than American courts. Someone should investigate the jurisdiction of American equity courts in the eighteenth century relative to that of any specialized probate courts that might have corresponded to the ecclesiastical court in England; no one has.

Still, he concluded that “however shoddy the historical underpinnings of the probate exception, it is too well established a feature of our federal system to be lightly discarded. . . .” *Id.*

In fact, probate matters were not exclusively litigated in the ecclesiastical courts of England, let alone in the general courts of the American governors and their councils. The ecclesiastical courts did not deal with real property—the result of Henry VIII’s effort to free real property from the grasp of the monasteries and bishops. These courts did admit wills to probate, but their administration was limited to the disposition of personal property. Lewis M. Simes & P.C. Basye, *The Organization of the Probate Court in America: I*, 42 Mich. L. Rev. 965, 968 (1944). Because orders of these courts were normally enforced by excommunication, unless chancery intervened, pagans, Catholics, Jews, and non-Anglicans had little to worry about from ecclesiastical courts if they ran off with the decedent’s goods. *Id.* at 970 n.119. In reality, the ecclesiastical courts had a limited role in probating wills, and no role in litigation involving trusts, which generally were heard in chancery or the law courts.

The probate of real property and disputes over any type of property by necessity were litigated in the courts of law

and chancery. Harold Chesnin & Geoffery C. Hazard Jr., *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 Yale L.J. 999 (1974), and Simes & Bayse, *supra*. Hence the historical premise of the *Markham* exception was illusory. As Judge Posner noted, "Rigidly historicist interpretations of the Constitution have not been much in vogue for generations." *Dragan*, 679 F.2d at 714. That is clearly the case in *Marshall*, if not in other cases where original intent is still fiercely disputed as the gravamen for decisions.

The decision of Justice Ginsberg paid little attention to this issue, in light of the change in the Judiciary Act and the fact that an *in personam* claim for tortious interference had no effect on the *in rem* jurisdiction of the Texas probate court.

Justice Stevens, however, wished the court to terminate the life of this unfortunate dicta:

Not only had the theory *Markham* espoused been only sporadically and tentatively cited as justification for the exception, but the most comprehensive article on the subject has persuasively demonstrated that *Markham's* assertion is "an exercise in mythography." [Note 2]

[Note 2]: Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 Probate L. J. 77, 126 (1997). . . . Winkler also observes, citing Charles Dickens' *Bleak House* (1853), that *Markham's* "suggestion that the High Court of Chancery lacked jurisdiction to 'administer an estate' was preposterous." 14 Probate L. J., at 125, and no. 256.

126 S. Ct. at 1751.

Dickens in fact had been a chancery clerk, the perfect training for a novelist on the foibles of humanity. See W. Holdsworth, *Charles Dickens as a Legal Historian* (Yale University Press 1928), citing multiple instances in Dickens's novels in which parties in probate and trust disputes waited interminably while matters were referred from chancery to law or from law to

chancery, begging heirs and enriching attorneys.

The *Marshall* decision asserted federal supremacy: "Directly on point, we have held that the jurisdiction of the federal courts, 'having existed from the beginning of the Federal government, [can] not be impaired by subsequent state legislation creating courts of probate.' *McClellan v. Carland*, 217 U.S. 268, 281 (1910)." 126 S. Ct. at 1749. This matter has been the subject of Supreme Court efforts to protect federal jurisdiction. "State legislatures can

The decision reflects the Supreme Court's willingness to look to the Restatements as a source of law, particularly in the burgeoning area of federal common law involving fiduciary relationships.

not impose restraints on federal jurisdiction by creating probate courts and vesting them with jurisdiction over similar issues. *Waterman v. Canal-Louisiana Bank & Trust Company*, 215 U.S. 33, 40, 30 S. Ct. 10, 11, 54 L. Ed. 80 (1909)." *Bryden v. Davis*, 522 F. Supp. 1168, 1171 (E.D. Mo. 1981). The *Waterman* decision cited the case of *Hess v. Reynolds*, 113 U.S. 73, 79 (1885), holding that "the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of states which prescribe modes of redress in their courts or which regulate the distribution of their judicial powers." *Hess* held that Michigan could not grant exclusive powers to its courts over controversies that would eliminate the rights of a citizen to seek diversity jurisdiction. In *Gross v. Weingarten*, the court held, "The Supreme Court has repeatedly and

unequivocally rejected the deputy receiver's contention that a state may oust the federal courts of jurisdiction by creating an exclusive forum for claims against an estate." 217 F.3d 208, 221 (4th Cir. 2000) (citing *Hess*).

