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ARTICLES

VIOLENCE OF ACTION: THE BANKRUPTCY CODE, DOMESTIC RELATIONS LAW, AND THE NEW WAR WITH STATE PROBATE LAW

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The author wishes to dedicate this Article to the late Laurence J. Kaiser, esteemed colleague and friend, who greatly influenced a young lawyer’s career many years ago. Collegueship, mentoring, and friendship are debts that can never truly be repaid, except by remembering and by lasting gratitude, which I give in abundance to my friend.

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III. “ANNA AND THE JUSTICES:” THE PROBATE
EXCEPTION TO FEDERAL JURISDICTION AND ITS
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Introduction

“When worlds collide.” “Clash of the Titans.” “Irresistible force meets immovable object.” Pick your metaphor; they are all apt descriptions of the violent interaction between the federal bankruptcy law and state laws governing domestic relations, divorce, and now, even decedents’ estates. And why is this so?

Academically, one clear reason is that while the creation and adjudication of bankruptcy law is exclusively committed to the federal arena by the Constitution,¹ domestic relations law is left to the states under sound principles of federalism. This inevitably leads to friction as these two masses of law and courts intersect at various junctures, sometimes even sharply colliding.

Yet another reason (and here we risk psychologizing) is that both domains of legal proceedings suffer from an inordinate level of stress for all parties. Individual debtors are never there by choice, and the newly revised Code only exacerbates existing pressures. Creditors want to get paid; need we say more?

Cases of divorce, child support, and the division of an estate are certainly not quiescent. The first two characteristically feature emotions running high, if not amok. The last situation’s tension level often increases in proportion to the amount of money being fought over. By any measure, there is more spilling of bad blood than cordiality.

When these two already volatile bodies of law clash, the results can be catastrophic. And that is why we are here to address this controversial and fascinating topic. This year’s Article deals with the subject as follows. First, we shall examine the relevant statutory changes brought about by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), probably the most

¹ U.S. Const., Art. I, Sec. 8, Cl. 4.

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sweeping change since the post-Marathon 1984 amendments to the Bankruptcy Code. While small in number, they are significant, so we will parse what they change and what they leave unaltered.

We will then segue into the more interesting cases in the field, and some practical application (mainly of pre-BAPCPA law, of course) of the Code in important areas such as the automatic stay and the discharge or nondischargeability of debts arising from domestic relations proceedings.

We have saved the best for last. The Article's final topic shall be a detailed discussion of the well known case now before the United States Supreme Court on the scope of the probate exception to federal court jurisdiction. This topic is worthy of our detailed review, and we shall not hesitate to even prognosticate as to the Supreme Court's final decision.

All this being said, let us proceed, for this is a battle worth watching.

I.

STATUTORY CHANGES

A. The Automatic Stay-Exceptions for Domestic Relations

One of the greatest axioms of the Bankruptcy Code is the automatic stay, which prevents the commencement or continuation of any action to collect a debt.² However, as with all great laws, there are exceptions, and in this regard, Section 362 was left largely unchanged by BAPCPA.

Section 362 has always exempted from the automatic stay any action to establish or modify an order for alimony, maintenance or support.³ BAPCPA had simply made a stylistic change on one hand, substituting the new terminology of "domestic support obligation," infra, for the now rote alimony, maintenance or support.⁴ However, the 2005 revisions have expanded the statutory exception to exempt any action "concerning child custody or visitation,"⁵ any action to

² 11 U.S.C. § 362c.

³ Former 11 U.S.C. § 362(b)(2)(A)(ii).

⁴ 11 U.S.C. § 362(b)(2)(A)(ii).

⁵ *Id.* at (iii).

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dissolve a marriage, unless the proceeding seeks to affect estate property by a division thereof,⁶ or any proceeding regarding domestic violence.⁷ The last is a reaffirmation of the rubric that such actions have always been exempt pursuant to the criminal action and/or the police power exemption from the stay.⁸ The exemption for paternity actions remains intact.⁹

To be sure, the former exemption from the automatic stay of actions to collect a debt for alimony, maintenance, and support from property that is not estate property has also been amended in parallel. Once more, the alimony, maintenance or support phraseology has been replaced with the new moniker domestic support obligation.¹⁰ Moreover, also now exempt is a proceeding for the withholding of income that is estate property or property of the debtor for the payment of a domestic support obligation as decreed by a court, administrative body or statute.¹¹ The reporting of overdue support (nee a domestic support obligation) owed by a parent to any consumer reporting agency is also exempted.¹²

In sum, the provisions of Section 362 that are key to the Code's intersection with domestic relation matters remain unchanged. We can therefore continue to rely upon the well developed precedents and practices already in place on these issues.

B. The New Section 507 Priority: The Last (or Seventh) Shall Be First

Fact: Allowed claims for alimony, maintenance or support have always enjoyed priority of payment under the Bankruptcy Code.

Former fact: That priority was accorded seventh place in the ordination of Section 507.¹³

New fact: Now, "first among equals" in priority of payment are claims for domestic support obligations, the former alimony,

⁶ *Id.* at (iv).

⁷ *Id.* at (v).

⁸ See 11 U.S.C. § 362(b)(1) and (4), respectively.

⁹ 11 U.S.C. § 362(b)(2)(A)(i).

¹⁰ 11 U.S.C. § 362(b)(2)(B).

¹¹ 11 U.S.C. § 362(B)(2)(C).

¹² 11 U.S.C. § 362(b)(2)(E).

¹³ See Former 11 U.S.C. § 507(a)(7).

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maintenance or support.¹⁴ The newly anointed first priority further provides that the obligation must be owed as of the petition date, and owed to or are recoverable by a spouse, former spouse, child, child's parent, legal guardian or responsible relative, regardless if the claim was actually filed by the person or on his or her behalf by a governmental unit.¹⁵ If filed by a governmental unit, then the first priority is conditioned upon monies received to be distributed according to applicable nonbankruptcy law.¹⁶

The new first priority adds another wrinkle. If a claim as described above has been assigned to a governmental unit as of the petition date, or the claim is owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, then it immediately follows in the priority scheme for payment.¹⁷ However, if the assignment was voluntary for purposes of collecting the debt, then it moves back to the first tranche of the subsection (1) priority.¹⁸ Again, a condition of the priority is that monies received by a governmental unit after the petition date must be distributed according to applicable nonbankruptcy law.¹⁹

Finally, a trustee's administrative expenses will trump and come before the new first priority, to the extent the trustee administers assets that are otherwise available for the payment of such claims.²⁰

The reworking of Section 507 is a study of marked contrasts. On the one hand, the jump of domestic obligations from seventh position to first is unprecedented in the Code's nearly thirty year history. Never before has a priority debt moved so far and all at once. This clearly represents a sea change by Congress, and reflects current thinking as of what takes priority in the bankruptcy law, as well as our legal system in general. The bold statement of social engineering made here by our lawmakers cannot be underestimated.

Yet in contradistinction is this fact: Congress did nothing to change the substance of the domestic obligation debt priority. Certainly, the language was modernized, to better reflect the current

¹⁴ 11 U.S.C. § 507(a)(1).

¹⁵ 11 U.S.C. § 507(a)(1)(A).

¹⁶ 11 U.S.C. § 507(a)(1)(A).

¹⁷ 11 U.S.C. § 507(a)(1)(B).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at (C).

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state of the legal landscape, not to mention streamline some cumbersome wording. We also have some clarification in the event the obligation is assigned, and greater definition as to how this affects priority, if at all. But the substance is unchanged; if the debt is for alimony, maintenance, support or any domestic support obligation as we now call it, it enjoys priority. Given all we know, maintaining the status quo is probably the best result one could hope for.

C. Five Simple Words

Section 523 of the Bankruptcy Code sets forth the “Exceptions to discharge,” debts that even bankruptcy does not wipe out.²¹ For decades, the fifth nondischargeable debt so delineated has been a debt owed to a spouse, former spouse, or child of the debtor, for alimony, maintenance or support, and in connection with any separation, divorce or other court order.²² The final proviso was that the obligation truly be in the nature of alimony, maintenance, or support,²³ per force excluding a property settlement.

In one stroke of the pen, or in this case the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, all that verbosity was wiped out. All the cumbersome verbiage was replaced with five simple words: “for a domestic support obligation.”²⁴ The new lexicon subsumes all the implications of the old, for a “domestic support obligation,” is defined in the introductory portion of the revised Code as any debt owed to the same spouse, former spouse, or child, but now adding the child’s parent, legal guardian, responsible relative or a governmental unit,²⁵ and which is in the nature of alimony, maintenance, or support, which now includes assistance provided by a governmental unit.²⁶ To be sure, the debt need not be expressly designated as such; in other words, substance controls over form.²⁷

Further new wrinkles make clear that the qualifying debt may be established before, on or after a petition is filed by means of any separation agreement, divorce decree, court of record, and now any property settlement agreement or determination made by a

²¹ See 11 U.S.C. § 523 (a).

²² Former 11 U.S.C. § 523(a)(5).

²³ Former 11 U.S.C. § 523(a)(5)(B).

²⁴ 11 U.S.C. § 523(a)(5).

²⁵ 11 U.S.C. § 101(14A)(A).

²⁶ 11 U.S.C. § 101(14A)(B).

²⁷ Id.

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governmental unit under applicable nonbankruptcy law.²⁸ However, the obligation loses its status as a domestic support obligation if it is assigned to a private entity, unless it was so assigned voluntarily by the spouse, former spouse, child, child's legal guardian, or responsible relative for the purpose of collecting the debt.²⁹

Finally, when a domestic support obligation accrues is irrelevant; it can be before, on or after a bankruptcy filing. And it now includes interest that accrues under applicable nonbankruptcy law.³⁰ Thus, in reality the streamlining of Section 523's fifth exception to five simple words was done at a cost of an even lengthier definition tucked away in Section 101. The more things change, the more they stay the same.

Section 523 was further amended in a way germane to this Article. While alimony, maintenance or support were long prioritized as nondischargeable debts, other debts arising from a marital dissolution, i.e., a property settlement, were ostensibly not dischargeable, unless the debtor could prove an inability to pay from income or property of the debtor not reasonably necessary for the debtor's own support.³¹ BAPCPA has now totally eliminated the inability to pay avenue towards dischargeability. Regardless of the debtor's ability to pay or not, any debt not already nondischargeable pursuant to subsection (5), but owed to a spouse, former spouse, or child, and rooted in any divorce, separation or similar court order is nondischargeable as well.³²

This amendment means we will have seen the last of controversies such as Means v. Grant (In re Grant).³³ Under their divorce decree, Grant owed his former spouse Means over \$28,000 for expenses related to their former business. Grant's overtime at work had been severely curtailed, and he claimed the subsection (15) exception of nondischargeability was invoked because of his inability to pay.³⁴

²⁸ 11 U.S.C. § 101(14A)(C).

²⁹ 11 U.S.C. § 101(14A)(D). *Compare County of Dallas, Texas v. Baldwin (In re Baldwin)*, 337 B.R. 592, 594 (Bankr. N.D. Tex. 2006) (payment in nature of either maintenance or support of debtors' child was dischargeable because state court entered judicial order making payment due directly to local county).

³⁰ 11 U.S.C. § 101(14A)(A).

³¹ Former 11 U.S.C. § (a)(15).

³² 11 U.S.C. § 523(a)(15).

