

Case No. 12-20164

**In the United States Court of Appeals
For the Fifth Circuit**

CANDACE LOUISE CURTIS,

Plaintiff - Appellant

v.

ANITA KAY BRUNSTING; DOES 1-100; AMY RUTH BRUNSTING,

Defendants - Appellees

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

BRIEF OF PLAINTIFF - APPELLANT

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*Appellant pro se***

CERTIFICATE OF INTERESTED PERSONS

NO. 12-20164

Candace Louise Curtis v. Anita Kay Brunsting, et al.

The undersigned Plaintiff-Appellant pro se, certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

- (1) Candace Louise Curtis, Plaintiff-Appellant, Beneficiary, Successor Co-Trustee for the Elmer Brunsting Irrevocable Decedent's Trust
- (2) Anita Kay Brunsting, Defendant
- (3) Amy Ruth Brunsting, Defendant
- (4) Bernard Lilse Mathews III, Counsel for Defendants in the District Court
- (5) The Honorable Kenneth Hoyt, Judge, United States District Court for the Southern District of Texas Houston Division
- (6) Carl Henry Brunsting, Beneficiary, Executor, Successor Co-Trustee for the Elmer Brunsting Irrevocable Decedent's Trust
- (7) Carole Ann Brunsting, Beneficiary
- (8) Vacek & Freed, PLLC, Trust Law Firm
- (9) Candace L. Kunz-Freed, Trust Attorney

NOTICE OF CORRELATIVE ACTION AND NEWLY DISCLOSED EVIDENCE

On March 9, 2012, Plaintiff-Appellant's brother, Carl Brunsting, filed a *Verified Petition to Take Depositions Before Suit*, in the District Court for Harris County Texas, No. 2012 14538. That Petition identifies the above named Defendant-Appellees, Anita Brunsting and Amy Brunsting, along with the law firm of Vacek and Freed, as having potentially adverse interests to that of Carl Brunsting.

Counsel for Carl Brunsting is Bobbie Bayless of Bayless and Stokes, Houston, Texas.

On April 2, 2012, the Houston firm of Vacek and Freed filed the Will of Elmer Brunsting [#412248] and a purported Will for Nelva Brunsting [#412249] with the Harris County Clerk, with application for No Administration.

On or about April 5, 2012, Curtis received a number of documents by email, addressed to Carl Brunsting c/o Bobbie Bayliss, Candace Curtis, and their sister Carole Brunsting, sent from Defendants' counsel Bernard Mathews, in "connection with litigation brought by Ms. Curtis and threatened by Carl Brunsting." These documents were offered to satisfy accounting requirements under the Texas Property Code and included spreadsheets labeled as Schedules A through J.

These "take my word for it documents" seem to indicate that more than half a million dollars in assets may have been self-dealt, commingled, or otherwise

misappropriated, **in the fifteen months prior to the death of Nelva Brunsting,** and that Defendants have not kept accurate books and records.

It should be noted here that misappropriation of fiduciary in excess of \$200,000.00 is a class “A” felony in Texas, and that an elderly victim adds a class level enhancement.

On May 18, 2012, the Harris County District Court entered an Order authorizing Carl Brunsting to proceed with depositions.

/s/

Candace Louise Curtis
Plaintiff-Appellant pro se

STATEMENT REGARDING ORAL ARGUMENT

Curtis requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Fifth Circuit Rule 28.2.3, only to the extent it would aid the Court in understanding the factual background of this case and clarify the legal issues presented.

Appellant suggests that the issues presented can be determined upon the record, pursuant to Fed. R. App. P. 34(a)(3), and that oral argument would not benefit the panel, as the parties' positions are clear and the record is uncomplicated.

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STATEMENT OF JURISDICTION

This Appeal is from an Order [481-482] dismissing four civil tort causes of action, entered by the Honorable Kenneth Hoyt of the United States District Court for the Southern District of Texas, on March 8, 2012. A timely Notice of Appeal [493-494] was filed on March 12, 2012. The District Court was asked to exercise jurisdiction under 28 U.S.C. § 1332. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. To what extent, if any, does the probate exception to federal subject matter jurisdiction apply to causes of action for breach of fiduciary, fraud, conversion, and other civil torts that occur in fiduciary relations related to trusts, wills or estates?
2. To what extent, if any, can the probate exception to federal subject matter jurisdiction be applied where there is no probate?
3. To what extent, if any, can the probate exception to federal subject matter jurisdiction be applied to trust related controversies, given the fact that modern trusts are created for the dual purposes of minimizing death tax obligations and avoidance of probate?
4. Does a sua sponte order dismissing Plaintiff's action on jurisdictional grounds deny due process to Plaintiff, who received no notice of motion and no meaningful opportunity to be heard?

