

Federal Litigation of Inheritance Disputes

I. Introduction

Probate litigation has historically been handled in state courts in the United States. Many states established specialized courts, often known as “Orphans Court” or “Surrogates Court” to handle probate matters, well before the founding of the nation. For example, New York’s “Court of Orphan Masters” was established by 1665.¹ Some states still retain a separate court system for probate disputes, while other states, such as Florida, handle probate disputes as part of the civil court system of general jurisdiction.

The federal court system has traditionally not heard probate disputes, as a result of the original enabling legislation that established the federal judiciary, the Judiciary Act of 1789.

It is true that a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789, 1 Stat. 73, and §24(1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters.

[*Markham v. Allen*](#), 326 U.S. 490, 494 (1946).

There is no present statutory prohibition to litigating a probate matter in federal court. The federal courts, however, have long maintained a “probate exception” to federal jurisdiction, to prohibit a probate case from being heard in federal court where the federal court system would otherwise have jurisdiction over the controversy. The “probate exception” has been limited and refined over time, so that presently a variety of probate and other inheritance disputes can be maintained in federal court.

There are two primary ways in which to invoke federal jurisdiction over an inheritance controversy – diversity jurisdiction and federal question jurisdiction. A third method, that of direct Supreme Court review of a state supreme court decision, is a rare but important method of obtaining Federal jurisdiction.

II. Diversity Jurisdiction of Inheritance Disputes

At the time of the founding of the country, property was transferred via probate of a will in a probate court, or via estates in real estate (e.g., life estate with remainder interest). The probate exception to federal jurisdiction pretty much kept all inheritance disputes out of federal court.

The mid 20th century invention of tax-advantaged retirement plans started to create wealth that could be transmitted at death, outside the narrow and historical limits of a local probate court, although most such plans, in the form of a defined benefit plan, limited the transmission of most retirement benefits to surviving spouses, creating few opportunities for litigation. The creation of

¹ Puff, Gregg, "[The Origin, History and Jurisdiction of the Surrogate's Court in New York](#)" (1896). Historical Theses and Dissertations Collection. Paper 40. Page 7

the 401(k) plan under the Revenue Act of 1978 began the broad introduction of tax-advantaged retirement plans that created inheritable retirement wealth that could be controlled and directed.²

The Individual Retirement Account (“IRA”) was created in 1974, pursuant to the Employee Retirement Income Security Act (“ERISA”).³ The Economic Recovery Act of 1981 expanded the use of IRA’s by eliminating the prohibition of an employee being allowed to use an IRA if the employee was covered by a qualified employment based retirement plan.⁴ The Taxpayer Relief Act of 1997 (“1997 TRA”) further expanded the use of IRA’s by increasing the contribution amounts that high income taxpayers could make.⁵ The 1997 TRA also introduced the Roth IRA, which allows withdrawals from an IRA to be tax-free if no income tax deduction is taken on the contribution to the Roth IRA (or a regular IRA is converted to a Roth IRA with the payment of income tax on the conversion).⁶

The more recent tools of revocable trusts, transfer on death deeds,⁷ pay on death accounts (also known as a “Totten Trust”) and beneficiary designations on various plans and bank accounts has further increased the transmission of inherited wealth outside the historical confines of probate.⁸ Hence, the ability to litigate inheritance disputes outside of a state probate court has increased significantly.

A. Diversity Jurisdiction in Federal Court

Diversity jurisdiction allows a citizen of one state to sue a citizen of another state in federal court for the adjudication of a civil matter. 28 U.S.C. Section 1332. Diversity jurisdiction requires that the amount in controversy exceed \$75,000, and that there be diversity of state citizenship among the litigants.⁹

Complete diversity is required under Section 1332, in that no plaintiff can be a citizen of the same state as any of the defendants.¹⁰

1. Citizenship of Fiduciaries

For a personal representative or executor, the citizenship of the deceased, not that of the fiduciary, determines citizenship for diversity purposes.¹¹

² The Revenue Act of 1978, Section 135, included a provision that became Section 401(k) of the Internal Revenue Code. The effective date was a retirement plan year after December 31, 1979. Revenue Act of 1979, Section 135(c).

³ Employee Retirement Income Security Act of 1974, Public Law 93-406, Section 2002.

⁴ Economic Recovery Act of 1981, Public Law 97-34, Section 311 et seq.

⁵ Taxpayer Relief Act of 1997, Public Law 105-34, Section 301.

⁶ Taxpayer Relief Act of 1997, Public Law 105-34, Section 302.