³³ 335 B.R. 767 (Bankr. Wyoming 2005).

³⁴ *Id.* at 769-70.

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Bankruptcy Judge McNiff noted that a creditor bears the burden, by a preponderance of the evidence, to show the nondischargeability of a debt.³⁵ In turn, subsection (15) “sets up a rebuttable presumption” that the debt is nondischargeable. This shifts the “ultimate burden” to the debtor to show the exception to nondischargeability applies.³⁶ Here, the Grant court found that the debtor had no excess income or property, and that without overtime, his pay was insufficient to cover the debt owed the former spouse. Therefore, the bankruptcy court held the debtor was unable to pay, and the debt was dischargeable under the exception.³⁷ Under the amended law, however, we will not see the like of this kind of case again.

And there we have it; new lexicon for a revised Bankruptcy Code. While the underlying substance has not changed, the revised statutory language should be easier to deal with, if nothing else. In the main, the substantive relief it provides remains unchanged.

II. CASE DEVELOPMENTS

In our symbiotic system of jurisprudence, statutory language is but words on a page until a court breathes life into them. Thus, we now turn to the all important matter of how our courts have interpreted the Bankruptcy Code in domestic relations matters in recent cases. As expected, we are not the least disappointed with the new learning bestowed by these decisions.

D. The “Police Power” Exception To The Automatic Stay

Section 362, the automatic stay, holds a specific exemption for actions taken pursuant to a governmental’s unit’s “police power,” that is, the power to enforce applicable nonbankruptcy law.³⁸ This proviso sees much use in cases where bankruptcy proceedings have domestic relations aspects, given the vested and significant interests of the States in enforcing such laws.

³⁵ *Id.* at 770. See *Grogran v. Garner*, 498 U.S. 279, 291 (1991).

³⁶ *Id.* at 770.

³⁷ *Id.* at 770. Compare *Simpson v. Simpson (In re Simpson)*, 336 B.R. 739, 743 (Bankr. W.D. Kentucky 2006) (concluding debtor had ability to repay debt, and thus held it to be nondischargeable).

³⁸ 11 U.S.C. § 362(b)(4).

The “police power” exception to the automatic stay played a decisive role in In re Nelson.³⁹ Victor and Kimberly Nelson were husband and wife. Kimberly filed for divorce in February, 2004, and soon thereafter petitioned for a protection from abuse order pursuant to Kansas state law. While these matters were pending, Victor was suspended from the practice of law. Notably, it appears Victor was not only an attorney, but the majority of his law practice was in the bankruptcy court. To add to the troubles, a secured creditor commenced a foreclosure action against the Nelsons’ home. The state family court judge consolidated all three actions.⁴⁰

In the weeks leading up to trial, Victor repeatedly told his wife, her attorney, and the judge that he intended to file for bankruptcy. On the day of trial, Victor failed to appear. The state judge contacted the nearby bankruptcy court, and was told that no bankruptcy petition had been filed. The trial proceeded, and default judgments were entered against Victor in all three matters. The court directed Kimberly’s attorney to journalize the court’s decisions.⁴¹

What no one knew then was that Victor was in actuality right across the street at the federal courthouse, filing his pro se Chapter 13 petition. But “[i]nstead of phoning the state court or simply crossing the street to the courthouse, Victor headed home.” Inexplicably, he simply never took the time to tell anyone he had filed for bankruptcy, until much later that day.⁴² Over the next few days, various orders were memorialized as to the Nelsons’ divorce, child custody, child support, and a protection from abuse directive. Around this time, Kimberly’s attorney finally confirmed Victor had filed for Chapter 13.⁴³

Subsequently, Kimberly filed a motion for relief from the automatic stay so she might complete the division of marital property. Victor countered by moving for sanctions for what he alleged were violations of the automatic stay.⁴⁴

³⁹ 335 B.R. 740 (Bankr. D. Kansas 2005).

⁴⁰ *Id.* at 744-45.

⁴¹ *Id.* at 745-46.

⁴² *Id.* at 746.

⁴³ *Id.* at 746-47. It should also be noted that Victor failed to pay his filing fee and filed deficient schedules. In other words, he filed a “bare bones” petition. *Id.* at 746 n.12.

⁴⁴ *Id.* at 747-48.

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The task of unraveling this tangled web fell to Bankruptcy Judge Robert Nugent. Pertinent to this Article, the bankruptcy court found that the divorce, child custody, and child support actions by the state court were all exempt from the automatic stay.⁴⁵

But the most prominent question before the bankruptcy bench was this: was a proceeding under the Kansas Protection from Abuse Statute exempt from the automatic stay? This was a case of first impression, found Judge Nugent, citing a lack of precedent.⁴⁶

Pioneering new ground, the Nelson court was guided by the nature of this local statute, and concluded that such actions are in fact exempt from Section 362. “PFA cases, like restraining orders entered by divorce courts, have quasi-criminal characteristics,” and are to be liberally construed to prevent domestic violence. Misdemeanor and even felony charges attach to a violation of a PFA order, observed Judge Nugent.⁴⁷

In the state case, nothing was done in the PFA segment to deprive the debtor of any property. The order entered was “purely a restraining order” aimed to prevent domestic violence. The Nelson court therefore concluded that such proceedings more closely resembled criminal actions or police power proceedings, which are of course exempt from the stay.⁴⁸

While the foregoing was clearly dispositive, Judge Nugent buttressed his holding on additional grounds. These protective orders “can also be deemed ancillary to paternity or alimony and support proceedings which are plainly exempted from the stay.” The bankruptcy court held that Section 362’s exemptions for criminal, police power, and domestic relations proceedings “express a strongly-held Congressional view that pending bankruptcies should not forestall fundamental nonbankruptcy law proceedings dedicated to the preservation of the safety and security of the family.”⁴⁹

Here, there was no abuse of Section 362. To the contrary, if proceedings of this kind were derailed by the simple expedient of a

⁴⁵ *Id.* at 750. See 11 U.S.C. § 362(b)(2)(A)(ii). See also *In re Taylor*, 233 B.R. 639 (S.D.N.Y. 1999) (automatic stay inapplicable to noneconomic aspects of divorce proceedings).

⁴⁶ *Id.* at 750.

⁴⁷ *Id.* at 750-51.

⁴⁸ *Id.* at 751. See 11 U.S.C. § 362(b)(1) and (4), respectively.

⁴⁹ *Id.* at 751.

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filing a bankruptcy petition, it “would permit a potential abuser to hide behind the stay while flouting orders restraining him or her from abusing, battering, injuring, assaulting or threatening a victim during the pendency of the abuser’s bankruptcy,” a result “incomprehensible” to the Nelson court.⁵⁰ Therefore, insofar as the state court acted pursuant to its authority to enter anti-domestic abuse orders, there was no Section 362 violation.⁵¹

In retrospect, Nelson marks another important milestone in assuring that the states may enforce their own laws, particularly in sensitive areas such as domestic relations, and, moreover, in preventing or punishing domestic violence.

E. Concurrent Jurisdiction Issues

Divorce may end a marriage, but not necessarily the obligation. This is especially so with post-divorce duties of payment, which, must often times be enforced by further state court proceedings. And what if the obligor files for bankruptcy? Then we have the classic question of when the state court’s authority ends and the bankruptcy court’s jurisdiction begins. One such case is In re Ivani.⁵²

After ten years of marriage, Richard and Catherine Ivani had been in “long and protracted divorce proceeding” in New York state court. The local court awarded Catherine a little less than \$500 per week in child support, private schooling costs for the couple’s two children, and just under \$100,000 in attorney’s fees. Claiming he could not comply with the equitable distribution and support awards, Richard filed for Chapter 7.⁵³

But Richard was also driven into bankruptcy by motions made by his former spouse to hold him in contempt for non-payment. The state court did in fact enter various orders of contempt and awarded monetary relief against Richard, subsequent to his bankruptcy filing.⁵⁴

Now Richard brought a motion before the bankruptcy bench to reverse those orders, on the theory that the state court’s action violated the automatic stay.⁵⁵ Notably, Richard acknowledged that the filing of

⁵⁰ *Id.* at 751.

⁵¹ *Id.* at 751-52.

⁵² 308 B.R. 132 (Bankr. E.D.N.Y. 2004).

⁵³ *Id.* at 134.

⁵⁴ *Id.* at 134.

⁵⁵ *Id.* at 133-34.

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a bankruptcy petition does not stay any action or proceeding to collect alimony, maintenance or support,⁵⁶ but he nevertheless argued that the effect of the state judge's ruling was interfering with property of the estate. Indeed, Richard sought to have both his ex-wife and her attorney held in contempt for violating Section 362 of the Code.⁵⁷

Bankruptcy Judge Elizabeth Stong began with the basic premise of the fundamental protection afforded debtors by the automatic stay. Nonetheless, Section 362 has exceptions, the one for the collection of alimony, maintenance of support being quite relevant here. On its face, opined the court, it appeared the state court's order was indeed valid, insofar as it pursued non-estate property.⁵⁸ Even so, this implicated another key precept.

The Ivani court noted that 'adjudicat[ing] the issue of the applicability of the automatic stay' is not exclusively reserved to the bankruptcy bench. Rather, it is well settled, at least in the Second Circuit, that when there is an action pending prebankruptcy in a district court, that judge has concurrent jurisdiction with the bankruptcy court to determine the applicability of Section 362.⁵⁹ To be sure, subsequent lower court decisions extended that doctrine to find that state courts likewise share concurrent jurisdiction with bankruptcy courts to rule on the automatic stay's application.⁶⁰ Given such, the state court's ruling, which included a holding that the automatic stay would not be violated by holding the debtor in contempt and directing him to pay money to his former spouse, was within this concurrent jurisdiction.⁶¹

Bankruptcy Judge Stong then turned to the next argument, implicating the crucial Rooker-Feldman doctrine. As is well known, wrote the bankruptcy judge, Rooker-Feldman provides that federal courts lack jurisdiction where an assertion of their power would overturn an otherwise valid state court ruling.⁶² For decades, these

⁵⁶ See 11 U.S.C. § 362(b)(2)(B).

⁵⁷ *Id.* at 134-35.

⁵⁸ *Id.* at 135.

⁵⁹ *Id.* at 135, citing *Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp.)*, 765 F.2d 343, 347 (2d Cir. 1985).

⁶⁰ *Id.* at 135, citing *Siskin v. Complete Aircraft Services, Inc. (In re Siskin)*, 258 B.R. 554, 562 (Bankr. E.D.N.Y. 2001) (Eisenberg, J.).

⁶¹ *Id.* at 136.

⁶² *Id.* at 136. Compare *In re Osting*, ___ B.R. ___, 2005 WL 3729402 (Bankr. N.D. Ohio 2005) (bankruptcy court abstained from hearing debtor's fraudulent conveyance claim, on grounds that to do so would undermine judgment already made by state court in a domestic relations matter); *Brickell v. Brickell (In re Brickell)*, 160 Fed. Appx. 969, 970-71 (11th Cir.

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twin landmarks have prevented direct or collateral attack upon state court edicts in a federal court.⁶³

Interestingly, the Ivani court pointed out, the federal and state claims at issue need not be identical; they only need be inextricably intertwined to hold the federal courts at bay.⁶⁴ To be sure, the delineation between the two is not always crystal clear.⁶⁵ For guidance, the New York bankruptcy court again referred to its parent Second Circuit.