STATEMENT OF THE CASE

The record will show that Plaintiff, Candace Curtis (Curtis), and Defendants, Anita Brunsting and Amy Brunsting (Anita and Amy), are siblings.

The record will further show that their father, Elmer H. Brunsting, died April 1, 2009, and their mother, Nelva Brunsting, died November 11, 2011. Subsequent to their Mother's death, Defendants refused to communicate in a satisfactory manner, if at all, and provided no meaningful information after receiving demand letters Curtis sent to Defendants officially demanding an accounting, a list of assets, and copies of trust documents and records. Curtis also requested that Defendants file the Decedents' Wills and that they not dispose of property without prior notice [67-68] [71-74].

On February 27, 2012, Curtis filed a pro se complaint [5-17] in the United States District Court for the Southern District of Texas alleging the civil torts of breach of fiduciary, extrinsic and constructive fraud, and intentional infliction of emotional distress, claiming that Defendants, acting as trustees, failed to notice her of any actions affecting her beneficial interests and refused to provide copies of non-protected trust instruments and accountings for the trust assets, or to report on any other acts of administration.

Curtis also filed an application for injunction [15] seeking to enjoin Defendants from further actions involving trust property until a true and complete

accounting, list of assets, copies of trust documents, and reports of transactions had been disclosed, or upon further order of the Court.

At the time Curtis filed her complaint in the federal court, neither Decedent's will had been filed, and no probate or other proceeding had been commenced in any court. [6]

Also filed amongst Plaintiff's papers were copies of common law *lis pendens* public notices.

Curtis's application for injunction was properly denied on February 28, 2012, pursuant to Fed.R.Civ.P. 65(b), as defendants had not yet been served.

In the order denying injunction [431] the Court expressed that it may not have subject matter jurisdiction, but did not articulate a reason, and did not invite briefs on any specific subject.

Following a telephone hearing on March 7, 2012, regarding defense motion for removal of a *lis pendens* notice, the Court issued an Order dismissing Plaintiff's complaint under the probate exception to federal diversity jurisdiction, citing to *Marshall v Marshall* 547 U.S. 293, 126 S. Ct. 1735. [*481]

STATEMENT OF FACTS

As the District Court correctly noted, Curtis has always maintained that the claims raised below are civil torts for personal injury, seeking monetary damages from Defendants in personam.

By Affidavit [18-31] in support of her complaint Curtis states that she has never received a true and complete accounting, has not received copies of trust documents relating to any now-existing trust in which she has a beneficial interest, has not received prior notice of actions affecting her beneficial interests, and has made the requisite written demands upon the fiduciary defendants prior to bringing court action.

All of the information necessary to the protection of Plaintiff's rights and beneficial interest is uniquely in the possession and under the control of Defendants.

“Silence can only be equated with fraud when there is a legal duty to speak, or when an inquiry left unanswered would be intentionally misleading... We cannot condone this shocking conduct.... If that is the case we hope our message is clear. This sort of deception will not be tolerated and if this is routine it should be corrected immediately.” *U.S. v. Tweel, 550 F2nd 997, 299-300.*

Amy and Anita have the obligation to provide material information that they have secreted or otherwise withheld Curtis has the equitable right to demand the information from the Defendants, Amy and Anita. Amy and Anita have the equitable duty to disclose and to account, and have no lawful reason for

withholding or concealing the information. Amy and Anita have refused or otherwise failed to meet the fiduciary obligations owed to Curtis and are thus liable for breach of fiduciary and associated civil torts. There is no valid constitutional, statutory or other rational reason why the federal court cannot take cognizance of these civil tort causes of action.

STANDARD OF REVIEW

“[a] trial court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the evidence.” *United States v. Caldwell*, 586 F.3d 338, 341 (5th Cir. 2009).

This Court is asked to review the District Court’s dismissal of Plaintiff’s four civil causes of action de novo.

SUMMARY OF ARGUMENT

1. There is no probate exception to federal diversity jurisdiction over an *inter partes* tort action, where a federal court is not asked to probate or annul a will or take jurisdiction over property in the possession of a state court.
2. The theory that one may be estopped from pursuing tort remedies by a probate exception where there is no probate is self-defeating. Where there is case or controversy, and the jurisdictional requisites of

diversity and amount in controversy are met, the federal courts have subject matter jurisdiction of torts whether there is a probate or not.