⁷ Stephanie Emrick, *Transfer on Death Deeds: It Is Time to Establish the Rules of the Game*, 70 FLA. L. REV. 469. Available at: <https://scholarship.law.ufl.edu/flr/vol70/iss2/6>

⁸ Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. Miami L. Rev. 757 (2008). Available at: <https://scholarship.law.ufl.edu/facultypub/439/>.

⁹ Citizens of a foreign country who are not permanent residents of the United States are always diverse. Citizens of a foreign country who are permanent residents of the United States are considered a citizen of the state of residency. 28 U.S.C. Section 1332(a)(2).

¹⁰ *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

¹¹ 28 U.S.C. § 1332(c)(2); *Palmer v. Hosp. Auth. of Randolph County*, 22 F.3d 1559, 1562 (11th Cir. 1994).

For a trustee acting as a fiduciary of a trust, the citizenship of the trustee determines citizenship for diversity purposes. Not all trusts are subject to this rule, however. The Supreme Court, in [*Americold Realty Trust v. Conagra Foods*](#), 136 S.Ct. 1012 (2016) has made the distinction between business trusts and traditional donative trusts, holding that only traditional trusts are subject to the rule that the citizenship of the trustees is determinative for diversity jurisdiction purposes.¹² For other types of trusts such as a business trust, the citizenship of the beneficiaries controls diversity jurisdiction.

Although *Americold* did not provide a comprehensive definition of a traditional trust, a 2016 decision from the United States Court of Appeals for the District of Columbia provides guidance.

According to *Americold* as well as the Restatement [of Trusts, Second], a traditional trust for diversity generally describes a fiduciary relationship regarding property where the trust cannot sue and be sued as an entity under state law. More broadly, we conclude that a traditional trust is a trust that lacks juridical person status. Whether a particular trust has or lacks juridical person status can be determined by reference to the law of the state where the trust is formed.

[*Yueh-Lan Wang v. New Mighty U.S. Trust*](#), 843 F.3d 487 (D.C. Cir. 2016).

Other courts have reached similar results, focusing on the “business trust” vs. “traditional trust” distinction.¹³

2. Proper Alignment of Plaintiffs and Defendants

Diversity jurisdiction requires complete diversity as between all of the plaintiffs and all of the defendants. Whether a party is characterized as a plaintiff or defendant can control whether complete diversity exists. In a traditional lawsuit of one plaintiff against one or more defendants, there is no issue as to who is a plaintiff and who is a defendant.

¹² *Americold Realty Trust v. Conagra Foods*, 136 S.Ct. 1012 (2016). The Supreme Court makes a distinction between a traditional trust and a business operating as a “trust.”

“[W]hen a trustee files a lawsuit or is sued in her own name, her citizenship is all that matters for diversity purposes. Navarro, 446 U. S., at 462–466. For a traditional trust, therefore, there is no need to determine its membership, as would be true if the trust, as an entity, were sued. * * *

Many States, however, have applied the “trust” label to a variety of unincorporated entities that have little in common with this traditional template. But neither this rule nor Navarro limits an entity’s membership to its trustees just because the entity happens to call itself a trust. We therefore decline to apply the same rule to an unincorporated entity sued in its organizational name that applies to a human trustee sued in her personal name.

¹³ See *Juarez v. DHI Mortg. Co.*, No. CV H-15-3534, 2016 WL 3906296, at *2 (S.D. Tex. July 19, 2016) (“*Americold* provides that if the trust itself is suing or being sued, then further analysis is required to determine whether the trust is a traditional trust . . . or a business entity”); *Wells Fargo Bank, N.A. v. Transcon. Realty Investors, Inc.*, No. 3:14-CV-3565-BN, 2016 WL 3570648, at *3 (N.D. Tex. July 1, 2016) (“The citizenship of a trust may depend on whether it is a traditional trust or what some have called a business trust.”), appeal docketed, No. 16-11167 (5th Cir. July 29, 2016); cf. *Sutter Ranch Corp. v. Cabot Oil & Gas Corp.*, No. CIV-16-42-M, 2016 WL 3945834, at *1 (W.D. Okla. July 19, 2016) (“[T]he United States Supreme Court has recently held that the citizenship of a trust, in particular a business type trust, is the citizenship of all of its members, i.e., its beneficiaries.”).

Inheritance litigation can often muddle whether a party should be treated as a plaintiff or a defendant. In many inheritance disputes, the parties will not take traditional stances as plaintiffs and defendants. Take, for example, a trust dispute, in which a plaintiff challenges the validity of deathbed amendment to a revocable trust. The amendment eliminates the bequest of the plaintiff, reduces bequests to some individuals, increases bequests to others, and replaces one trustee with another. None of the other individuals harmed by the deathbed amendment wish to bring suit. In a typical state court action, where the diversity concept is not relevant, the plaintiff would simply name all of the affected persons, even those who would benefit from the challenge, as defendants. But a beneficiary who has seen his or share decreased as a result of the amendment, and who will gain if the trust contest is successful, who could be named as a nominal defendant because that beneficiary has not chosen to litigate as a plaintiff, nevertheless has an interest in the litigation aligned with the plaintiff.