The Uniform Probate Code and state enactments such as California's Probate Code § 17000(a) attempt to vest exclusive jurisdiction over trust disputes in probate or other specialized courts. With *Marshall*, such actions face the limits of federal supremacy when there is federal subject matter jurisdiction or diversity jurisdiction and when the action does not interfere with the *res* in the possession of the court.

Tortious Interference

The decision also reflects the Supreme Court's willingness to look to the Restatements as a source of law, particularly in the burgeoning area of federal common law involving fiduciary relationships. *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000). In *Harris*, the unanimous Supreme Court in an ERISA case looked to the "common law of trusts, which offers a 'starting point for analysis [of ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure or its purposes,'" holding that the common law of trusts "plainly countenances the sort of relief sought by petitions against Salomon here." 530 U.S. at 249. The decision cited Restatement (Second) of Trusts § 294, cmt. c, to reject the argument that a culpable fiduciary could not seek redress from a seller:

"Although the trustee bases his cause of action on his own voluntary act, and even though the act was knowingly done in breach of his duty to the beneficiary, he is permitted to maintain the action, since the purpose of the action is to recover money or other property for the trust estate, and whatever he recovers he will hold subject to the trust." 530 U.S. at 252.

In *Marshall*, the Court looked not only to Texas law, but to the Restatement of Torts: the court described tortious interference with right to inherit as a "widely recog-

nized tort” and cited a Texas decision allowing such claims, as well as Restatement (Second) of Torts § 774B.

Central to the analysis of the case is the recognition that tortious interference with an inheritance or gift is not premised on the validity of an existing will or trust when the conduct of the defendant has prevented the creation or revocation of an inter vivos or testamentary transfer.

The traditional will contest deals with a limited set of assets subject to probate, seeks to validate or reject specific wills or portions thereof, and has limited means to transfer ill-gotten gains to appropriate heirs in the face of residuary clauses, construction rules when a gift to one member of a class is eliminated, and intestacy laws. Hence when the miscreant by improper conduct forces the transfer of all assets to him during the testator’s lifetime and then refuses to probate the will, a claim to impose a constructive trust on the property based on wrongful interference with a testamentary expectancy can be allowed. *Henshall v. Lowe*, 657 So. 2d 6 (Fla. Dist. Ct. App. 1995).

The beneficiary also is hobbled by that Anglo-Saxon court tradition that requires litigants to adhere strictly to the ancient forms of pleading lest they end up like Picts fighting in front of the courthouse with spears and hide shields. *Devisavit vel non* limited the ambit of some probate courts in a will contest to deal only with the “mechanical integrity of an instrument purporting to be a will.” *Barone v. Barone*, 294 S.E.2d 260, 263 (W. Va. 1982). This proved too restrictive for many judges. *In re Broderick’s Will*, 88 U.S. 503 (1874); *Dixon v. Olmius*, 1 Cox. Ch. Cas. 414, 29 Eng. Rep. 1227 (1787); *Mestair v. Gillespie*, 11 Ves. 638, 32 Eng. Rep. 1236 (1805).

Probate can strike from the will something that is in it as a result of fraud but cannot add to the will a provision that is not there nor can the probate court bring into being a will which the testator was prevented from making and executed by fraud. In such cases, since the

remedy in the probate proceeding is inadequate, relief should be granted either in the form of a constructive trust, by permitting the fraudulent gift to stand and holding the defrauder, to whom legal title passes, as a constructive trustee for the victim of the fraud, or by giving the aggrieved party an action at law for damages against the defrauder.