3. As it is the primary purpose for creation of a trust to avoid probate and reduce estate tax liabilities, it is irrational and a cruel irony that a competent federal tribunal would be barred from protecting the rights of one's beneficiaries because of some fictitious relationship between ministerial estate functions performed by ecclesiastical courts and controversies heard exclusively before courts of Chancery at Westminster.
4. The Sua sponte dismissal of Plaintiff's action, without notice and opportunity to be heard, is denial of Due Process.

ARGUMENT

NATURE OF THE CLAIM

The probate exception does not apply to *inter partes* civil tort claims seeking purely monetary damages from defendants in personam¹.

The District Court's Order of Dismissal [*481] at item II states:

“The plaintiff's dispute arises out of the administration of the family Trust.”

¹ Resting upon the authorities contained in the Brief for Petitioner Vicky Lynn Marshall No. 04-1544 before the United States Supreme Court *Marshall v Marshall* 547 U.S. 293, 126 S. Ct. 1735. Argument & Summary of Argument Pages 9-18 and authorities cited.

And at item III:

“... However, in her pleadings, the plaintiff asserts that she is suing her sisters individually and severally as co-trustees for the Trust because they have failed... “to meet their first obligation under that power...””

The “Nature of the Claim” test has always been the choice of the Fifth Circuit, and these conclusions are not wholly relevant to application of the probate exception. Since there is no dispute that Curtis’s suit seeks monetary damages from defendant trustee’s in personam, questions surrounding distribution are moot. The Trust is not liable.

“...an officer may be held liable in damages to any person injured in consequence of a breach of any of the duties connected with his office...The liability for nonfeasance, misfeasance, and for malfeasance in office is in his 'individual', not his official capacity...”
70 Am. Jur. 2nd Sec. 50, VII Civil Liability.

THE ROUTE TEST

Defendant’s Emergency Motion for Removal of lis pendens [434] states:

“[Note: This Motion is brought subject to the Trustees contention that this Court lacks subject matter jurisdiction due to the fact that Texas Probate Code §115.001 (7) confers exclusive jurisdiction over matters related to questions “arising in the administration or distribution of a trust” to the State District Court, and by analogy this case should not be considered under the Probate Exception to Federal Court Jurisdiction, *Marshall v. Marshall*, 126 S.Ct. 1735, 1748 (2006). These issues will be raised by a separate Motion to Dismiss under FRCP 12(b)”

First impression seemed to indicate that Defendant’s motion for removal of lis pendens should have been filed with the court Defendants claimed to be the

court having exclusive jurisdiction. This appears to be the same error to which the District Court fell victim.

Under closer scrutiny it becomes clear that Defendant's counsel, Bernard Mathews, misstated Texas Property Code §115.001, claiming it to be the Probate Code, and then bootstrapped to the Supreme Court what appears to be the Ninth Circuit's holding, that was very harshly reversed by the Supreme Court on the second page of the Marshall opinion.²

It is not Texas Probate Code §115.001, rather Texas Property Code §115.001, that grants original and exclusive jurisdiction over the administration of trusts, and that grant of jurisdiction is to the District Court not the Probate Court. The District Court is a court of general, not special, jurisdiction.

“Nevertheless, the Ninth Circuit in the instant case read the probate exception broadly to exclude from the federal courts' adjudicatory authority "not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." *392 F.3d 1118, 1133 (2004)*. The Court of Appeals further held that a State's vesting of exclusive jurisdiction over probate matters in a special court strips federal courts of jurisdiction to entertain any "probate related matter," including claims respecting "tax liability, debt, gift, [or] tort." *Id.*, at 1136. **We hold that the Ninth Circuit had no warrant from Congress, or from decisions of this Court, for its sweeping extension of the probate exception**". (*emphasis Curtis*)

The District court dismissed Curtis's action a priori on the assertion of Defendants' counsel without an FRCP 12(b) motion or jurisdictional hearing, even

² *Marshall v Marshall* 547 U.S. 293, 126 S. Ct. 1735, 1736

though Defendants' own exhibits [473] show that the property subject to lis pendens was not property of a probate estate but of a resulting Trust.

Even if Defendants' counsel had stated the Texas statutes honestly, the Supreme Court in *Marshall* expressly dispels Defendants' route test assertions. In view of the very compelling brief filed by the petitioner before the Supreme Court in that case, it is difficult to envision an application of the probate exception where, as here, there is no probate.