A federal district court has the ability properly align the parties in a lawsuit so that diversity jurisdiction succeeds or fails based on the actual “interests” of the parties. To be properly aligned, an "actual and substantial" controversy must exist between the plaintiffs and defendants. As explained by the Sixth Circuit:

[t]he courts, not the parties, are responsible for aligning the parties according to their interests in the litigation. If the interests of a party named as a defendant coincide with those of the plaintiff in relation to the purpose of the lawsuit, the named defendant must be realigned as a plaintiff for jurisdictional purposes.

U.S. Fidelity v. Thomas, 955 F.2d 1085, 1089 (6th Cir. 1992) (quoting *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir.1987)).

The appropriate alignment of the parties in a case where jurisdiction is based on diversity "is not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' . . . and the 'primary and controlling matter in dispute.'" *Indianapolis Gas*, 314 U.S. 63, 69 (1941).

Accordingly, in a typical trust contest or other inheritance dispute with numerous parties, the court has the ability to determine who should be treated as a plaintiff and who should be treated as a defendant for purposes of determining whether complete diversity exists for diversity jurisdiction purposes.

3. Indispensable Party Rule

Indispensable party rules vary from state to state. Some states require that all interested persons be named as parties in a case. Some states have a somewhat relaxed rule that allows for virtual representation.

Rule 19 of the Rules of Civil Procedure sets forth the indispensable party rule.¹⁴

¹⁴ (a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

Federal caselaw is somewhat muddled on the necessity of joining all interested parties in litigation.

In *Tick v. Cohen*, 787 F.2d 1490 (11th Cir. 1986), plaintiffs sought broad relief against the trustee of a land trust, including accountings, appointment of a receiver, removal of the trustee, establishment of constructive or resulting trusts regarding assets removed from the trusts by the trustee, and compensatory and punitive damages. As explained by the Court:

As a general rule, all beneficiaries are persons needed for just adjudication of an action to remove trustees and require an accounting or restoration of trust assets." *Walsh v. Centeio*, 692 F.2d 1239, 1243 (9th Cir. 1982) (citations omitted). *See also Carey v. Brown*, 2 Otto 171, 172, 92 U.S. 171, 172, 23 L. Ed. 469 (1875) (citation omitted) ("The general rule is, that in suits respecting trust-property, brought either by or against the trustees, the cestuis que trust as well as the trustees are necessary parties."); *Griley v. Marion Mortgage Co.*, 132 Fla. 299, 182 So. 297, 300 (1937) (citing *Carey*).

On the other hand, a number of cases have taken a more practical approach to the necessity of requiring the joinder of all interested persons, if the interests of the nonjoinder persons will not be harmed. These cases suggests that a party affected by litigation will not need to be joined if (i) the absent party is aware of the litigation and chooses not to participate,¹⁵ or (ii) the absent

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or
(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

¹⁵ U.S. v. Bowen, 172 F.3d 682 (9th Cir. 1999) (Joinder of absent party unnecessary because party was aware of the action and chose not to claim an interest.); HDR Engineering, Inc. v. R.C.T. Engineering, Inc., No. 08-cv-81040, 2010 WL 2402908, at *4 (S.D. Fla. June 15, 2010) ("[C]ourts are reluctant to join a nonparty for the purpose of protecting that nonparty's interests when the nonparty itself has not claimed an interest in the outcome of a suit.").

party's rights are adequately protected by existing parties.¹⁶ These more practical interpretations of Rule 19 would seem to run counter to the rule set forth in *Tick v. Cohen*.

For purposes of preserving complete diversity, the ability to exclude non-diverse interested persons can be critical. If a plaintiff refrains from naming a non-diverse person as a party, and that party has notice of the litigation and chooses not to participate, diversity jurisdiction might be upheld. Conversely, a plaintiff who wishes to remain in state court should name non-diverse interested persons as defendants to preclude the ability to remove the action to federal court. Nevertheless, the court might realign persons according to their actual interest in the controversy to allow diversity jurisdiction.

4. Amount in controversy

Diversity jurisdiction requires that the amount in controversy exceed \$75,000. Two issues can arise in inheritance disputes in determining the amount in controversy.