Bowe & Parker, 1 *Page on Wills* § 14.8, at 706–07 (1960). See J. Perry, 1 *Perry on Trusts and Trustees* § 211 (7th ed. 1929); 4 *Page on Wills* (3d ed. 1962), at 961; *Story, Equity* § 1592 (14th ed. 1918); 4 *Pomeroy’s Equity Jurisprudence* § 1053 (5th ed.); Restatement of the Law of Restitution § 184(g) (1937), at 750–51.

The California Supreme Court in *Brasil v. Silva*, 185 P. 174 (Cal. 1919), followed such precedents in allowing a cause of action for constructive trust, despite statutory requirements for a written contract to make a will:

Equity does not stay its hand in such a case because, forsooth, the statute requires a contract in writing and there is none, and whatever may have been the historical reason why courts of equity granted such relief originally, the reason now universally assigned is that not to grant it would be to enable the defendant to perpetrate a fraud by means of the statute.

Brasil, 185 P. at 176.

In *Latham v. Father Divine*, 85 N.E.2d 168 (N.Y. 1949), the plaintiff sought a constructive trust on the assets of an estate, claiming that Father Divine prevented a disciple from changing a will benefiting him, first by false representations, undue influence, and physical force, and then by sending her to the hereafter prematurely. The New York Court of Appeals upheld such a cause of action, holding that

[l]eading writers (3 *Scott on Trusts*, pp. 2371–2376 [Fletcher, 4 *Scott on Trusts* § 489.4 at 421]; 3 *Bogert on Trusts and Trustees*, Part 1,

§§ 473–474, 498, 499; 1 *Perry on Trusts and Trustees* [7th ed.], pp. 265, 371), in one form or another, state the law of the subject to be about as it is expressed in comment *i* under section 184 of the Restatement of the Law of Restitution: “*Preventing revocation of a will and making new will*. Where a devisee or legatee under a will already executed prevents the testator by fraud, duress or undue influence from revoking the will and executing a new will in favor of another or from making a codicil, so that the testator dies leaving the original will in force, the devisee or legatee holds the property thus acquired upon a constructive trust for the intended devisee or legatee.”

Divine, 85 N.E.2d at 169. Note that in a memorandum opinion, a later New York Court of Appeals summarily rejected adoption of the tort remedy, holding that independently tortious conduct would be required for such a cause of action. *Vogt v. Witmeyer*, 665 N.E.2d 189 (N.Y. 1996).

Equity has provided remedies through the concept of tortious interference with the right to inherit by imposing a constructive trust on the ill-gotten gains. *Fletcher*, 5 *Scott on Trusts* § 489, at 413.

The Marshalls all brought tortious interference claims at one time or another. Howard Marshall III attacked his father’s estate plan, claiming he had been improperly excluded by his father and filing a tortious interference claim against his brother and also against third parties. *Marshall v. Cordes*, No. 1-99-01347-CV, 2000 WL 1160602 (Tex. App. Aug. 17, 2000) (dismissing the case against the third parties). Pierce brought tortious interference claims against Howard Marshall III and Vickie, based on their filing of will contests; Pierce obtained a tortious interference judgment from the jury in the Texas action against his brother. (This was overturned by the trial court, holding that mere filing of a will contest was insufficient to state a claim for tortious interference. *Estate of Howard Marshall II*, Second Modified Final Judgment ¶ 4.2.1 (Dec. 7, 2001) (“as a matter of Texas law, the fil-

ing of a will contest and/or the filing of a claim for an interest in an estate and/or the filing of a claim against an heir of an estate does not constitute tortious interference with inheritance rights"). Texas subsequently amended its Probate Code to preclude use of a will contest as the basis for a tortious interference claim. Tex. Prob. Code § 10C(a.)

Among the issues on remand will be which court got to judgment first on which issues or claims. The district court, concerned about the reliance of the bankruptcy court on discovery sanctions for granting summary judgment in favor of the widow, reviewed the case as noncore, despite the language of the statute, in light of concerns that adjudication of this matter might be beyond the jurisdiction of a bankruptcy judge, rather than an Article III judge. 264 B.R. at 609. Subsequently, the district court construed its role as akin to an appeal, looking to the bankruptcy court's findings of fact and conclusions of law as estopping the Texas court. 271 B.R. at 858.