The Ivani court recognized that, at a minimum, if a party to a federal claim has had the opportunity to litigate that claim in state court already, further litigation is then precluded by Rooker-Feldman.⁶⁶ Put another way, the federal claim cannot be unhitched from the state court's judgment to the extent the former declares the latter to be wrong.⁶⁷

Bankruptcy Judge Stong handily found that Richard had indeed fully litigated his cause before the state judge. The state bench had the concurrent jurisdiction to decide the automatic stay issue, reiterated the bankruptcy judge, and having resolved it, its ultimate holding could not be reviewed without declaring it incorrect, a step that would violate Rooker-Feldman. Thus prohibited from interfering with a matter already concluded by its state court brethren, the Ivani court refused to interfere, and permitted the state court's contempt order to stand unmolested.⁶⁸

In sum, when the federal bankruptcy courts and state tribunals interact, it is not always a smooth mixing. Nonetheless, cases such as Ivani do much to clear the air and foment comity between the two jurisdictions. By wisely adhering to the Rooker-Feldman doctrine, this decision does much to advance the shared goal of fair adjudication in both fora.

2006) (*res judicata* barred relitigation of former spouse's claim of nondischargeability of a debt allegedly owed by ex-husband).

⁶³ *Id.* at 136.

⁶⁴ *Id.* at 136. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-84 n. 16 (1983).

⁶⁵ *Id.* at 136-37. See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987).

⁶⁶ *Id.* at 137, citing *Moccio v. New York State Office of Court Administration*, 95 F.3d 195, 199-200 (2d Cir. 1996).

⁶⁷ *Id.* at 137 (citations omitted).

⁶⁸ *Id.* at 137.

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**F. Nothing Petty About It:
Distinguishing Between Domestic Support Debts And Property
Settlements**

Our next case, Petty v. Petty (In re Petty),⁶⁹ represents an interesting exercise in determining the distinction between nondischargeable debts for alimony, support or maintenance, as contrasted to property settlements (which are dischargeable in bankruptcy) or even post-divorce obligations.

Brad and Carole Petty had been divorced in 1995. The Florida state court awarded Carole 13.5% of Brad's military pension, and one-half of the proceeds arising from the sale of the "Out of Bounds Lounge," a business they had once jointly owned. An unsecured promissory note stood in place of the actual proceeds. An appropriate judgment was entered.⁷⁰

In mid-2003, nearly eight years later, Brad filed for bankruptcy pursuant to Chapter 13. That case was dismissed in December of that same year, and during that time, Brad stopped making the monthly payments from his Army pension.⁷¹

Subsequent to the Chapter 13 being dismissed, Carole moved in state court to hold Brad in contempt for non-payment. A further judgment was entered for past and future payments to be made by Brad.⁷² Two days later, in March, 2004, Brad again filed for bankruptcy, this time pursuant to Chapter 7. Carole then filed a complaint in the bankruptcy court seeking to have all the monies owed her by Brad declared nondischargeable, ostensibly as support or maintenance.⁷³ Brad alleged that what Carole sought was a property settlement, and therefore susceptible of discharge.⁷⁴

Chief Judge Paul M. Glenn first tackled the issues surrounding the monies owed from Brad's military pension. "It appears well-established," said the court, that an award of a portion of a military

⁶⁹ 333 B.R. 472 (Bankr. M.D. Fla. 2005).

⁷⁰ *Id.* at 474-476.

⁷¹ *Id.* at 476.

⁷² *Id.* at 476.

⁷³ *Id.* at 476 and 474.

⁷⁴ *Id.* at 474.

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pension invests the former spouse with a property interest therein.⁷⁵ Chief Judge Glenn was greatly swayed by the reasoning of In re Potter,⁷⁶ where that northern New York bankruptcy court concluded that an award of part of a military pension by a state divorce court does not create a debt, but bestows separate property upon the non-debtor spouse.⁷⁷

Continuing, the Petty court held that this bestowal of a property right occurs when the judgment of divorce is entered, and does not require further state court orders. Thus, the portion of the military pension so awarded to the former spouse is never property of the debtor's estate, obviating any need to decide nondischargeability, since it is never a debt in the first place.⁷⁸ Forthrightly applying that principle here, the Petty court easily found that the percentage of Brad's military pension was Carole's sole property, and thus outside the estate, and certainly not a debt.⁷⁹

But there was a critical subissue yet to be decided. The Florida court had penalized Brad for withholding Carole's share of his Army pension, finding it to be "civil theft" under that state's law, and likewise imposing the treble damages that state allows in such cases.⁸⁰

Were these treble damages a nondischargeable debt? Indeed they are, held Chief Judge Glenn, for the following reasons. One, the Supreme Court some years ago in Cohen v. de la Cruz⁸¹ established that treble damages may be nondischargeable as part of the debt arising from a debtor's fraudulent conduct.⁸² In accord with that landmark, bankruptcy courts in Florida have determined that the treble damages arising from the state's civil theft law do so qualify for such

⁷⁵ *Id.* at 477, citing *In re Baker*, 274 B.R. 176, 192 (Bankr. D.S.C. 2000). See also *In re Califf*, 195 B.R. 499, 501 (Bankr. N.D. Ala. 1996).

⁷⁶ 159 B.R. 672 (Bankr. N.D.N.Y. 1993).

⁷⁷ *Petty*, 333 B.R. at 477, quoting *Potter*, *supra*, 159 B.R. at 675. See also *In re McQuade*, 232 B.R. 810, 813 (Bankr. M.D. Fla. 1999) (same). Compare *Davis v. Cox*, 356 F.3d 76, 84 (1st Cir. 2004) (pending divorce action gave non-debtor spouse an equitable interest in debtor's IRA, such that IRA never became property of the debtor's estate in his subsequent Chapter 13 case); *Verner v. Verner (In re Verner)*, 318 B.R. 778, 793 (Bankr. W.D. Pa. 2005) (former spouse's prepetition equitable distribution interest in husband's ERISA-protected pension plan could not be avoided by debtor, and thus it survived his Chapter 7 bankruptcy).

⁷⁸ *Id.* at 477. See *In re Newcomb*, 151 B.R. 287, 289-90 (Bankr. M.D. Fla. 1993). See also *In re Chandler*, 805 F.2d 555 (5th Cir. 1986); *Bush v. Taylor*, 912 F.2d 989 (8th Cir. 1990).

⁷⁹ *Id.* at 478. Interestingly, the accrual interest on the unpaid money was deemed to part of Carole's payment as well, and not a debt, although quite payable. *Id.*

⁸⁰ *Id.* at 478.

⁸¹ 523 U.S. 213 (1998).

⁸² *Petty*, 333 B.R. 478-79, citing *Cohen*, *supra*, 523 U.S. at 223.

nondischargeable treatment.⁸³ Implicitly, opined Chief Judge Glenn, the additional penalty for wrongdoing is just as nondischargeable in character as any other debt arising from fraud.⁸⁴ And as an additional point, the court found the state court's judgment against Brad had collateral estoppel effect, and he was thus precluded from challenging it.⁸⁵

Chief Judge Glenn then turned to the second major issue, that of the state court's judgment directing Brad to pay \$40,000 to Carole as her one-half share of the "Out of Bonds Lounge" they once owned. To be sure, Brad had whittled this down to a remaining balance of approximately \$14,000 still owed to his ex-wife.⁸⁶

The Petty court rapidly determined that the divorce court's judgment "constitutes a property settlement, and is not in the nature of alimony, maintenance, or support."⁸⁷ Explaining its reasons, the bankruptcy court noted this type of determination must be made upon the individual circumstances of each case.⁸⁸ The burden of proving a debt to be alimony or support falls upon the party seeking to have it declared nondischargeable.⁸⁹ Many factors play a role in this determination, but the predominant one is "the intent of the divorce court in allocating the assets and liabilities" of the divorcing couple.⁹⁰

Here, wrote Chief Judge Glenn, the state court's intent was unmistakable; the award of the proceeds from the sale of the lounge was a property settlement and nothing else. Notably, the couple had no children together and both were employed during the marriage. Carole's request for alimony was specifically denied, and the divorce court ordered each side to bear its own attorneys' fees and costs.

⁸³ *Id.* at 479. See *In re Padgett*, 235 B.R. 660 (Bankr. M.D. Fla. 1999); *In re Rogers*, 193 B.R. 55, 60 (Bankr. M.D. Fla. 1996).

⁸⁴ *Id.* at 479. See 11 U.S.C. § 523(a)(6).

⁸⁵ *Id.* at 479-80.

⁸⁶ *Id.* at 480.

⁸⁷ *Id.* at 480.

⁸⁸ *Id.* at 480, citing *In re Bristow*, ___ B.R. ___, 2005 WL 1321996 at 3 (Bankr. M. D.N.C.

2005). Compare *Cegan v. Cegan (In re Cegan)*, 153 Fed. Appx. 73, 75 (3d Cir. 2005) (courts must look beyond mere labels to determine if a marital obligation is nondischargeable as in the nature of alimony or support; this is a question of federal, not state, law, which turns upon the intent of the parties at the time of the dissolution of the marriage).

⁸⁹ *Id.* at 480, citing *Cummings v. Cummings*, 244 F.3d 1263, 1265 (11th Cir. 2001). See also *Andrus v. Ajemian (In re Andrus)*, 338 B.R. 746, 752 (Bankr. E.D. Mich. 2006).

⁹⁰ *Id.* at 480. See also *Cummings*, *supra*, 244 F.3d at 1266; *In re Coker*, 272 B.R. 762, 764-65 (Bankr. M.D. Fla. 2001); *Froncillo v. Froncillo (In re Froncillo)*, 155 Fed. Appx. 608, 610-11 (3d Cir. 2005) (intent of parties at the time of marital dissolution determines if it is nondischargeable alimony or support).

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Support was not an issue, found the bankruptcy court in its review of the underlying state action. Therefore, the sales proceeds were a property settlement only.⁹¹

But again a subissue arose. Carole contended the debt to be nondischargeable because Brad allegedly committed a fraud while acting in a fiduciary capacity, i.e., holding the proceeds rightfully belonging to his former spouse. Not so, said Judge Glenn. The state court decree did not establish a trust or any other special relationship for Carole.

The fraud-as-a-fiduciary exception to discharge,⁹² “as with all other discharge statutes, is construed narrowly to further the fundamental policy of the Bankruptcy Code of providing the debtor with a fresh start.”⁹³ More particularly, the notion of a “fiduciary” as encompassed by the statute applies solely to express or legally created trusts, which exist before the purported fraud. The term is most certainly not be construed expansively.⁹⁴ In sum, the Petty court declared that the state court never declared a trust in Carole’s favor, nor did it ever find Brad guilty of wrongdoing with regard to the lounge sale proceeds.⁹⁵

Similarly, Brad’s failure to pay his ex-wife the balance due from the sale of their business did not rise to the level of a willful or malicious injury. There was nothing “willful” nor “malicious” about it, Chief Judge Glenn indicated.⁹⁶ As before, the divorce tribunal never made any such findings to Brad’s nonpayment; very much to the contrary, the state court plainly declared Brad had not acted willfully nor intentional when he failed to remit the balance of the money to Carole. Confronted with such facts, it was not surprising that the bankruptcy court rejected Carole’s claim of nondischargeability.⁹⁷

⁹¹ *Id.* at 480-81.