First is whether, and to what extent, attorney fees are included in the amount in controversy. The Ninth Circuit has held that attorney's fees awarded under fee shifting statutes or contract is included in the amount in controversy, including future attorneys' fees. *Fritsch v. Swift Transp. Co. of Ariz., LLC*, 899 F.3d 785 (9th Cir. 2018) The Seventh Circuit has held that attorney fees that have not yet been incurred when jurisdiction is determined are not so includable. *Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955 (7th Cir. 1998)

Second is how to determine the amount in controversy when declaratory relief, as opposed to money damages, are sought. As explained by the Supreme Court, "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object in litigation." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333,347 (1977). "The amount in controversy, in an action for declaratory or injunctive relief, is the value of the right to be protected or the extent of the injury to be prevented." *Farkas v. GMAC*, 737 F.3d 338 (5th Cir. 2013).

5. Abstention

Even if a federal court has subject matter jurisdiction over a dispute, the court will decline to hear the matter if it would interfere with state court jurisdiction over the controversy. There are two abstention doctrines pursuant to which a federal court will decline jurisdiction: Younger Abstention Doctrine, and the Colorado River Abstention Doctrine.

a. Younger Abstention Doctrine

The Younger Abstention Doctrine, named for *Younger v. Harris*, 401 U.S. 27 (1971), bars federal courts from taking matters that will interfere with a pending state court action. Originally, the doctrine barred federal courts from hearing civil rights torts during the pendency of a state court criminal prosecution. The doctrine has been extended to bar a federal court from

¹⁶ *Wellin v. Wellin*, No. 2:14-cv-4067, 2015 U.S. Dist. LEXIS 19488, at 24-25 (D.S.C. Feb. 12, 2015) (Absent beneficiaries not necessary under Rule 19(a)(1)(B)(i) in lawsuit seeking to invalidate a trust because their interests were adequately represented by existing parties.).

taking jurisdiction over a matter while administrative proceedings have been initiated by a state agency.

b. Colorado River Abstention Doctrine

The Colorado River Abstention Doctrine allows a federal court to dismiss a case when a concurrent state proceeding provides a more appropriate forum.¹⁷ The doctrine requires federal courts to consider six factors in determining whether abstention in favor of a concurrent state proceeding is appropriate: (1) the order in which the courts assumed jurisdiction over property; (2) the relative inconvenience of the fora; (3) the order in which jurisdiction was obtained and the relative progress of the two actions; (4) the desire to avoid piecemeal litigation; (5) whether federal law provides the rule of decision; and (6) whether the state court will adequately protect the rights of all parties.¹⁸ The Supreme Court indicated that these criteria could not be applied according to a rigid formula; no one factor is dispositive.¹⁹

An example of a federal court declining to dismiss an interpleader action over a life insurance death benefit is *Life Insurance Company of North America v. Wagner*, 2016 U.S. Dist. LEXIS 50902 (D. Utah 2016). The Court explained:

There is no duplicative or parallel litigation because the state court does not have custody of the interpled insurance proceeds. However, even if the doctrine were applicable, after considering the foregoing factors, the Court concludes that abstention is not warranted. The state court does not have jurisdiction over the insurance proceeds. There has been no satisfactory showing that the federal forum is inconvenient or that hearing this interpleader action and accompanying cross-claim will result in piecemeal litigation. The state probate action seeking appointment of a special administrator and this interpleader action are not concurrent cases and the order of when jurisdiction was obtained is not determinative. The Court acknowledges that Utah law will be referenced in determining the rights of the parties. This lone factor, however, does not warrant the Court's abstention from hearing this matter. The final consideration is not determinative because, as *Wagner* notes, her rights would only be protected in the state court proceedings if the state court had custody over the interpled funds, which it does not.

In *Kaplan v. Kaplan*, 524 Fed. Appx. 547 (11th Cir. 2013), a beneficiary sued the personal representative for breach of fiduciary duty. The Court stayed the federal action pursuant to the Colorado River doctrine, explaining:

The nature of the probate proceedings reveals that parallel federal and state litigation would result in deleterious piecemeal litigation. See *Moorer*, 374 F.3d at 996; *Ambrosia Coal and Const. Co. v. Pages Morales*, 368 F.3d 1320, 1333, 95 Fed. Appx. 1320 (11th Cir. 2004). Alexander has an opportunity to object to the decisions that Leon has [**3] made in distributing the estate, see Fla. Prob. R. 5.150, 5.345, 5.400, and the resolution of those objections will dispose of or substantially limit Alexander's claims that Leon breached his

¹⁷ *Colorado River Water Conservation Dist. V. United States*, 424 U.S. 800 (1976); *Transouth Financial Corp. v. Bell* 149 F.3d 1292 (11th Cir. 1998).

¹⁸ *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 16-26.