“Texas courts have recognized a state-law tort action for interference [***37] with an expected inheritance or gift, modeled on the Restatement formulation. See *King*, 725 S. W. 2d, at 754; *Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144, 146-147 [**499] (*Tex. App.* 1998). It is clear, under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), that Texas law governs the substantive elements of Vickie's tortious interference claim. It is also clear, however, that Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort. We have long recognized that "a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction." *Tennessee Coal, Iron & R. Co. v. George*, 233 U.S. 354, 360, 34 S. Ct. 587, 58 L. Ed. 997 (1914). Jurisdiction is determined "by the law of the court's creation and cannot be defeated by the extraterritorial operation of a [state] statute . . . , even though it created the right of action." *Ibid.* Directly on point, we have held that the jurisdiction of the federal courts, "having existed from the beginning of the Federal government, [can] not be impaired by subsequent state [***38] legislation creating courts of probate." *McClellan v. Carland*, 217 U.S. 268, 281, 30 S. Ct. 501, 54 L. Ed. 762 (1910) (upholding federal jurisdiction over action by heirs of decedent, who died intestate, to determine their rights in the estate (citing *Waterman*, 215 U.S. 33, 30 S. Ct. 10, 54 L. Ed. 80)).” *Marshall v Marshall* 547 U.S. 293, 126 S. Ct. 1735, 1744.

TEXAS STATUTORY PROBATE JURISDICTION

The correct jurisdictional statement for probate is found at Texas Probate

Code §4:

§ 4. Jurisdiction of County Court With Respect to Probate Proceedings

The county court shall have the general jurisdiction of a probate court. It shall probate wills, grant letters testamentary and of administration, settle accounts of personal representatives, and transact all business appertaining to estates subject to administration, including the settlement, partition, and distribution of such estates. Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1993, 73rd Leg., ch. 957, § 4, eff. Sept. 1, 1993.

TEXAS STATUTORY TRUST JURISDICTION

The correct jurisdictional statement for trusts is found at Property

Code § 115.001:

§ 115.001. JURISDICTION. (a) Except as provided by Subsection (d) of this section, a district court has original and exclusive jurisdiction over all proceedings concerning trusts, including proceedings to:

- (1) construe a trust instrument;
- (2) determine the law applicable to a trust instrument;
- (3) appoint or remove a trustee;
- (4) determine the powers, responsibilities, duties, and liability of a trustee;
- (5) ascertain beneficiaries;
- (6) make determinations of fact affecting the administration, distribution, or duration of a trust;
- (7) determine a question arising in the administration or distribution of a trust;
- (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle;

(9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and

(10) surcharge a trustee.

(b) The district court may exercise the powers of a court of equity in matters pertaining to trusts.

CUSTODIA LEGIS AND THE LAW OF COMITY

The District Court's Order of Dismissal [481] points to distribution in dismissing the action under the probate exception and further comments thusly:

“Responding to the defendants’ motion, the plaintiff seeks to satisfy the jurisdictional issue of the amount in controversy by stating that the *res* is the Trust.”

The trial Court construes derivative rights for the primary premise of Curtis's action, borrowing from arguments made by Defendants, which appear nowhere in Curtis's pleadings. Fraud, intentional infliction of emotional distress and breach of fiduciary duties are civil torts, distinct from in Rem actions.

The incorporeal *res* of the complaint, as first stated in paragraph 3 therein [*6], includes only the body of rights harmed, or in jeopardy, resulting from the breach of fiduciary obligations on the part of Defendants. The second reference to “*res*” in the same paragraph of Curtis’s complaint is a notice that federal jurisdiction was not precluded by doctrines of *Comity* or *Custodia legis*, as no prior action had been commenced in any other court, and Curtis fails to find “in rem” custody of property to be a formative factor in probate exception test analysis in any other context.

THE FIFTH CIRCUIT AND THE PROBATE EXCEPTION

In *Breaux et al., v. Dilsaver* 254 F.3d 533 (5th Cir. 2001) the court held that civil tort claims against administrators in their individual capacity do not fall within the probate exception. The court reasoned that because plaintiff's claim did not challenge the validity of probate proceedings, did not seek to recover property from either estate, and did not require that a federal court assume control of estate property or interfere with state probate proceedings, that it was outside the probate exception to diversity jurisdiction. The court held in the opening paragraph:

This diversity suit arises from Appellants' claim that the Appellee committed fraud and breached his fiduciary duties while serving as administrator of two decedents' estates. The district court dismissed the suit, concluding that the probate exception to federal jurisdiction prevented it from hearing the case. We disagree: that the suit is against the administrator only in his personal capacity and does not require federal interference in any state probate proceeding. As the suit does not fall within the probate exception, we reverse and remand. *Breaux et al., v. Dilsaver* 254 F.3d 533 (5th Cir. 2001)

HISTORY OF PROBATE AND TRUSTS IN ENGLAND

Justice Ginsberg authored the opinion of the Supreme Court in *Marshall* and she begins with the following quote:

In *Cohens v. Virginia*, Chief Justice Marshall famously cautioned: "It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 19 U.S. 264, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821). 1821). [***14] Among [**490] longstanding limitations on federal jurisdiction otherwise properly

exercised are the so-called "domestic relations" and "probate" exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history..."