The Ninth Circuit overturned the bankruptcy court's decision, which held that an award of attorney's fees by the probate court was in violation of the widow's discharge injunction. *Marshall v. Marshall*, 119 Fed. Appx. 136 (9th Cir. 2004). The Ninth Circuit in its later decision on the main appeal in dicta looked to the continuance of a declaratory judgment action in the Texas court as potentially preclusive.

Despite the probate court's warnings, Vickie Lynn Marshall freely elected to dismiss her claims against the estate of J. Howard Marshall II and against E. Pierce Marshall, individually and in his representative capacities. However, the non-suit did not dismiss Vickie Lynn Marshall as a defendant in the declaratory judgment action seeking to establish that the 1982 trust, as amended, and the decedent's last will and testament were valid.

392 F.3d at 1128.

The case has been sent to mediation by the Ninth Circuit. If it does not settle, the outcome will turn on issues related to the core jurisdiction of the

bankruptcy court, the preclusive effect of the federal court decisions, the ability of the defendant to use Texas procedure regarding compulsory counterclaims to limit federal subject matter jurisdiction, and the underlying jurisdiction of the Texas court over the tortious interference claims.

Conclusion

J. Howard Marshall, who had taught wills and trusts at Yale Law School, certainly has provided a most intriguing case study for future generations of law students and practitioners. The price of a unanimous decision such as *Marshall* is that many contentious issues are left unresolved in order to reach a common decision. The lower courts continue to wrangle over attempts to use federal diversity jurisdiction for probate and trust disputes based on the general conclusions in *Marshall*.

In *Hoffman v. Sumner*, No. 05-C-7114, 2006 WL 1444677 (N.D. Ill. May 18, 2006), the court followed *Marshall* in denying remand of a diversity case involving a dispute over a joint tenancy asset, holding that the dispute did not violate the probate exception, and rejected the suggestion that it should abstain in favor of the local probate court. The bankruptcy court in *In re Enron Corp. v. Whalen*, 351 B.R. 305 (Bankr. S.D.N.Y. 2006), held that an action to recover an allegedly improper transfer from the estate of a decedent was not covered by the probate exception because there was no interference with the *res* in the possession of the state court. The court explained that any federal judgment could subsequently be enforced in the probate action.

Judge Richard Posner in *Jones v. Brennan*, 465 F.3d 304 (7th Cir. 2006), distinguished between a claim brought concerning the conduct of the Cook County Probate Court in a pending dispute, holding:

That clearly would violate the probate exception. *Marshall v. Marshall*, *supra*, 126 S. Ct. at 1748. But she is also accusing the

guardians of having mismanaged the estate, and as an heir she may have a claim for breach of fiduciary duty by them. . . . Such a claim does not ask the court in which it is filed to administer the estate, but rather to impose tort liability on the guardians for breach of fiduciary duty.

465 F. 3d at 307–08 (citations omitted).

In *Burt v. Rhode Island Hospital Trust National Bank*, No. C.A. PC/02-2243, 2006 WL 2089254 (R.I. Super. July 26, 2006), the court followed *Marshall* in holding that a breach of fiduciary duty claim against an executor was not within the limited jurisdiction of the probate court and could be heard in the Rhode Island general jurisdiction court instead.

In *Bedree v. Lebamoff*, No. 05-2258, 2006 WL 2860575 (7th Cir. Sept. 27, 2006), the Seventh Circuit held in a federal question case that

[t]he claim against the probate commissioner confronts another jurisdictional bar: the probate exception to federal jurisdiction. . . . And Bedree's request for the district court to remedy what he perceives as errors in the state court's administration of the estate, like the plaintiff's request in *Jones* is the equivalent to asking the district court to take over administration of the estate. . . . This violates the probate exception even under the Supreme Court's narrowed construction of the exception in *Marshall*. See, *Marshall*, 126 S.Ct. at 1748 (limited probate exception to proscribe only "disturb[ing] or affect[ing] the possession of property in the custody of a state court"). . . . The breach of fiduciary duty claim, on the other hand, is not barred by the probate exception because it need not necessarily affect the administration of the estate. See *Marshall*, 126 S. Ct. at 1748; *Jones*, 2006 WL 2337610, at *3.

2006 WL 2860575 at *2. ■