¹⁹ *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. at 16-26.

fiduciary duties to the estate, see Fla. Stat. §§ 733.609(1), 733.901(1)-(2). For example, Alexander complains that Leon acted tortuously by settling a wrongful death survivor's claim for a low amount, but the probate court has approved the settlement and, in so doing, "relieved [Leon] of liability or responsibility for the compromise," see Fla. Stat. § 733.708. And the record supports the finding of the district court that a parallel federal action would be wasteful.

6. Rooker-Feldman Doctrine

Rooker-Feldman is a doctrine that holds that lower United States federal courts, i.e., courts other than the United States Supreme Court, should not sit in direct review of state court decisions, absent a specific jurisdictional grant of legislative authority.²⁰

This Court has observed that "[a] state court judgment is attacked for purposes of Rooker—Feldman 'when the [federal] claims are 'inextricably intertwined' with a challenged state court judgment,' or where the losing party in a state court action seeks 'what in substance would be appellate review of the state judgment.'" Weaver v. Tex. Capital Bank, N.A., 660 F.3d 900, 904 (5th Cir. 2011) (per curiam) (second alteration in original) (citations omitted). However, Rooker—Feldman "does not preclude federal jurisdiction over an 'independent claim,' even 'one that denies a legal conclusion that a state court has reached.'" *Id.* (quoting Exxon, 544 U.S. at 293). Indeed, the doctrine "generally applies only where a plaintiff seeks relief that directly attacks the validity of an existing state court judgment." *Id.* Nonetheless, a party cannot escape Rooker—Feldman by "casting . . . a complaint in the form of a civil rights action."

Houston v. Queen, 606 Fed. Appx. 725, 2015 U.S. App. LEXIS 3915, 2015 WL 1064375

Federal actions involving probate matters have been dismissed pursuant to the Rooker-Feldman Doctrine.²¹

7. Princess Lida Doctrine

The Princess Lida Doctrine applies to divest a federal court of jurisdiction when "(1) the litigation in both the first and second fora are in rem or quasi in rem in nature, and (2) the relief sought requires that the second court exercise control over the property in dispute and such property is already under the control of the first court." *Dailey v. Nat'l Hockey League*, 987 F.2d 172, 176 (3d Cir. 1993).

An action is quasi in rem within the meaning of Princess Lida when it involves the "'administration and restoration of corpus' and [is] not 'merely an adjudication of [a party's] right or interest.'" *See id.* at 77 (quoting *Princess Lida*, 305 U.S. at 466-67). In determining whether jurisdiction exists, courts must "endeavor to distinguish between direct interferences with or control of the res and adjudication of the rights of individuals who have an interest in the res." *Bassler v. Arrowood*, 500 F.2d 138, 142 (8th Cir. 1974). "Where the action is clearly in

²⁰ *Rooker v. Fidelity Trust*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

²¹ *Mann v. Boatright*, 477 F.3d 1140 (10th Cir. 2007)

personam, federal courts have the power to adjudicate the controversy." *Id.* at 141 (citing *Princess Lida* at 456, 466-67). However, "this line of distinction is not always clear." *Id.* at 142.

8. Probate Exception

The diversity statute, codified under 28 U.S.C. § 1332, does not mention probate matters. Historically, the Supreme Court observed that:

Generally, federal courts lack jurisdiction to probate a will or administer an estate. *Markham*, seeking to clarify this doctrine, held there is a distinction between a federal court's jurisdiction to "entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* at 495 (internal citations omitted). The latter fall outside the grant of diversity jurisdiction. *Id.*

Markham, for the second half of the 20th century held sway. Nearly a decade ago, however, the Supreme Court seized an opportunity to clarify this doctrinal exception in *Marshall v. Marshall*, 547 U.S. 293 (2006).

In *Marshall*, the Supreme Court provided a more precise definition to the probate exception, wherein it stated as follows:

[T]he 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 it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

Id. at 311-12. *Marshall* concluded that the probate exception did not apply. *Id.* In that instance, the claimant sought an in personam judgment against the defendant, not the probate or annulment of a will. *Id.*

Following *Marshall*, the probate exception has been interpreted as barring a federal district court from (1) probating or annulling a will; or (2) seeking to reach a *res* in custody of a state court by endeavoring to dispose of such property. *Id.* at 312-13. In order to determine whether the probate exception deprives a federal court of jurisdiction, *Marshall* requires a two-step inquiry into:

- (1) whether the property in dispute is estate property within the custody of the probate court; and
- (2) whether the plaintiff's claims would require the federal court to assume *in rem* jurisdiction over that property.

Curtis v. Brunsting, 704 F.3d 406, 409 (5th Cir. 2013) (interpreting *Marshall*, 547 U.S. at 312)).