DISPUTES OVER LEGACIES

The Surrey Council of England³ presents a history of Probate in England and Wales from the early 13th century until the Court of Probate Act of 1857.

"Since the church had little jurisdiction over real estate there are few references in church records to land disputes. Whilst the church had some authority over litigation before the interregnum, disputes were often considered a matter for the King's court not the ecclesiastical ones, and after the interregnum any land or property disputes were usually conducted in Chancery (eg in "Bleak House" by Charles Dickens)."

The Surrey Council does not mention trusts in their published history of probate. Seagle⁴ gives a history of the creation of trusts as follows:

"The evasion of feudal dues and burdens began in the second half of the fourteenth century when the great landowners hit upon the idea of conveying the legal titles to their lands to groups of friends, with the understanding, however, that they would hold the land to certain uses of the grantor. Since the group of "*feoffees to uses*" as it was called, could renew itself, the feudal burdens which attached only on death could be avoided. Feudalism, it is true, was a chain of holding, and they lost in relation to their subtenants, but gained immeasurably more, in view of the vastness of their holdings, in relation to the greatest lord of all, who was the king. The common-law courts recognized only the legal title, but the Court of Chancery, being a court of conscience, stood ready to see to it that the feoffees discharged

³ <http://www.surreycc.gov.uk/recreation-heritage-and-culture/archives-and-history/archives-and-history-research-guides/wills-and-probate-records/a-brief-history-of-probate-in-england-and-wales>

⁴ Book IV of "the Quest for Law" (William Seagle 1941) Chapter 13 "The Quest for Equity" page 190

the obligations of the uses. Henry VIII tried to end the process of evasion by extorting from a rather reluctant Parliament the Statute of Uses in 1535. But it was not long before this was evaded by a ridiculously transparent device. Estates were now conveyed to A for the use of B. The Statute of Uses executed the first use, for it provided that when one stood seized of land to the use of another, the feoffee should be deemed the legal owner. It was held, however, that the statute did not execute the second use! It has been well said that “by this means a statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add at most three words to a conveyance.⁵ The double use became what was called a trust, and the protection of the rights of the *cestui que trust* became the most important function of the Court of Chancery.”

By these histories the common thread between probate and trust is the Court of Chancery. Trust matters were always heard in Chancery, while probate matters were heard in the ecclesiastical courts. However, all disputes arising under probate were heard in Chancery.

It thus appears that the probate exception nomenclature is a misnomer properly referring only to administrative functions that do not, as a matter of law, present a controversy⁶ and this is the sole reason for the lack of federal statutory subject matter jurisdiction in regard to the probate of a will, the administration of an estate and any other matter that does not present the requisite elements of case or controversy.

⁵ Fisher, *op. cit.*, p. 160 - The footnoted authorities for this section are given on page 412 of “the Quest for Law” Vol IV

⁶ Brief for Petitioner Vicky Lynn Marshall before the United States Supreme Court No. 04-1544 Page 16 and authorities cited therein.

THE PROBATE EXCEPTION AFTER MARSHALL

Article III of the United States Constitution,⁷ 28 U.S.C. §1331 and 28 U.S.C. §1332, defines modern federal diversity jurisdiction.⁸ There is nothing in the language of these provisions that explicitly bar federal courts from hearing probate related claims.

The Supreme Court has:

“...never recognized a "probate exception" to federal jurisdiction - i.e., a blanket jurisdictional bar that is uniquely applicable to probate-related claims." To the contrary, throughout its history, this Court repeatedly has held that there is broad federal jurisdiction over all kinds of probate related claims, including claims to decedents' estates by heirs, legatees and creditors.

In the occasional case where the Court held that there was no jurisdiction over a particular probate-related claim, it did so because a statutory jurisdictional requisite was not met - for example, because the parties were not diverse or because the plaintiff had not pled a case "at common law or in equity" - *not* because a non-statutory subject-matter exception precluded the exercise of federal jurisdiction.”⁹

⁷ Section 1, cl. 2 reads in pertinent part: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States.”

