I want to probate a will in federal court

By James W. Martin

The U.S. Supreme Court gave me a great idea: probate a will in federal court. The primary advantage over state court is that federal courts have nationwide jurisdiction. But can I really file an action in U.S. District Court in Tampa to determine the beneficiaries and creditors entitled to the assets of a deceased New York resident? I used to think that federal courts would not hear probate cases, just as they would not hear divorces. But it turns out that neither Congress nor the Supreme Court ever said they could not, so they can. In fact, they must, if they should, to paraphrase the Court's quotation of Chief Justice Marshall.

All of this came to light when the Court decided to hear the Anna Nicole Smith case, the decision of which issued on May 1, 2006, under the unlikely title *Marshall v. Marshall*, 547 U.S. ____ (2006), because the infamous petitioner's married name became Vickie Lynn Marshall when she married J. Howard Marshall II in 1994. Her husband was apparently quite wealthy and had a pre-existing family including a son named E. Pierce Marshall. When J. Howard died a year after the marriage, his will left his assets to a trust that named his son E. Pierce but not his wife Anna Nicole/Vickie.

This created a setting for the usual probate contest, but Anna Nicole/Vickie added a twist by filing for bankruptcy in federal court in California while her husband's will was being probated in state court in Texas. The decedent's son E. Pierce twisted more by filing a claim in the bankruptcy alleging she defamed him when her lawyers told the press that he "had engaged in forgery, fraud, and overreaching to gain control of his father's assets." Anna Nicole/Vickie twisted further by counterclaiming against E. Pierce in the federal bankruptcy proceeding for tortious interference with the gift she expected from her husband, alleging such things as "effectively imprisoning J. Howard against his wishes, surrounding him with hired guards for the purpose of preventing personal contact between him and Vickie, making misrepresentations to J. Howard, and transferring property against J. Howard's expressed wishes."

The federal bankruptcy court held a trial on her tortious interference claim and awarded her $449 million in compensatory damages and $25 million in punitive damages. E. Pierce then moved to dismiss for lack of jurisdiction on the basis that only the Texas state court had jurisdiction over a tortious interference claim. The bankruptcy court said it was not timely raised so it was waived. While this was going on in federal court, the Texas state court upheld the validity of the will and trust that did not name Anna Nicole/Vickie as a beneficiary.

E. Pierce sought federal district court review of the very large judgment rendered against him in favor of Anna Nicole/Vickie by the bankruptcy court, and succeeded in reducing the amount of the judgment down to $44 million in compensatory damages and $44 million in punitive damages. That decision cost her about $400 million, but it got worse when E. Pierce appealed to the Ninth Circuit Court of Appeals and successfully argued that the probate exception (the rule I always thought would keep me from probating wills in federal court) applied to bar federal jurisdiction entirely. She just lost the $88 million.

The Ninth Circuit ruled that a claim falls within the probate exception, even if it does not involve administration of an estate, the probate of a will, or any other purely probate matter, if it "raises questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument, whether those questions involve fraud, undue influence, or tortious interference with the testator's intent." The Ninth Circuit also made this statement, which the U.S. Supreme Court found problematic: "Where a state has relegated jurisdiction over probate matters to a special court and the state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then federal courts also lack jurisdiction over probate matters."

The Supreme Court accepted jurisdiction to "resolve the apparent confusion among federal courts concerning the scope of the probate exception." It held that "Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort . . . of the federal courts, having existed from the beginning of the federal government, cannot be impaired by a subsequent state legislation creating courts of probate." The Court held that the federal district court properly asserted jurisdiction over Anna Nicole/Vickie's tortious interference claim against E. Pierce, reversing the Ninth Circuit: "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."

The Court held that "the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." But this appears to be the limit because the Court said that the probate exception "does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction." A concurring opinion took this a step further and said there is no such thing as a probate exception to oust a federal court of jurisdiction and that the concept should be given a decent burial.

The opinion is interesting reading for probate lawyers. I highly recommend it. It portends a future where we can probate a will in federal court. Its reference to the probate exception as "stemming in large measure from misty understandings of English legal history" reminds me of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which opened the floodgates of lawyer advertising with its comment on the then long-standing ban on same:

> "It appears that the ban on advertising originated as a rule of etiquette, and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on 'trade' as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. But habit and tradition are not, in themselves, an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.
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> "[T]he assertion that advertising will diminish the attorney's reputation in the community is open to question. Bankers and engineers advertise, and yet these professions are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: studies reveal that many persons do not obtain counsel, even when they perceive a need, because of the feared price of services or because of an inability to locate a competent attorney. Indeed, cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients."

James W Martin is a probate, real estate, and corporate lawyer in St. Petersburg, who has written for The Florida Bar Journal *and* News, ALI-ABA Practical Lawyer, *and West Publishing. His Web site is located at www.jamesmartinpa.com.*