⁹² 11 U.S.C. § 523(a)(4).

⁹³ *Id.* at 481. See *In re Delisle*, 281 B.R. 457, 466 (Bankr. D. Mass. 2002).

⁹⁴ *Id.* at 481. See *In re Hanft*, 315 B.R. 617, 623 (S.D. Fla. 2002); *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993).

⁹⁵ *Id.* at 481. See *Owens v. Owens*, 155 Fed. Appx. 42, 44 (2d Cir. 2005) (wife unable to prove husband’s debt to her was nondischargeable on basis of fraud; husband was not a fiduciary to wife, and therefore wife could not claim Section 523(a)(4) “fraud in a fiduciary capacity” exception to discharge).

⁹⁶ *Id.* at 481. See *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998).

⁹⁷ *Id.* at 481.

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The third and final issue pertained to an unresolved credit card debt of over \$6,000. The debt arose from the lounge business. The Pettys' final divorce decree provided that Brad would indemnify Carole for any credit card debt arising from the "Out of Bounds Lounge." Notably, the card balance had ballooned to over \$10,000.⁹⁸

Brad testified he had zeroed out the business debt at the time of the divorce, but the new arrearage was incurred by he and his new wife. Brad testified that he told the credit card company to take Carole's name off the account, but apparently to no avail.⁹⁹

Given the above, the bankruptcy court ruled that Brad's acknowledged debt fell outside the marital dissolution, since it was a new debt. As such, it was not dischargeable vis-à-vis his former spouse. Nevertheless, the bankruptcy court decided the best course of action was to modify the automatic stay, in order to allow Carole to pursue Brad in state court, and finally resolve this debt.¹⁰⁰

In sum, distinguishing between what is a domestic support obligation and what is a property settlement remains crucial. The former enjoys priority of payment (indeed, now the greatest of priorities under the reworked Section 507) and nondischargeability, while the latter is more prosaic, and enjoys none of those special attributes. While our terminology may have changed somewhat, we can continue to draw this line between these two distinct obligations as we have always done under existing law.

G. Marital Debts Nondischargeable by Reason of Fraud

Not every debt springing from a marital relationship is nondischargeable solely because it is in the nature of alimony, maintenance or support. Let it be remembered that a debt obtained by fraud is just as nondischargeable.¹⁰¹ Therefore, former spouses can and do raise the fraud exception to discharge when the ex-husband or wife files for bankruptcy.

⁹⁸ *Id.* at 482.

⁹⁹ *Id.* at 482.

¹⁰⁰ *Id.* at 482. *Accord In re Fussell*, 303 B.R. 539, 547 (Bankr. S.D. Ga. 2003) (state court best forum to determine status of debtor's post-divorce, pre-bankruptcy credit card obligations).

¹⁰¹ 11 U.S.C. § 523(a)(2)(A).

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Cooke v. Cooke (In re Cooke)¹⁰² is one such case. Richard Cooke had filed for Chapter 11, and his case was subsequently converted to a Chapter 7. A few months before the initial filing, Richard's marriage to Maryalice Cooke was dissolved by a Connecticut state court.¹⁰³ Alas, that was to prove to be but one phase of a long, drawn out legal entanglement between the two.

In an adversary proceeding alleging nondischargeability of certain debts, Maryalice accused Richard of forging her name on a promissory note, allegedly secured by their home, to Chase Manhattan Bank. At the trial of the action, Richard admitted the forgery, most likely because he had convicted of that same crime previously.¹⁰⁴ While "troubling" to the court,¹⁰⁵ that only set the stage for what was to follow.

Maryalice's main allegation was that Richard deceived her into quitting her claim to the marital home in exchange for a promise by Richard to pay her \$72,500 from the proceeds of an expected sale. But Richard never sold the property, leading his ex-wife to seek a declaration that the unpaid \$72,500 was nondischargeable as a debt obtained by fraud.¹⁰⁶

Bankruptcy Judge Shiff cataloged the elements of a debt obtained by fraud, as rendered nondischargeable by Section 523(c)(2)(A): a) the debtor made a false representation; b) knowing it was false; c) with the intent to deceive; and d) the creditor relied upon the falsehood to his or her detriment.¹⁰⁷ The creditor bears the burden of proving each and every element by a preponderance of the evidence,¹⁰⁸ but need not prove what was in the debtor's mind to a "psychiatric certainty."¹⁰⁹ Rather, the proof lies in examining the totality of the circumstances in adjudging the purported fraud of the debtor.¹¹⁰

¹⁰² 335 B.R. 269 (Bankr. D. Conn. 2005).

¹⁰³ *Id.* at 273.

¹⁰⁴ *Id.* at 274.

¹⁰⁵ *Id.* at 274 n. 4.

¹⁰⁶ *Id.* at 274.

¹⁰⁷ *Id.* at 274-75. See *Field v. Mans*, 516 U.S. 59, 69, 74-75 (1995) (stating, *inter alia*, that the exception for fraud statutory language is based upon common law terms, and reliance is a prerequisite to a finding of fraud).

¹⁰⁸ *Id.* at 275. See *Grogan v. Garner*, 498 U.S. 279, 285-86 (1991).

¹⁰⁹ *Id.* at 275.

¹¹⁰ *Id.* at 275. See also *In re Leventhal*, 194 B.R. 26, 30 (Bankr. S.D.N.Y. 1996); *In re Rickey*, 8 B.R. 860, 863 (Bankr. M.D. Fla. 1981).

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Examining the circumstances here, the Cooke court found Richard, as part of the divorce, had fraudulently induced Maryalice to relinquish her claim by promising to sell their former home.¹¹¹ Bankruptcy Judge Shiff reached this conclusion because the debtor's own bankruptcy petition showed without a doubt that the property was so deeply mortgaged, it would have been impossible for him to clear \$72,500 out of non-existent equity to pay Maryalice.¹¹²

Yet there was still more. The bankruptcy court noted that after the divorce, but before his Chapter 11, Richard remarried and took up residence in the same house with his new wife. In his bankruptcy petition, he declared he would not be selling the property, and in fact arranged for his stepfather to purchase the home out of Richard's then – Chapter 11 case. All the while, Richard continued to live there.¹¹³

Weighing all this, it was no surprise that Judge Shiff found that Richard had “succeeded in deceiving” Maryalice, and “should not benefit from a discharge of the debt which is the product of that deception.” There was no doubt at all, said the court, that Maryalice relied and justifiably relied¹¹⁴ upon Richard's fraudulent representations that he would sell the property, that it had equity, and he would pay her over \$70,000 there from.¹¹⁵

Here, the undisputed evidence that Richard had engaged in forgery on the Chase note came back to haunt him. The debtor was in no position to challenge the quality of his former note's reliance, “since it was his fraudulent conduct that induced that reliance.” Putting it all together, the Cooke bench found the debtor guilty of engaging in false pretenses, misrepresentations, and actual fraud. The debt arising from such wrongdoing was therefore nondischargeable.¹¹⁶

¹¹¹ *Id.* at 275.

¹¹² *Id.* at 275-76.

¹¹³ *Id.* at 276-78.

¹¹⁴ See *Field v. Mans*, 516 U.S. 59, 65, 74 (1995) (Section 523(c)(2)(A) requires justifiable, but not reasonable, reliance).

¹¹⁵ *Id.* at 278.

¹¹⁶ *Id.* at 278. The debtor also raised affirmative defenses of laches, collateral estoppel and res judicata. The bankruptcy judge rejected them all for lack of proof. As for laches, the debtor offered no evidence of lack of diligence by his former spouse in prosecuting her nondischargeability complaint. *Id.* at 279-80. Collateral estoppel and res judicata did not apply because the issues were not actually litigated nor was a final judgment reached on these issues in the state court divorce action. *Id.* at 281.

In review, Cooke is a stark example of a fraud perpetrated upon a spouse or former spouse. Fortunately, it is not a frequent occurrence, but the point remains that spouses or children so injured by a debtor's deceitful ways have yet another tool available to them to vindicate their rights.

H. Determining Nondischargeability of Domestic Debts

Section 523(a)(5) of the Code has long provided that bankruptcy does not discharge a debt owed to a spouse, former spouse, a child of a debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other court order.¹¹⁷ It hardly needs stating that the bankruptcy court may determine what is dischargeable under that provision and the statute generally. But is that jurisdiction exclusive? No, it is not; rather, state courts have concurrent jurisdiction with the bankruptcy courts to determine whether or not a debt is dischargeable pursuant to Section 523.¹¹⁸

In this arena, we were recently reminded of this shared authority by the Seventh Circuit in Eden v. Robert A. Chapski, Ltd.¹¹⁹ When an Illinois state court dissolved the marriage between Larry Eden and Jen Eakins, it ordered Eden to pay the fees of his former spouse's attorneys, Chapski, for legal work related to the litigation. During the pendency of the divorce, Eden filed for Chapter 13.¹²⁰

As so well put by Circuit Judge Rovner, the debtor "repaired to the bankruptcy court," seeking injunctive relief to prevent the ex-wife's attorneys from collecting the fees.¹²¹ After Eden was granted his discharge, the bankruptcy judge closed the adversary proceeding.¹²² Returning to the state court, a determination was made by the local judge that Eden's debt for the legal fees was indeed nondischargeable in bankruptcy, as it was in the nature of alimony, maintenance or support.¹²³ Eden worked mightily to put the matter

¹¹⁷ 11 U.S.C. §523(a)(5). See also *Landry v. Soffee (In re Soffee)*, 337 B.R. 837, 840 (Bankr. E.D. Va. 2004) (guardian *ad litem* fees are incurred to protect the best interests of the children, and are therefore nondischargeable as a debt in the nature of support).

¹¹⁸ See *Rein v. Providian Fin. Corp.*, 270 F.3d 895, 904 n. 15 (9th Cir. 2001); *Cummings v. Cummings*, 244 F.3d 1263, 1267 (11th Cir. 2001).

¹¹⁹ 405 F.3d 582 (7th Cir. 2005).

¹²⁰ *Id.* at 583.

¹²¹ *Id.* at 583-84.

¹²² *Id.* at 584-85.

¹²³ *Id.* at 585.

back before the federal bench, claiming that only the bankruptcy judge could decide the nondischargeability issue.¹²⁴

The Seventh Circuit would not hear of it. The panel quickly ticked off the salient points: 1) state courts enjoy concurrent jurisdiction with the bankruptcy courts to decide the dischargeability of a debt; 2) the state court in Eden unequivocally addressed the issue of nondischargeability under the (a)(5) exception for alimony, maintenance, or support; 3) the bankruptcy court never ruled on that precise issue during the pendency of Eden's Chapter 11; and 4) it is a given that creditors can wait until after a debtor is discharged to litigate nondischargeability issues.¹²⁵

Among other things, Circuit Judge Rovner went on to note the overwhelming view that the necessity of payment of attorney's fees incurred by a former spouse is a common obligation that does constitute alimony, maintenance or support.¹²⁶ Thus, what this debtor was experiencing was commonplace.¹²⁷

Continuing, there is nothing in the record to suggest the bankruptcy judge intended to reserve exclusive jurisdiction for himself, said Judge Rovner.¹²⁸ Lastly, nothing that transpired in the bankruptcy proceedings suggested that the creditor was obligated to raise the nondischargeability issue in that forum, nor that the divorce court was barred from exercising its concurrent jurisdiction to decide that nettlesome issue.¹²⁹

Eden tossed in his final argument; the trial of the divorce action in state court violated the automatic stay. "But this argument is a non-starter," declared the tribunal. Section 362, the automatic stay proviso, "expressly exempts" any proceedings to establish or modify alimony, maintenance, or support.¹³⁰ "[T]he pertinent question here," said Judge Rovner, "is whether or not the divorce trial, to the extent it

¹²⁴ *Id.* at 585.