⁸ The grant of federal question jurisdiction under the Judiciary Act of 1875, 18 Stat. at 470, was later codified as 28 U.S.C. § 1331: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Diversity jurisdiction as originally granted by the Judiciary Act of 1789, 1 Stat. at 78, is codified in 28 U.S.C. 1332(a):

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest and costs, and is between (1) Citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title as plaintiff and citizens of a State or of different States.

⁹ Please see *Brief for Petitioner Vickie Lynn Marshall in the Supreme Court of the United States No. 04-1544 - Summary of Argument page 9*

Recently, in *Marshall*, the Supreme Court revisited the probate exception, cautioning against its expansive application and stating that the probate exception is "narrow," and should not be used as an excuse for federal courts to decline to exercise jurisdiction over actions merely because they involve a probate-related matter.

Amongst the relevant progeny of *Marshall* are *Lefkowitz v. Bank of New York*, 528 F.3d 102, 104 (2d Cir. 2007), and *Wisecarver v. Moore*, 489 F.3d 747 (6th Cir.2007) each of which specifically describes Curtis's four causes of action as outside the probate exception to federal diversity jurisdiction. Following in the wake of *Marshall*, the *Lefkowitz* court stated the exception thusly:

“While the issues involved in Plaintiff's remaining claims undoubtedly intertwine with the litigation proceeding in the probate courts, in addressing the claims, the federal court will not be asserting control of any res in the custody of a state court. A federal court properly “exercise[s] its jurisdiction to¹⁰ adjudicate rights in [property in the custody of a state court] where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.” *Marshall*, 126 S.Ct. at 1747 (citing *Markham*, 326 U.S. at 494, 66 S.Ct. **The probate exception can no longer be used to dismiss “widely recognized tort[s]” such as breach of fiduciary duty or fraudulent misrepresentation merely because the issues intertwine with claims proceeding in state court. Accordingly, these claims may not be dismissed under the probate exception.**” (Emphasis added) *Lefkowitz v. Bank of New York*, 528 F.3d 102, 104 (2d Cir. 2007)

¹⁰ *Marshall*, 126 S.Ct. at 1748

In *Wisecarver v. Moore*, 489 F.3d 747 (6th Cir.2007), a case uniquely similar to the case in point in both fact and law, Plaintiffs raised 12 causes of action. The District Court dismissed the case under the probate exception to diversity. Wisecarver appealed the dismissal. Counts one through three were abandoned on appeal and of the nine remaining claims, five were dismissed and four were reversed and remanded. Most of the five tort claims were dismissed because the relief requested sought a probate related remedy, not because the causes themselves were within the dominion of probate per se. The Wisecarver court's legal reasoning concluded that:

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Therefore, to the extent that Plaintiffs' claims seek *in personam* jurisdiction over the Defendants, and do not seek to probate or annul a will, the probate exception does not apply. Turning to the complaint, Plaintiffs allege, in relevant part:

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Loretta Moore and Evelyn Page exercised undue influence on Floyd C. McCamy, and procured from Floyd C. McCamy his signature on testamentary documents The plaintiffs, upon information and belief, allege that the defendants obtained a Power of Attorney from the deceased prior to his death and used that Power of Attorney for their benefit. The defendants . . . failed to use good faith in exercising the authority granted by the power of attorney.

14

The defendants . . . through the use of their fiduciary and confidential relationship, with Floyd C. McCamy, prior to his death, persuaded him at a time when he was both physically and mentally incompetent, to execute a Will leaving his entire Estate to them even though the bulk of his Estate had come from the family of the plaintiffs and the deceased, Floyd C. McCamy, had stated his intent to leave the Estate to the plaintiffs.

15

[Defendants] . . . used their relationship with Mr. McCamy and his frail, weak and deteriorating physical and mental condition to create animosity towards the plaintiffs and to exercise dominion and control over McCamy.

16

[B]y virtue of the confidential and fiduciary relationship and the defendants' dominance over Floyd C. McCamy, defendants procured a Will from him which was not the intent or desire of Floyd C. McCamy and was designed solely for the benefit of the defendants . . .

.

17

[D]efendants . . . manipulated Floyd C. McCamy by means of undue pressure and undue influence in order to cause Floyd C. McCamy to execute a Will whereby the defendants were materially benefited [sic].

18

Defendants . . . by way of conversion, have retained money and personal property of the deceased and have exercised dominion and control over such property as their own to [the] exclusion of the rightful owner. . . .