The probate exception is sometimes referred to as the probate/domestic relations exceptions. As explained by Judge Posner, "The exception is usually described as two exceptions, one for probate and one for domestic relations. But the two exceptions are materially identical. The fact

that they are two rather than one reflects nothing more profound than the legal profession's delight in multiplying entities." *Struck v. Cook County Pub. Guardian*, 508 F.3d 858, 859 (7th Cir. Ill. 2007).

B. Survey of Diversity Jurisdiction Inheritance Cases

1. Probate Matters – Courts of Appeal

Carvel v. Carvel Foundation Inc., 230 Fed. Appx. 103 (2nd Cir. 2007)

Action by executor to confirm a foreign country money judgment against estate barred by probate exception because action would interfere with a complex pending proceeding in New York Surrogate's Court concerning the assets and property of the Estate.

Lefkowitz v. Bank of N.Y., 528 F. 3d 102 (2d Cir. 2007)

Counts where heir essentially sought disgorgement of funds that remained under the control of the probate court were dismissed for lack of jurisdiction under probate exception. Counts which sought damage from defendants personally (breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent misrepresentation, and fraudulent concealment) were within the jurisdiction of the court because these counts did not require the district court to assert control of any res in the custody of a state court.

United States of America v. Tyler, 528 Fed Appx. 193 (3rd Cir. 2013)

Judgment was *in personam* against appellants for their failure to pay the government its share of sale proceeds from property in estate that was subject to an IRS lien; the federal court did not remove any property from the probate court's control, and the probate exception did not apply.

McAninch v. Wintermute, 491 F. 3d 759 (5th Cir. 2007)

Claims for wrongful refusal to indemnify and defend against defendant Kansas Bankers Surety Company were not barred by probate exception. An *in personam* judgment was sought asking the court to declare that defendant had a duty to defend, that it breached the contract, and to find that it libeled plaintiff.

Robertson v. Robertson, Jr., 803 F.2d 136 (5th Cir. 1986)

Determination that decedent was a domiciliary of Louisiana would have no practical effect on the probate of the will or the Arkansas court's jurisdiction because under Arkansas law the probate court has jurisdiction over a probate proceeding from the filing of the petition until the final order for distribution is entered—a federal court determination will result solely in a decree between the parties to the federal suit.

Nahabedian v. OneWest Bank, FSB, 556 Fed. Appx. 389 (6th Cir. 2014)

District Court properly found that the probate exception did not apply to a case asserting claims of quiet title, fraud, and failure to comply with Michigan's foreclosure by advertisement law because the probate court did not have custody over the property at the time of the district court's decision.

Wisecarver v. Moore, 489 F. 3d 747 (6th Cir. 2007)

Claims for breach of fiduciary duty, breach of confidential relationship, undue influence, and fraud regarding events prior to Decedents death were not barred by probate exception because claims sought in personam jurisdiction over Defendant and did not seek to probate or annul a will . Assets were also allegedly transferred during Decedent's lifetime and therefore were not part of estate at death. The probate exception barred claims to invalidate the will and seeking return of assets obtained pursuant to will.

Beasley v. Coleman, 560 Fed. Appx. 578 (7th Cir. 2014)

The probate exception barred the estate representative's claim against his former attorney challenging how the probate court was administering the estate.

Struck v. Cook County Pub. Guardian, 508 F. 3d 858 (7th Cir. 2007)

A son filed an action claiming his constitutional rights were violated by a guardian's refusal to let him visit his mother. The action was dismissed because the son's claims fell within probate exception, as mother and her estate were a res within the control of the guardian. The son's right to visit his mother and to access her assets, records and mail were at the heart of the guardian's responsibilities, and the guardian was subject to state court control.

Hassanati v. International Lease Finance Corp., 2016 U.S. App. LEXIS 5300 (9th Cir. 2016)

District Court correctly denied plaintiffs' motion for appointment as decedents' personal representatives because under the probate exception, federal courts lack jurisdiction over probate matters. The appointment of a personal representative falls within the probate exception because it, essentially, seeks that a court issue letters of administration.

Dunlap v. Nielsen, 922 F.3d 1036 (10th Cir. 2019)

The Court adjudicated the timeliness of a creditor claim against an estate. "Federal courts of equity have jurisdiction to entertain suits in favor of creditors, legatees, and heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." Therefore, determining the timeliness of a creditor claim against an estate is not barred by the probate exception.