¹²⁵ *Id.* at 586-87. *Accord Swartling v. Swartling (In re Swartling)*, 337 B.R. 569, 573 (Bankr. E.D. Va. 2005) ("State courts and bankruptcy courts have concurrent jurisdiction over the determination of [support] nondischargeability claims.") (citations omitted).

¹²⁶ *Id.* at 586-87. *See In re Maddigan*, 312 F.3d 589, 595 (2d Cir. 2002); *In re Peters*, 133 B.R. 291, 295 (S.D.N.Y. 1991), *affirmed*, 964 F.2d 166 (2d Cir. 1992) (*per curiam*); *In re Rios*, 901 F.2d 71, 72 (7th Cir. 1990) (*per curiam*); *In re Spong*, 661 F.2d 6 (2d Cir. 1981).

¹²⁷ *Id.* at 586-87.

¹²⁸ *Id.* at 587.

¹²⁹ *Id.* at 587.

¹³⁰ *Id.* at 588. *See* 11 U.S.C. §362(b)(2)(A)(ii).

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took place while the automatic stay was in place, qualified as a proceeding to establish an order for alimony, maintenance, or support.”¹³¹ The answer to that question lies in state court’s judgment of dissolution and the obligations it imposed.

The Seventh Circuit found it quite clear that the state judge imposed a debt in the nature of alimony, maintenance or support upon Eden, and logically the process from which that obligation arose was the kind of proceeding specifically exempted from the automatic stay.¹³²

In sum, we are grateful once again for the sage wisdom of the Seventh Circuit in bankruptcy matters. Determining the nondischargeable status of a domestic relations debt is a crucial step in assuring that the legislative intent to protect former spouses and children is carried out.¹³³ Eden represents an important landmark in assuring those worthwhile policies are enforced to the letter of the law.

III. “ANNA AND THE JUSTICES:” THE PROBATE EXCEPTION TO JURISDICTION AND ITS FUTURE

It is an irony of our legal system that our greatest cases are populated with the most ordinary of individuals and businesses. Miranda, Gideon, and International Shoe, to name a few, were all nondescript persons or entities. In the field of our Nation’s insolvency cases, Grogan, Bildisco, and Marathon were all the most ordinary of litigants; yet they now occupy that exalted plain of landmark status. Put another way, our courts, and especially the Supreme Court, is not a forum for celebrity cases.

That is one of the oddities that makes our final case for analysis so noteworthy. Rarely in recent history has the high Court hosted a proceeding with all the trappings of a media event. But it is far more important to look beyond the celebrity notoriety of this controversy,

¹³¹ *Id.* at 588.

¹³² *Id.* at 588. See *In re Gianakas*, 917 F.2d 759, 764 (3d Cir. 1990) (once a court finds a debt to be alimony, maintenance or support, *a fortiori* it is nondischargeable and exempt from the automatic stay). Parenthically, the Seventh Circuit allowed that any attempt to *enforce* the judgment against property of the debtor’s estate would be subject to the stay. *Id.* at 588 (emphasis in the original).

¹³³ The Seventh Circuit has held that “[t]he unquestionable purpose of §523(a)(5) is to ensure that spouses, former spouses, and children receive support even though a support provider has declared bankruptcy.” *In re Platter*, 140 F.3d 676, 683 (7th Cir. 1998).

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and focus on the precise legal issue, for that is truly worthy of our attention.

This controversy of law, as we will soon exposit below, is the scope of the longstanding probate exception to federal court jurisdiction. Certainly, the latter part of the above formulation is the subject of constitutional edict, sound principles of federalism, and statute. As for the initial leg, the probate exception is based upon pragmatism, comity, and a judicious dose of common sense.

Simply put, and as the analysis below will expand upon, matters of wills, trusts, and estate administration are traditionally reserved to the States, and rightly so. Well developed state law and dedicated courts possessing expertise in probate matters should be the forum where such matters are litigated and resolved. Overwhelmingly, these are affairs that the federal courts should not meddle with.

In short, the probate exception to federal jurisdiction prevents federal court interference with matters best left to specialized state probate courts. Indeed, it is an axiom of practical utility, as well as jurisprudence.

However, like all doctrines, it is sometimes misunderstood or misapplied. These controversies lead to conflicting decisions, and then the need for the highest court in the land to level the playing field.

Thus, we are now preoccupied with Marshall v. Marshall (In re Marshall),¹³⁴ and the Ninth Circuit's ultimate holding that all federal courts, include those of bankruptcy, are bound by the probate exception to federal court jurisdiction, and are therefore "required to refrain from deciding state law probate matters," no matter what guise the parties mask their claims with.¹³⁵

We need to first sort out the Marshall clan. J. Howard Marshall II ("Howard") was a multimillionaire, by virtue of a decades-long career as a highly successful Texas oilman, and at the relevant times he was well into his senior years. E. Pierce Marshall ("Pierce") was Howard's adult son, and, as we will see, clearly his favorite offspring. Vicki Lynn Marshall ("Vicki") was Howard's third wife,

¹³⁴ 392 F.3d 1118 (9th Cir. 2004).

¹³⁵ *Id.* at 1121.

and his junior by decades. Most would not recognize Vicki by her married name, nor even her maiden name Vicki Lynn Smith. But we would likely recognize her by her stage name --- Anna Nicole Smith, former Playboy model, star of her own “E!” cable channel show “The Anna Nicole Show,” and spokesperson for a dietary supplement program.¹³⁶ Vicki is a well known Hollywood celebrity, and some of that flamboyance rubbed off on this case.

The factual chronology that preceded this litigation is fairly involved, but we can break down the key events on the following timeline. In 1982, when Howard was approximately 77 years old, he created a written revocable *inter vivos* trust, pursuant to the laws of his home state of Texas. Commencing that year and thereafter, he placed most his sizeable fortune into that trust. Howard and his son Pierce were the co-trustees.¹³⁷ When Howard’s second wife died in 1991, Pierce became the primary beneficiary of the trust.¹³⁸ As written, upon Howard’s death the trust would turn over most of its corpus to Pierce.¹³⁹ Howard’s last will and testament was executed on December 22, 1992.¹⁴⁰

Howard met Vicki in 1991. They were married on June 27, 1994. Of critical importance, Howard never modified his trust to include Vicki, did not create a new, written trust for Vicki, and did not revise his 1992 will to include Vicki.¹⁴¹ Instead, on September 29, 1994, nearly 90 days precisely after the nuptials, Howard delivered “gifts” to Vicki. And what gifts! Valued at approximately \$6 million, they included “Compagnie Victoire,” a entity created to invest in Vicki’s career as a model,¹⁴² jewelry, title to a Texas ranch, and a Mercedes automobile. Vicki accepted these gifts on October 27, 1994, a date almost exactly 30 days later.¹⁴³ And Howard did not simply bestow those simple baubles upon his new bride; he memorialized them in a written document called an “Act of Donation,” which apparently went so far as to declare Howard gifted Vicki “in consideration of her marriage to me.”¹⁴⁴ Notably, no one, least of all Vicki, ever disputed Howard’s mental capacity to make these highly

¹³⁶ *Id.* at 1121-23.

¹³⁷ *Id.* at 1121.

¹³⁸ *Id.* at 1122.

¹³⁹ *Id.* at 1121-22.

¹⁴⁰ *Id.* at 1122.

¹⁴¹ *Id.* at 1122.

¹⁴² *Id.* at 1123 and 1123 n.1.

¹⁴³ *Id.* at 1123.

¹⁴⁴ *Id.* at 1123.

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documented gifts to this third wife.¹⁴⁵ Sadly, Howard died of heart failure at age 90 on August 4, 1995; possibly a little more than a year of marriage to his youthful bride was more than he could take. If not, certainly the vicious family feud that followed surely would have killed him, had he not already passed on.

Writing for the court, Circuit Judge Bezzer said it best: “[t]he route followed by the parties to this appeal on their epic journey is a tortured one indeed.”¹⁴⁶ Since an epic is beyond the scope of this Article, we will distill three convoluted litigations into their most essential terms. First, let us quickly posit the legal arguments.

Vicki’s position was clear as crystal; she wanted a piece of Howard’s estate. She argued various things: that Pierce had fraudulently altered his father’s trust; Pierce had engaged in fraud to keep Vicki out of Howard’s will; and that Howard lacked requisite mental capacity.¹⁴⁷ But here was the heart of Vicki’s contentions; she argued Howard intended to give her an inter vivos gift or a post mortem gift, and Pierce tortiously interfered with her entitlement. Vicki’s evidence was a mere letter from one of Howard’s tax attorneys to another of Howard’s veritable army of tax attorneys suggesting a number of ways to provide for Vicki, including a “catch-all” trust.¹⁴⁸ To be sure, an actual trust instrument was never put into evidence.¹⁴⁹

As could be expected, Pierce argued to the contrary. He simply pointed out the trust predated his father even knowing Vicki by nearly a decade, that Howard never changed the trust, his will predated the marriage and was never changed, and Howard made various significant gifts to Vicki during their marriage, but in no way, shape or form did he execute any instrument or evince any intent to make a trust or other gift.¹⁵⁰ Yet as detailed as the above may be, these are only the factual essentials of the controversy. They are but a prelude to the litigious nightmare that resulted.

Sadly, Vicki and Pierce did not even wait until Howard passed to begin squabbling. In April, 1992, four months before Howard died, Vicki commenced an action in Texas probate court, alleging, inter alia,

¹⁴⁵ *Id.* at 1123.

¹⁴⁶ *Id.* at 1124.

¹⁴⁷ *Id.* at 1122-23.

¹⁴⁸ *Id.* at 1122.

¹⁴⁹ *Id.* at 1122.

¹⁵⁰ *Id.* at 1122-23.

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that Pierce was tortiously interfering with her rights to spousal support from Howard. More importantly, she sought to invalidate the 1982 trust.¹⁵¹ Just three days after Howard passed away, Vicki sued on the claim that Howard had died in testate.¹⁵² Pierce opposed, and fought to declare the will and the trust valid.¹⁵³ Vicki admitted the Texas probate court had jurisdiction over her claims.¹⁵⁴ But Vicki's acquiescence did not last, and the Texas probate bench was only the first court she turned to.