19

Liberally construed, Plaintiffs' claims for breach of fiduciary duty, breach of confidential relationship, undue influence, and fraud are not barred by the probate exception because they seek *in personam* jurisdiction over the Defendants and do not seek to probate or annul a will. Instead, these claims allege that the Defendants received assets from McCamy during his lifetime by misusing the Power of Attorney executed by McCamy in their favor and that Plaintiffs were damaged as a result. Moreover, these assets were allegedly transferred during McCamy's lifetime and were therefore not part of his estate at his death. Thus, these assets were not subject to the probate court's disposition of McCamy's estate. *See Lamica v. Pierre*, No. 5:05-CV-964, 2006 WL 3423861 (N.D.N.Y. Nov. 28, 2006) (finding probate exception inapplicable to claims relating to property transferred before decedent's death).

20

Since *Marshall*, other circuit courts considering similar claims have also held that causes of action alleging breach of fiduciary duties, fraud, and undue influence do not necessarily fall within the scope of the probate exception. *See Campi v. Chirco Trust UDT*, No. 05-55595, 2007 WL 628049, at *1 (9th Cir. Feb. 27, 2007) (cause of

action alleging fraud, undue influence, and breach of fiduciary duties regarding property removed from a trust and never probated not barred by probate exception); *Jones v. Brennan*, 465 F.3d 304, 307-308 (7th Cir.2006) (breach of fiduciary duty claim regarding guardian's mismanagement not barred by probate exception). These decisions follow *Marshall's in personam/in rem* distinction and find that the principles underlying the probate exception are not implicated when federal courts exercise jurisdiction over claims seeking *in personam* jurisdiction based upon tort liability because the claims do not interfere with the *res* in the state court probate proceedings or ask a federal court to probate or annul a will.

21

Even though these claims in this case seek *in personam* jurisdiction, a majority of the relief that Plaintiffs seek would involve disturbing McCamy's estate, which has already been probated. For instance, Plaintiffs seek: (1) an order enjoining Defendants' disposition of assets received from McCamy's estate, (2) an order divesting Defendants of all property retained by them, which should be turned over to Plaintiffs as the heirs, next of kin, and intended beneficiaries of the deceased, and (3) a declaration that McCamy's probated will be declared invalid and that Defendants be denied any of the benefits of McCamy's will. Granting this relief is precisely what the probate exception prohibits because it would require the district court to dispose of property in a manner inconsistent with the state probate court's distribution of the assets. *Marshall*, 126 S.Ct. at 1748.

22

However, **Plaintiffs also seek two forms of relief which would not implicate the probate exception. First, they seek an accounting of assets received during the last two years of McCamy's life. As mentioned above, the removal of these assets from McCamy's estate during his lifetime removes them from the limited scope of the probate exception.** Second, they seek a monetary judgment in an amount to be determined in relation to the assets so removed.

23

Plaintiffs' remaining claims, those seeking money damages and other remedies relating to the procurement and promotion of a false will, are barred by the probate exception. These claims challenge the validity of McCamy's will and would require the district court to "disturb or affect the possession of property in the custody of a state court" because the state court already probated McCamy's estate. *Jones*, 465

F.3d at 307-08. These claims clearly involve the probate or annulment of a will and thus are barred by the probate exception.

24

AFFIRMED in part and REVERSED in part. *Wisecarver v. Moore*, 489 F.3d 747 (6th Cir.2007)

Although the *Wisecarver* Court makes a valid distinction as it relates to estates, Curtis questions whether a trust distribution remedy remains a valid factor in determining application of the probate exception in the wake of *Marshall*.

PROBATE EXCEPTION SUMMARY

The “*nature of the claim*” test has always been the choice of the Fifth Circuit. Breach of fiduciary causes were not excluded under the probate exception in the Fifth Circuit, even before *Marshall*, so long as the relief sought was in personam, and granting it would not interfere with state probate proceedings.

The absence of *custodia legis* negates application of the law of “*Comity*”.

The “*route test*” can no longer be used to exclude federal subject matter jurisdiction after the Supreme Court’s holding in *Marshall*.

The civil torts complained of in the Court below are not ancillary to probate and, thus, the Seventh Circuit’s *Practical Test* does not apply, nor do any of the three abstention doctrines. Like the “*route test*” Curtis believes application of the Seventh Circuit’s “ancillary to probate” or “practical test” may not be wholly viable after *Marshall*, and that trust matters are not barred by any so-called probate exception.