Stuart v. Hatcher, 757 Fed. Appx. 807 (11th Cir. 2018)

Court dismissed a breach of fiduciary duty claim against the executor of an estate under the probate exception. Plaintiff alleged that brother breached his fiduciary duty as executor of the father's estate – the estate was still the subject of pending proceedings in the Georgia probate court. In determining whether the probate exception applied, court looked "past the plaintiff's theory of relief and consider the effect a judgment would have on the jurisdiction of the probate court." Plaintiff claimed that the value of the estate, and plaintiff's interest, had been reduced as a result of defendant's mismanagement - these claims center around the assets of the estate and the probate exception was implicated. Plaintiff also sought a constructive trust – under Georgia law, the probate court retains control over the assets of an estate until the probate court

issues a final accounting and settlement. Because no final accounting and settlement had yet been entered, the probate court maintained control over the assets in dispute.

Michigan Tech Fund v. Century Nat'l Bank, 680 F.2d 736 (11th Cir. 1982) (Prior to *Marshall*)

Michigan Tech Fund sued personal representative of the estate and trustee of the testamentary trust, and decedent's widow for an interpretation of the will, a judgment of breach of agreement against estate for decedent's failure to execute a will benefitting the Fund, reformation of a mortgage, and a declaratory judgment that the widow breached her contract to execute a will benefitting the fund. The Court found that probate exception did not bar any of the claims, holding that (1) will interpretation is within the jurisdiction of the Court, (2) the probate exception also does not foreclose a creditor from obtaining a federal judgment that the creditor has a valid claim against the estate for a certain amount, (3) reformation of a mortgage would not disturb any property currently under control of the probate court because widow took the mortgage free and clear, and (4) breach of agreement to make a will claim will not interfere with any property under the probate court's control.

2. Probate Matters – Lower Courts

Abercrombie v. College, 438 F. Supp. 2d 243 (D. N.Y. 2006)

An estate administratrix's suit to rescind deed based on undue influence and fraud was not barred by the probate exception. The suit did not interfere with probate proceedings but concerned tort allegations of undue influence.

Brown v. Brown, D.N.M (April 27, 2015)

Court held that probate exception bars an action seeking declaratory judgment that a will is invalid and that decedent died intestate, because a federal court cannot probate or determine the validity of a will.

Capponi v. Murphy, 772 F. Supp. 2d 457 (D. N.Y. 2009)

Claims by Plaintiff, as personal representative of Decedent's estate, to award him money allegedly wrongfully withheld from Decedent during Decedent's lifetime do not fall within the probate exception. The Court is not being asked to administer decedent's estate, and because the money at issue was not in decedent's possession at the time of her death, decedent's estate is not exercising in rem jurisdiction over the funds. "Where a plaintiff seeks to 'recover assets allegedly in [a defendant's] possession so that they may be returned to the estate' the probate exception does not apply." *Id.* At 466.

Carpenter's Pension Trust Fund – Detroit and Vicinity v. Century Truss Company, 2015 U.S. Dist. LEXIS 39106 (E.D. Mich. 2015)

Probate exception plainly applied to bar action seeking recovery against Estate, because funds are currently in the hands of the state probate court. As an action *in rem*, the Court's exercise of jurisdiction would implicate the purposes of the probate exception because it would disturb the state court's probate proceedings over property in its custody.

Critchlow v. Waner, 617 Fed. Appx. 664, 2015 U.S. App. LEXIS 9790, 2015 WL 3620621

Court affirmed dismissal of actions for breach of fiduciary duty, fraud, and conversion related to estate administration on grounds of untimeliness, but court noted that federal subject matter jurisdiction otherwise existed, and that probate exception to federal court jurisdiction did not bar these claims.

Estate of Miller v. Miller, 51 F. Supp. 3d 861 (D. Ark 2014)

If state law authorizes a suit *inter partes* to annul a will or to set aside the probate of a will, and the suit is enforceable in a court of general jurisdiction within the state, a federal court may entertain jurisdiction over the will contest. The action authorized by state law must not be incidental to, or an ancillary proceeding of, the prior probate action for federal jurisdiction to exist. A declaratory judgment action to declare a will invalid is not cognizable under the general jurisdiction of Arkansas's circuit courts – the validity of a will may be adjudicated by means of an *in rem* probate proceeding. Therefore, the court lacked jurisdiction over the claims to annul the will.

Ferreira v. Kerr, 2006 U.S. Dist. LEXIS 3160 (D. Hawaii)

Plaintiffs' claim that a new will and other trust documents revoke the prior will and name plaintiff as personal representative, trustee, and beneficiary held barred by the probate exception. Because the court is asked to review conflicting will and trust documents, the Court is essentially being asked to determine which document represents Decedent's last will and testament and to ascertain the testamentary intent of the Decedent, which would conflict with the probate court's jurisdiction.

Fisch v. Fisch, 2014 U.S. Dist. LEXIS 134678 (D. N.Y. 2014)

Although styled as an *in personam* claim against Defendant for monetary damages, Plaintiff made no allegations that Defendant engaged in any wrongdoing, and sued Defendant in her capacity as personal representative of the estate, not for any of her own actions. Plaintiff was really asking the Court to order a distribution that implicates the *res* of the estate, bringing his claim squarely within the probate exception and outside the subject matter jurisdiction of this Court.