"We now shift to another forum," wrote Judge Beezer, because, in January, 1996, Vicki filed for bankruptcy. Now claiming to be a resident of California, she filed a Chapter 11 petition in that state's federal Central District.¹⁵⁵ To be sure, the Texas probate proceeding was still pending when she filed for reorganization.¹⁵⁶ Pierce individually filed an action in Vicki's bankruptcy case to bar any discharge to a future defamation claim. Vicki counterclaimed against Pierce for tortiously interfering with her expectancy of a gift or bequest from Howard.¹⁵⁷ Indeed, Vicki's counterclaims in large part mirrored her allegations in the Texas state probate action.¹⁵⁸ Pierce countered by invoking the probate exception to federal court jurisdiction.¹⁵⁹

After some jousting back and forth, the eminent Bankruptcy Judge Samuel L. Bufford of California's Central District found that Pierce had tortiously interfered with Vicki's expectation of an inter vivos gift from the late Howard. More importantly, the bankruptcy judge ruled that the probate exception was not a jurisdictional bar to Vicki's claims.¹⁶⁰ Subsequently, the bankruptcy judge further ruled that Pierce had tortiously interfered with Vicki's expectation that she would inherit from Howard's estate, and awarded Vicki nearly \$450 million in damages.¹⁶¹ Another \$25 million in punitive damages was

¹⁵¹ *Id.* at 1124-25.

¹⁵² *Id.* at 1125.

¹⁵³ *Id.* at 1125. Howard's other son, the disinherited Howard III, joined the fray on Vicki's side, but did not participate in the instant appeal. *Id.* at 1125.

¹⁵⁴ *Id.* at 1125-26.

¹⁵⁵ *Id.* at 1126.

¹⁵⁶ *Id.* at 1126.

¹⁵⁷ *Id.* at 1126.

¹⁵⁸ *Id.* at 1126.

¹⁵⁹ *Id.* at 1126.

¹⁶⁰ *Id.* at 1127.

¹⁶¹ *Id.* at 1127-28.

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awarded for discovery abuses, bringing Vicki's total award as against Pierce to nearly \$475 million.¹⁶²

But the California bankruptcy court was not the only forum busy with this controversy. "During the bankruptcy court proceedings, litigation continued in the Texas probate court."¹⁶³ Apparently confident that she would prevail in the bankruptcy court, Vicki "nonsuited" her probate claims, despite a warning from the Texas probate judge that in doing so she was forfeiting all claims against her late husband's estate. Vicki ignored the warning, and "freely elected to dismiss her claims" against Howard's estate. She also voluntarily dismissed her claims against Pierce.¹⁶⁴ To be sure, Vicki's withdrawal as a plaintiff did not remove her as a defendant in Pierce's action to have the Texas probate court declare Howard's will as valid.¹⁶⁵

As noted by the Ninth Circuit, "[t]he Texas probate court conducted a jury trial that lasted more than five months, in which all parties fully participated."¹⁶⁶ No doubt the length of the trial can be attributed at least in part to the fact that Vicki and Howard III "contested the validity of every estate planning transaction from 1979 forward" which the elder Howard had engaged in.¹⁶⁷ In sum, Vicki testified that Howard promised her one-half of all of his property, and Pierce destroyed documents, including those relating to a trust for her sole benefit, in order to keep Howard's estate out of her reach.¹⁶⁸

When all was said and done, the Texas jury returned a unanimous verdict, declaring that Howard's 1982 trust and his last will were completely valid, and Howard never intended nor did he give Vicki any gifts or bequests from either the 1982 trust or his estate. In short, Vicki received nothing (other than the gifts during Howard's lifetime).¹⁶⁹ Moreover, Pierce was awarded over a half a million dollars in attorneys' fees as against Vicki.¹⁷⁰

Based upon the jury verdict, the Texas probate court made other crucial legal rulings. It decided that Vicki's counterclaims

¹⁶² *Id.* at 1128.

¹⁶³ *Id.* at 1128.

¹⁶⁴ *Id.* at 1128.

¹⁶⁵ *Id.* at 1128.

¹⁶⁶ *Id.* at 1129.

¹⁶⁷ *Id.* at 1128-29. Vicki herself testified for more than six days. *Id.* at 1129.

¹⁶⁸ *Id.* at 1129.

¹⁶⁹ *Id.* at 1129.

¹⁷⁰ *Id.* at 1129.

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against Pierce were compulsory and were required to be brought in the probate proceedings, that Vicki had voluntarily relinquished her claims for reason of the non-suiting, and all of Vicki's claims were dismissed.¹⁷¹ Paramount was the Texas court's "declaration as a matter of law that it had exclusive and dominant jurisdiction" over all controversies arising under Howard's will and his 1982 trust.¹⁷² Sadly, this was not the end.

Back to California, where Bankruptcy Judge Bufford's orders were on appeal to the district court. Having prevailed in the Texas probate court, Pierce now also sought to dismiss Vicki's claims on the legal points of claim preclusion and issue preclusion. Critically, Pierce argued in his pleadings that the probate exception to federal jurisdiction required the federal jurists to step away, given the Texas probate bench had already asserted jurisdiction, and had decided the matter.¹⁷³

Yet Pierce's arguments were to no avail in the federal forum. The district court found it had jurisdiction, although it vacated the bankruptcy judge's orders, decreeing them to be merely proposed findings of fact and conclusions of law. Of note, the California federal district judge held that the probate exception to federal jurisdiction is applicable only to proceedings for the probate of wills, and Vicki's claims did not involve Howard's will.¹⁷⁴

Conducting a *de novo* review, the Central District of California court determined that Howard intended to give Vicki "a gift in the form of a newly created trust.... to take effect after the decedent's death." Notably, the court utterly failed to identify what the specific corpus of this phantom trust was to be, who was to be the trustee, and how the purported trust was to work and make distributions to Vicki. The federal judge ruled that Pierce had tortiously interfered with Vicki's realization of this gift or trust, and awarded Vicki over \$88 million in compensatory and punitive damages, plus costs of suit. And for a legal ruling, the federal judge in California "determined that although the Supreme Court of Texas had not yet done so, that Court would recognize the tort of intentional interference with the expectancy of a gift under Texas law."¹⁷⁵

¹⁷¹ *Id.* at 1129-30.

¹⁷² *Id.* at 1130.

¹⁷³ *Id.* at 1130.

¹⁷⁴ *Id.* at 1130.

¹⁷⁵ *Id.* at 1130-31.

This ultimate decision from the U.S. District Court for the Central District of California became the centerpiece of the instant appeal to the Ninth Circuit.¹⁷⁶ With over 440 pages of briefs and an incalculable number of pages for the record below, the panel declared this was “one of the most extensive records ever produced” from that vicinage.¹⁷⁷

Judge Beezer unhesitatingly launched into the tribunal’s opinion. To be certain, the Ninth Circuit first declared that it “retain[ed] jurisdiction to determine whether we have jurisdiction,”¹⁷⁸ a question of law it would review de novo.¹⁷⁹

The Ninth Circuit posited it was “well established” that wills, the probate thereof, and matters of estate administration are not within the ordinary equity jurisdiction of the federal courts, as these matters are reserved to the States.¹⁸⁰ This is the so-called probate exception to federal jurisdiction, the doctrine invoked by Pierce in support of his allegation that the federal courts could not play a role in the proceeding regarding his late father’s will and estate.¹⁸¹ The tribunal further opined that, while federal courts might entertain suits among competing interests so as to establish their claims, the federal bench cannot interfere with state probate cases nor assume control over the res in the custody of the state judiciary.¹⁸²

But the foregoing rubric is not universally applied, and now the Ninth Circuit began to highlight the internecine conflict among the circuits that fomented this controversy. Judge Beezer noted that in Goerg v. Parungao¹⁸³ the Eleventh Circuit indicated that the probate exception to federal jurisdiction is limited to cases predicated upon federal diversity jurisdiction, and the exception should not be overextended to the federal bankruptcy powers.¹⁸⁴ The maxim of an exemption to federal jurisdiction for probate matters does not impinge upon federal question jurisdiction, said the Goerg tribunal.¹⁸⁵ In the

¹⁷⁶ *Id.* at 1130.

¹⁷⁷ *Id.* at 1131.

¹⁷⁸ *Id.* at 1131, citing *U.S. v. United Mine Workers*, 330 U.S. 258, 291 (1947).

¹⁷⁹ *Id.* at 1131, citing *U.S. v. Garrett*, 253 F.3d 443, 446 (9th Cir. 2001).

¹⁸⁰ *Id.* at 1131, citing *Sutton v. English*, 246 U.S. 199, 205 (1918).

¹⁸¹ *Id.* at 1131.

¹⁸² *Id.* at 1131, citing *Markham v. Allen*, 326 U.S. 490, 494 (1946).

¹⁸³ 844 F.2d 1562 (11th Cir. 1988).

¹⁸⁴ *Goerg*, 844 F.2d at 1565.

¹⁸⁵ *Goerg*, 844 F.2d at 1565.

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instant case, Vicki urged the Ninth Circuit to adopt the reasoning of its southerly brethren.¹⁸⁶

However, this panel was not easily persuaded. Judge Beezer immediately criticized the Eleventh Circuit's statements as mere dicta.¹⁸⁷ But there was much more.

According to the Marshall tribunal, "no other circuit has followed the Eleventh Circuit's lead in refusing to apply the [probate] exception to federal question cases."¹⁸⁸ For instance, the Sixth Circuit applied the probate exception to federal jurisdiction in a Section 1983 civil rights case, clearly a federal question controversy.¹⁸⁹

Also standing in counterpoise, in McKibben v. Chubb¹⁹⁰ the Tenth Circuit declared that it determines federal jurisdiction based upon whether or not state law would place the dispute before a probate court.¹⁹¹ The Seventh Circuit meanwhile has urged that a federal court determine the reach of its jurisdiction after taking into account the policy goals underlying the probate exception, such as encouraging judicial economy, avoiding undue interfere with state laws and courts, and deferring to the relative expertise of probate judges, albeith while construing the probate exception narrowly.¹⁹²

Standing somewhat in contradistinction, the Fifth Circuit in Breaux v. Dilsaver¹⁹³ declared that so-called federal court interference with local probate cases is to be measured by the degree to which the controversy implicates the validity of the probate proceedings or if the parties merely seek adjudication of a claim.¹⁹⁴

Having thoroughly explicated the circuit conflict, Judge Beezer reverted to taking Goerg to task. The Eleventh Circuit's view conflicts with Supreme Court precedent, declared the Marshall panel.¹⁹⁵ The

¹⁸⁶ *Marshall*, 392 F.3d at 1131.

¹⁸⁷ *Id.* at 1131.

¹⁸⁸ *Id.* at 1132 (fooonote omitted).

¹⁸⁹ *Tonti v. Petropoulous*, 656 F.2d 212, 215-16 (6th Cir. 1981).

¹⁹⁰ 840 F.2d 1525 (10th Cir. 1988).

¹⁹¹ *Id.* at 1529, followed by *Lepard v. NBD Bank*, 384 F.3d 232, 237 (6th Cir. 2004).

¹⁹² *Storm v. Storm*, 328 F.3d 941, 944 (7th Cir. 2003). Compare *Marshall v. Lauriault*, 372 F.3d 175, 181 (3d Cir. 2004).

¹⁹³ 254 F.3d 533 (5th Cir. 2001).

¹⁹⁴ *Id.* at 536. Compare *Mangieri v. Mangieri*, 226 F.3d 1, 2 (1st Cir. 2000) (the probate exception usually applies to suits merely ancillary to probate). See also *Georges v. Glick*, 856 F.2d 971, 973 (7th Cir. 1988) (same).

¹⁹⁵ *Marshall*, 392 F.3d at 1132.