BREACH OF FIDUCIARY IS A VIOLATION OF PUBLIC POLICY

Curtis alleges Defendants have failed to fully disclose all material facts affecting her beneficial interest, refused to provide non-privileged documents and information as requested, appear to have mismanaged assets, may have engaged in self-dealing, co-mingling and use of fiduciary property to the injury of Curtis and for their own benefit, have failed to file true, complete, accurate and timely accountings, appear to have failed to maintain accurate books and records, have refused to disclose acts of administration, appear to have caused tax liabilities in a manner violative of trust terms, have shown bias and hostility towards Curtis, appear to have trespassed upon the Elmer Brunsting irrevocable decedents trust, to which Defendants are most likely not the proper co-trustees, and appear to have failed to protect assets in which Curtis has a beneficial interest.

Where there is a claim of breach of fiduciary regarding any transaction, and the appearance of a conflict of interest is shown, the presumption of impropriety applies and the burden of bringing forth proof that the actions were fair, necessary or justified is upon the fiduciary. The federal courts are not foreclosed from addressing these kinds of public policy concerns whether civil, criminal or both.

DUE PROCESS

Due Process unquestionably requires both notice and a meaningful opportunity to be heard. The burden of establishing jurisdiction of any court over

either person or subject matter is upon the Plaintiff. However, Defendants never filed a motion challenging jurisdiction under Fed.R.Civ.P. 12(b). The Court never invited briefs on application of the probate exception to this case, there was no jurisdictional hearing, and there are no transcripts of any conference or hearing.

The Court's a priori order, issued sua sponte, denied Curtis Due Process, as Curtis has a right to notice and a meaningful opportunity to be heard on any jurisdictional challenge, prior to the Court's dismissal of the action.

For purposes of a motion to dismiss for lack of subject matter jurisdiction as a matter of law, the factual allegations of the complaint are presumed to be true and all reasonable inferences are to be made in favor of the plaintiff. *Whisnant v. United States*, 400 F.3d 1 177, 1 179 (9th Cir. 2005)

However, where the jurisdictional issue is bound up with the merits, the entire factual dispute is appropriately resolved by the proceeding on the merits. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)

Justice Ginsberg authored the Supreme Court's opinion in *Marshall* and ends that 12 page instrument with the following quote:

“Rather than preserving whatever vitality that the "exception" has retained as a result of the *Markham* dicta, I would provide the creature with a decent burial in a grave adjacent to the resting place of the *Rooker-Feldman* doctrine. [***46] See *Lance v. Dennis*, 546 U.S. 459, 126 S. Ct. 1198, 163 L. Ed. 2d 1059 (2006) (Stevens, J., dissenting).”

CONCLUSION

Breach of fiduciary, extrinsic and constructive fraud, and intentional infliction of emotional distress clearly fall outside what remains of the so-called “probate exception” to federal subject matter jurisdiction, whether or not the obligations breached interweave with trust or estate matters.

The Federal Court is only excluded from exercising the limited ministerial functions of probate courts, and those limits are consistent with what is expressed in Texas Probate Code §4.

The Federal Court has statutory jurisdiction to hear this controversy, and has the equitable jurisdiction to provide any relief that could be obtained from the Texas District Court under Texas Property Codes § 114.008 and § 115.001, including interpreting trust provisions, enjoining trustees from acting, compelling trustees to account, replacing trustees, dissolving a trust, distributing trust assets and any other relief that could be obtained from the Texas State District Court.

Wherefore, Plaintiff-Appellant Curtis herein respectfully moves this court to issue an order reversing the District Court’s dismissal of her four causes of action, and remand to the District Court for further proceedings consistent with this Court’s learned opinion.

Further, Curtis asks this Court for instruction to the U. S. District Court, to reconsider her application for injunction with a proper view of the law and in light of the fact Defendants have been served.

Curtis also asks that Defendants' counsel Bernard Mathews be ordered to show cause why he should not be held in contempt and sanctioned for perpetrating a fraud upon the District Court, and further order that Defendants are to bear the costs associated with this appeal.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Candace L. Curtis, certify that today, June 11, 2012, a copy of the brief for appellant, a copy of the record excerpts, and the official record in this case, consisting of one CD, were served upon George William Vie III, by certified mail, No. 7010 0290 0002 8531 8897, postage prepaid to him at One City Centre, 1021 Main Street, Suite 1950, Houston, TX 77002.

/s/

Candace L. Curtis

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7 (c), undersigned pro se Plaintiff-Appellant certifies that this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7 (b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7 (b)(3), this brief contains 6,844 words printed in a proportionally spaced typeface.
2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Microsoft Word 2010 software.
3. Upon request, undersigned will provide an electronic version of this brief and/or a copy of the word printout to the Court.
4. Undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

/s/

Candace L. Curtis