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high Court has evaluated the probate exception to federal jurisdiction, including in bankruptcy cases, wrote Judge Breezer, and “has said nothing that limits the probate exception to diversity cases.”¹⁹⁶ In addition to the Markham case,¹⁹⁷ the Supreme Court landmark of Harris v. Zion Sav. Bank & Trust Co.¹⁹⁸ plainly declared that a probate court, and not a bankruptcy forum, is the proper place to weight who shares in a decedent’s estate.¹⁹⁹ Federal courts, said the Justices six decades ago, “have no probate jurisdiction and have sedulously refrained” from interposing themselves into state probate matters, even in diversity cases.²⁰⁰ To the Ninth Circuit, such a strong assertion of restraint “suggests that the probate exception also encompasses federal question cases.”²⁰¹

Indeed, the “evil [of] federal interference with state probate proceedings” was the subject of the Ninth Circuit’s caution in Hilton v. Mumaw,²⁰² a warning this tribunal found consistent with the Supreme Court’s proclamations in Harris.²⁰³ More to the point, it embodied a rationale “as relevant to federal question cases as it is to diversity ones,” wrote Judge Beezer.²⁰⁴

For all these reasons, the Ninth Circuit in Marshall flatly rejected the circumscribed view of the Eleventh Circuit, and instead declared “the probate exception is applicable in bankruptcy cases.”²⁰⁵ That maxim decided, the panel now had to clear the hurdle of determining if the probate exception applied to the case before it. This was problematic, because of the few precedents available within the Ninth Circuit.²⁰⁶

That being the case, the panel looked to its sister circuits for guidance, in particular the Second Circuit’s decision in Moser v. Pollin.²⁰⁷ In Moser, the appellate court articulated a two fold test, the first prong of which was to ask if the controversy was purely one of

¹⁹⁶ *Id.* at 1132.

¹⁹⁷ *Infra* n. 182.

¹⁹⁸ 317 U.S. 447 (1943).

¹⁹⁹ *Id.* at 450.

²⁰⁰ *Id.* at 450.

²⁰¹ Marshall, 392 F.3d at 1132.

²⁰² 522 F.2d 588, 593 (9th Cir. 1975).

²⁰³ Marshall, 392 F.3d at 1132.

²⁰⁴ *Id.* at 1132.

²⁰⁵ *Id.* at 1132.

²⁰⁶ *Id.* at 1132.

²⁰⁷ 294 F.3d 335 (2d Cir. 2002).

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probate, and the federal court was requested to actually probate a will or administer an estate.²⁰⁸ The second prong focuses on determining whether the federal court would interfere with the probate proceedings, assume general jurisdiction over an estate or assume control over property in the custody of the state court.²⁰⁹

“If the answer to any of these questions is yes,” said Marshall, “then the probate exception applies.”²¹⁰ This mode of analysis, found the Ninth Circuit, was the most consistent with the Supreme Court’s declarations in Markham.²¹¹

The Ninth Circuit postulated the following axiom to guide its reasoning in Marshall:

The probate of a last will and testament, the validity of a testamentary trust, and the administration of a decedent’s estate are matters of primarily concern to the several states.²¹²

Because the federal trial court here had not immersed itself into any of these “purely probate matter[s],” the Ninth Circuit pursued the next leg of its analysis.²¹³ Specifically, wrote Judge Beezer, was Vicki’s counterclaim so inimical to probate that the exception to federal jurisdiction would apply?²¹⁴

Here the tribunal opined that the scope of the probate exception encompasses not only direct challenges to a will, but also the questions that would ordinarily be decided by a state probate judge in ruling upon the validity of a will or trust, such as fraud and undue influence.²¹⁵

²⁰⁸ *Moser*, 294 F.3d at 340.

²⁰⁹ *Id.* at 340.

²¹⁰ *Marshall*, 392 F.3d at 1132-33.

²¹¹ *Id.* at 1132.

²¹² *Id.* at 1133.

²¹³ *Id.* at 1133.

²¹⁴ *Id.* at 1133.

²¹⁵ *Id.* at 1133. See *Sutton v. English*, 246 U.S. 199, 207-08 (1918) (claim to probatable property is outside federal jurisdiction); *Turja v. Turja*, 118 F.3d 1006, 1008-10 (4th Cir. 1997) (no federal jurisdiction over claims of undue influence and lack of capacity); *Beren v. Ropfogel*, 24 F.3d 1226, 1228-29 (10th Cir. 1994) (tortious interference claim belongs in state court); *Dragan v. Miller*, 679 F.2d 712, 714-17 (7th Cir. 1982) (same).

The Ninth Circuit had no difficulty in finding that the near-totality of Howard's estate was to pass post mortem to the trust he expressly created in 1982, said trust primarily benefiting his son Pierce. "The Texas probate court, as the supervisor of estate administration, was required to sort through all claims," which that court and the jury it impaneled did, and which the federal bankruptcy and district courts attempted to reverse.²¹⁶ As for the preemptive actions of the lower federal courts, Judge Beezer wrote "it is clear that the exercise of federal jurisdiction would and, in this case, did interfere with the Texas probate court proceedings."²¹⁷

And although Vicki characterized her action as a tort claim personal to Pierce, the tribunal would have none of it. Notwithstanding what Vicki labeled her claim, the Ninth Circuit found it in substance to be a thinly veiled will contest.²¹⁸ Refusing to exalt mere form over reality in its probate exception analysis, the Marshall panel was clearly offended at how the federal district judge had "negated" the holdings of the Texas probate court.²¹⁹

Vicki's further contention, that her claim was actually for a inter vivos gift and thus outside the probate exception, was held to be without support. The Ninth Circuit ruled that the probate exception applies "not only to contested wills, but also to trusts that direct a post mortem disposition."²²⁰

In sum, Vicki could not avoid the probate exception to federal jurisdiction by the simple expedient of declaring she was deprived of an inter vivos trust. Howard's 1982 trust was "the centerpiece of his estate plan," wrote Judge Beezer, and, by purporting to invalidate that trust, "the bankruptcy and district courts directly interfered with the Texas probate court's administration of [Howard's] estate."²²¹ This the Ninth Circuit would not countenance, and therefore its reversal of

²¹⁶ *Id.* at 1134.

²¹⁷ *Id.* at 1134.

²¹⁸ *Id.* at 1134-35. Compare *Breaux v. Dilsaver*, 254 F.3d 533, 534-37 (5th Cir. 2001) (claimant challenged the estate representative's performance of his duties under a will, not the validity of the will itself).

²¹⁹ *Id.* at 1135. See *Storm v. Storm*, 328 F.3d 941, 945 (7th Cir. 2003) (grandson's purported tort action excluded by probate exception because its true aim was to gain estate assets; "mere labels" not decisive in probate-exception analysis).

²²⁰ *Id.* at 1135. Accord *Golden ex rel. Golden v. Golden*, 382 F.3d 348, 359 (3d Cir. 2004);

Georges v. Glick, 856 F.2d 971, 974 n.2 (7th Cir. 1988); *Storm*, *infra* n. 192, 328 F.3d at 947.

²²¹ *Id.* at 1135-36.

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the federal courts below, and the restoration to paramouncy of the state court's final verdict.

Now the panel acted to clarify the remaining legal matters. It is well established, said the panel, that where a state invests probate jurisdiction in a specialized court (as opposed to a state trial court of general jurisdiction), then the federal bench is likewise deprived of jurisdiction.²²² The probate exception to federal jurisdiction is pragmatically grounded upon the necessity for the state probate court to enjoy “exclusive in rem jurisdiction over all claims” by or against the estate, without regard to the legal theory of any particular claim.²²³ “Such jurisdiction is necessary for a probate court to perform its function properly in determining the lawful distribution of the decedent’s estate.”²²⁴

Here, state law and the Texas probate court’s own rulings clearly bestowed that jurisdiction, to the exclusion of the federal judiciary. Vicki’s claims “went to the very essence” of her late husband’s will and estate. The Ninth Circuit found Vicki’s claims were “required to be made and adjudicated in the Texas probate court having exclusive jurisdiction” over such probate issues.²²⁵ Vicki’s voluntary dismissal of her own claims changed nothing; she “clearly remained” a party to the probate of Howard’s estate, and thus could not avoid the inevitable.

As point in fact, her allegations were compulsory counterclaims that could only be heard before the Texas probate court, as part and parcel of Pierce’s continuing claims against her. Vicki’s dismissal availed her nothing, and her resistance to the jurisdiction of the Texas court was futile.²²⁶ Once again, Vicki was rebuffed by the Ninth Circuit, and told by that tribunal to abide by the decision of the Texas probate court.

All of the multitudinous facts sorted out and put in their proper place, and all of the conflicting legal theories likewise properly categorized, discarded or applied, the Ninth Circuit moved to its penultimate conclusion. The tribunal finally declared that the probate exception to federal court jurisdiction applied, because Vicki’s claims

²²² *Id.* at 1136.

²²³ *Id.* at 1136.

²²⁴ *Id.* at 1136.

²²⁵ *Id.* at 1136-37.

²²⁶ *Id.* at 1137.

“were simply a disguised attack” on Howard’s will.²²⁷ All of the lower federal court rulings favoring Vicki were reversed, and all of Vicki’s claims were dismissed for lack of jurisdiction.²²⁸ And so ends the Marshall saga, at least until the Supreme Court renders its own decision. As is well know, the high court has heard the appeal,²²⁹ and we await its final adjudication. However, there is nothing to prevent our analysis and predictions, so we conclude with some thoughts on the subject.

Commentary and Analysis

As stated at the outset, there are very good and sundry reasons behind the probate exception to federal jurisdiction. It cannot be emphasized enough that our federal courts, and furthermore all federal courts, including those sitting in bankruptcy, enjoy only limited jurisdiction. This is consistent with our founding principles of federalism, limitations upon federal power, and the reservation of the vast amount of judicial power to the several States.

This is a view born from pragmatism as well. Wills, trusts, and estates are creatures only recently of statute, but in the main find their antecedents in hundreds of years of the common law and cases. Not only do the states have their own statutory schemes and long developed precedents, the majority also have courts of probate dedicated to this field of specialization. Practicality guides us to the inescapable conclusion that the federal bench should leave its specialized brethren in the probate courts to do what they do best.

Are there any negative implications for the federal judiciary from this view? This author thinks clearly not, and for a number of reasons.

²²⁷ *Id.* at 1137.

²²⁸ *Id.* at 1137.

²²⁹ ___ U.S. ___ (No. 04-1544) (2005). See *Biskupic*, “Anna Nicole Smith Stirs Up High Court,” *USA Today* (Wednesday, March 1, 2006) at p. 3A, cl.2. Reporting on the February 28th oral argument before the Supreme Court, the news article identified the former Mrs. Marshall as the 1993 “Playboy” Playmate of the Year, cataloged her career, and, in something quite rare for those appearing before the Justices, went into great detail about her hair, her clothes, and the *paparazzi* trailing her. Not an ordinary day at the Supreme Court by any means. See also *Biskupic*, “Anna Nicole Legal Drama Moves Center Stage to Supreme Court,” *USA Today* (Monday, February 27, 2006) p. 4A, cl. 1 (previewing oral argument, but again emphasizing the appellant as a former “exotic dancer...and reality-TV star, and, in an observation of great legal significance, a “buxom blonde.”). For more erudite commentary, see Prof. Jonathan Turley’s observations at “Lap Dances, Wills and You,” *USA Today* (Tuesday, February 28, 2006) p. 13A, cl. 1.

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First, the probate exception to federal jurisdiction is a longstanding doctrine. Few, if any, have said it is unworkable. Indeed, by all accounts, it works well in allocating judicial power, caseload, and obtaining just results. If it works, why tinker with it? And if it works well, as it seemingly does, the argument to leave the status quo becomes more urgent.

Second, and drawing from the above, the probate exception is consistent with federalism and many of our bedrock principles of jurisprudence. Why fly in face of that truism? Again, the doctrine is a valid one, and hence not lightly disturbed.

Third, the doctrine does not cut against the proper administration of federal cases, in particularly those in the bankruptcy forum, as is our major concern here. Indeed, bankruptcy courts, still laboring under the lesser status of Article I courts, are one of the utmost examples of federal courts of circumscribed jurisdiction. Bankruptcy courts daily engage in statutory exercises of core versus non-core jurisdiction, mandatory and discretionary abstention, and just plain abstention. More to the point, they do so successfully every day, and the administration of insolvency cases does not suffer one bit.

The probate exception has worked successfully as part of the overall fabric of federal jurisdiction, and poses no specific danger to the bankruptcy courts. Therefore, there is no ground to alter, let alone sweep away, that which already exists.

Fourth, an important clue as to how the Justices shall ultimately rule can be garnered from the fresh Supreme Court opinion in Central Virginia Community College v. Katz.²³⁰ This is, of course, the high Court's latest pronouncement on the States' sovereign immunity in bankruptcy preference cases.

Here are the nuggets of the wisdom bestowed by Central Virginia that are relevant to this issue. Justice Stevens early on delineates that “[b]ankruptcy jurisdiction, at its core, is in rem.”²³¹ The essential work of bankruptcy courts is to administer and distribute the res of the bankruptcy estate. “Bankruptcy jurisdiction, as

²³⁰ ___ U.S. ___, 126 S. Ct. Rep. 990 (No. 04-885) (January 23, 2006) (Stevens, J.).

²³¹ Id. at ___, S. Ct. Rep. at 995 (citation omitted).

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understood today and at the time of the framing, is principally in rem jurisdiction,” said the high Court.²³²

What does this tell us in the present situation? A great deal, to be sure. Analogous to the law of physics, two courts cannot exercise jurisdiction over the same res at the same time. The bankruptcy court controls the debtor’s property, but the state probate court exercises dominion over a decedent’s estate. This sharp division is precisely what the probate exception is all about; it keeps the two parallel universes in exquisite counterpoise.

It is respectfully submitted that if the Supreme Court in Central Virginia has just declared the bankruptcy court’s power over the debtor’s property fundamentally turns upon in rem jurisdiction over the debtor’s res, then it flies in the face of reason that such power would be at the derogation of the state probate courts, and their sway over assets and matters of probate. Moreover, it would make no sense for the Justices to suddenly do violence to the probate exception by now turning around and realigning the borders between federal bankruptcy courts and state probate jurisdiction over respective assets. The delimiting language of Central Virginia presages a Supreme Court that will continue to carefully maintain traditional and sensible boundaries of jurisdiction between fora, each so dedicated to their own separate domains.

Fifth and last, let us ask the following basic question: just how often does the probate exception become an issue? To be sure, this writer offers no empirical evidence, but respectfully counters that none is needed. Experience (which Holmes tells us is the life of the law) clearly indicates that this is not a matter of dire concern to the federal judiciary. Simply put, the application of the probate exception, while nevertheless significant, does not arise so often as to justify a sea change in our jurisprudence. In the limited number of instances where it is invoked, it appears to work just fine, thank you. Thus, it is best left alone, with a gradual evolution, if that is even necessary.

For all these reasons, this Article reaches the penultimate conclusion: Marshall shall reaffirm and leave unchanged the probate exception to federal jurisdiction, as accurately posited by the Ninth

²³² *Id.* at ___, S. Ct. Rep. at 1000. *See also id.* at ___, S. Ct. Rep. at 1009 n.3 (Thomas, J., dissenting) (federal bankruptcy law in the early 1800s “leaves an ample role for the States”) (citing *Sturges v. Crownshield*, 4 Wheat. 122 (1819)).

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Circuit and the majority camp. With such certaintude, all courts, federal and bankruptcy, bankruptcy and probate, may proceed to do what each does best, without fear of let or hindrance from another. Truly, a just result for all, be they celebrity or ordinary citizens.

Conclusion

And there we have it: from the head-on collision of the Bankruptcy Code and domestic relations law, we have sorted out crucial legal and social issues of the payment of domestic support, nondischargeable debt, appropriate fora, and the continuation of proper proceedings to enforce orders aimed to assure domestic safety and prevent harm in that most sacrosanct of places, the home. We can be well satisfied that, notwithstanding the friction when these tectonic masses meet, it can all be resolved with justice and equity.

Indeed, we have also examined that other great body of personal law, the law of wills, trusts, and estates, and its interaction with our bankruptcy and other federal courts. We perceive a clear direction, really a continuation, in the form of the probate exception to federal court jurisdiction, that has served us well, and will continue to do so. Certainly, the celebrity aspect of the present controversy has made it seem more controversial than it really is, but we are confident that, once the hyperbole is long forgotten, a bedrock principle of solid jurisprudence will long remain.

Author's Note

In a surprising move, the Supreme Court most recently reversed and remanded the Ninth Circuit's decision in Marshall. Marshall v. Marshall, ___ U.S. ___, available at <http://supctlaw.cornell.edu/suptct/html/04-1544.ZO.html>. Surprising because of the reversal, and equally so because the decision was unanimous. However, the salient point to be made is that the remand means this controversy is far from over. Of equal comfort to the probate community, the probate exception to federal jurisdiction has by no means been eradicated by the high Court's fresh pronouncement.

Writing for the united Court, Justice Ginsburg seemed intent on demonstrating that the federal courts shall not avoid asserting jurisdiction unless they are clearly required to do so. Preceding a

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lengthy historical dissertation on the scope of federal judicial power, the Justices acknowledged the propriety of the probate exception, but simultaneously characterized the Ninth Circuit's reading thereof to be broad and the panel's ultimate conclusion as a "sweeping extension" of the otherwise viable doctrine. Id. at 1-2.

Equally so, or of even greater import, Justice Ginsburg unequivocally declared that the heart of Vicki's case was a tort action, not a probate matter. As such, her claim "falls far outside the bounds of the probate exception described in Markham" and elsewhere, and thus the high Court refused to decide if the probate exception did not apply to federal bankruptcy cases. Id. at 4. Apparently, the Justices were untroubled by their decision here because Vicki's allegations did not ask a federal court to assert in rem jurisdiction over the same res already under the purview of the Texas probate court. Id. at 5. Notably, Justice Ginsburg with equal vigor reiterated the bedrock principle that federal courts are precluded from disposing of property that is in the custody of a state probate court. Id. Once again, the Justices made unmistakable their view that Vicki's claim was a tort, thusly falling well outside the probate exception, yet in this instance still an issue to be decided solely under Texas law. Id.

Now for the penultimate paragraph of the Supreme Court's decision, one that guarantees not only that this matter has much distance yet to travel, but indicates that the probate exception remains largely unscathed. The high Court explicitly reminds that the Texas probate court's judgment became final on February 11, 2002, nearly one month before the California district court ruled in Vicki's favor. Thus, the Ninth Circuit did not address if Vicki's claim was "core" or "non-core" under axioms of bankruptcy jurisdiction, nor Pierce's arguments of *res judicata* and collateral estoppel. These critical issues were explicitly left open to be considered on the remand to the appellate tribunal. Id. at 6 and 7 n.5. See also Stevens, J., concurring at 1 ("administration of decedents' estates typically is governed by rules of state law and conducted by state probate courts," yet indicating the instant claim fell outside that arena).

After a fair reading, it can be rightly said that the new decision in Marshall does no lasting damage to the probate exception to federal jurisdiction. Firstly, the high Court seemingly found fault with the Ninth Circuit's ruling because the Justices viewed it as stretching the probate exception beyond its well reasoned limits. Justice Ginsburg's

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opinion reveals more of a concern that federal courts should not be boxed into a position of declining jurisdiction over matters they can rightly hear. Thus, Marshall does not vitiate the probate exception; its greater concern is to forestall a sweeping extension of the exception beyond its appropriate bounds.

Next, this was clearly not a probate matter to the Supreme Court; it was a tort case. Even the most ardent defender of the probate exception would not assert it should be used to deprive non-probate courts of jurisdiction over torts and similar claims merely because of some tangential relationship to a decedent's estate.

Indeed, a most telling point here; the Marshall court refused to modify the essential precepts that estate administration and custody and control of estate assets belong in the state probate courts. Be mindful that Justice Ginsburg's opinion did not move one iota in the direction of eviscerating that crucial proposition. Rather, by openly declaring Vicki's claim to clearly be a tort, the high Court avoided any extensive remodeling of that doctrine. Henceforth, any reading of the probate exception must be grounded upon this fact that the maxim of state authority, and not federal, prevails as strongly as ever.

Lastly, the remand by itself means this case is far from over, so no final conclusions can be drawn. Nonetheless, the directive to remand also supplies the very devices to quickly kill the controversy upon further proceedings. After all, it is not customary for the high Court to so carefully parse out the exact dating of two lower court decision in counterpoise. The not so hidden message here is that the principles of *res judicata* and collateral estoppel might still be conclusive, given the timing as well as the comprehensive substance of the probate court's verdict, arrived at after a lengthy and exhaustive trial, vis-à-vis the federal district court's actions, which came later and in a much more truncated hearing. Vicki's unwise decision to abandon her state court claims might still very well prove to be her undoing. By any measure, the totality of this case's history might yet prove decisive as to the vitality of these allegations.

And without an unnecessary adventure into the esoteria of bankruptcy jurisdiction, the Justices in Marshall only hint at the "core/non-core" dichotomy. Indeed, the mere mention of that convulsive and fractious schism in federal bankruptcy jurisdiction is enough to cause an upheaval. To explain in the brief space allowed

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here, only matters going to the heart of the debtor-creditor relationship, the “core” of the bankruptcy apple if you will, are fully cognizable before federal bankruptcy judges. Anything else is “non-core,” and read that as “state law” claims. No less than the Justices themselves declared Vicki’s claim to be a state law tort, and one clearly bound by Texas law, to boot. Given all that, very real doubt exists as to whether or not a federal court, let alone an Article I bankruptcy judge, should decide such a matter, given strong statutory and case law authority, including provisions of the federal Judicial Code, calling for federal jurists to abstain from hearing such nonfederal matters, said abstention made mandatory, discretionary or something more permissive. Certainly, more than enough to doubt the sustainability of Vicki’s claim in a federal forum, but, more importantly, a near certainty that Marshall poses no real threat to the probate exception’s robust continuance.

In conclusion (again), Marshall is not what it appears, as some would have you believe. A preventive for an overly broad application of a viable probate exception? Yes. A categorization of the case at hand as a tort and thus landing well outside said exception? Yes. But at the same time, a confirmation that the probate exception to federal jurisdiction still exists, is still vital, and once more estate administration and the custody of estate assets is best left to state probate courts, acting free from federal interference? A resounding yes to all three. Simply put, the probate exception is not headed for the endangered species list just yet, but rather has a long and healthy life ahead of it.