Fischer v. Hartford Life Ins. Co., 486 F. Supp. 2d 735, 2007 U.S. Dist. LEXIS 32805

Court remanded action which sought to recover life insurance proceeds. Estate used a specialized cause of action, called a Citation to Recover Assets, pursuant to the Illinois Probate Act.

The Court explained: "The citation proceeding is a special administrative process with unique procedural and evidentiary rules designed by the Illinois legislature to allow expeditious estate administration and resolution of disputes over property that may or may not belong to the estate before the court. 755 ILCS 5/16-1. The citation proceeding is thus an example of the specialized probate-related proceedings that give rise to state courts' unique proficiency in handling probate disputes and exemplifies the modern justifications for the probate exception"

In re Robert G. Wallace Trust v. Schaub, 2014 U.S. Dist. LEXIS 150808 (E.D. Cal. 2014)

Action dismissed because Plaintiff's claims requesting determination of validity of provision in testamentary instrument fall squarely under probate exception.

Kindred Nursing Centers East, LLC v. Estate of Nyce, 2016 U.S. Dist. LEXIS 80256 (D. Vermont 2016)

Probate exception did not apply to tort claims because exception requires more than the possibility that claims might "intertwine" with litigation in probate court.

Long v. Blair, 650 F.Supp.2d 542 (S.D.W.Va 2009)

A motion to dismiss a complaint to impeach the last will and testament of decedent, based on probate exception, was denied. The federal court determined that the probate exception did not bar the will contest, by looking at the state statutory scheme. The West Virginia Code does not limit will challenges to state probate courts, but instead permits a state court of general jurisdiction to resolve will contests. W.V. Code section 41-5-11. The federal court determined that when the state scheme permits a state court of general jurisdiction to resolve will contests, there is no basis for invoking the probate exception to bar the exercise of federal subject matter jurisdiction.

McIntyre v. U.S., 2006 U.S. Dist. LEXIS 66417 (D. Mass. 2006)

Action that asked court to determine whether the proper individuals have been named as administrators of the estate is the essence of a state probate matter and is barred by the probate exception to federal jurisdiction.

Parks v. Kiewel, 2015 U.S. Dist. LEXIS 155979 (D. Kan. 2015)

One claim seeking a mixture of relief – both in personam and an order disinheriting defendant - is barred by the probate exception because part of it would require court to administer, if not annul, the will. In a single claim plaintiff sought damages, to mandate production of property, and to require defendant to not inherit any property.

Sarhan v. Rothenberg, 2008 U.S. Dist. LEXIS 121855 (S.D. Fla. 2008)

Claims required a review of the work that the probate judge engaged in over ward's guardianship proceeding, a redistribution of the assets belonging to the guardianship res, and direct interference with a pending matter in the state court, and thus the probate exception squarely applied to bar the claims.

Solow v. Berger, 2011 WL 1045098, at *2 (E.D. Pa. Mar. 22, 2011)

Will contest dismissed pursuant to probate exception because "for plaintiffs to recover on any claim . . . there would have to be findings that the 1996 will is invalid and that the 1994 will is valid, effectively requiring the Court to annul the 1996 will and probate the 1994 will."

Vanderburg v. Vanderberg, 2007 WL 1342091, at *1 (N.D. Tex. May 1, 2007)

Dismissed action to determine heirship, as such is “clearly within the province of the probate court.

Wilmington Trust v. Estate of McClendon, 287 F. Supp. 3d 353, 2018 U.S. Dist. LEXIS 26961, 2018 WL 1010489

Court allowed creditor claim against estate to proceed. (Case also has lengthy discussion of Younger Abstention Doctrine.)

3. Trust Matters – Courts of Appeal

Mercer v. Bank of N.Y. Mellon 2015 U.S. App. LEXIS 5995(2nd Cir. 2015)

Court dismissed challenge for trust accountings and trust contest pursuant to probate exception, because trust assets were in custody of surrogate’s court.

Kennedy v. Trs. Of the Testamentary Trust, 406 Fed. Appx. 507 (2nd Cir. 2010)

In action where plaintiff claimed to be a beneficiary of a class gift in President Kennedy’s will, plaintiff sought order compelling defendant trustee of President Kennedy’s testamentary trust to investigate plaintiff’s claim, and also compelling defendant upon proof of his claim to pay him funds from the testamentary trust. The probate exception applied to plaintiff’s request for an order to pay funds from the trust, but did not apply to request for order compelling defendant to investigate the claim.

Lee Graham Shopping Ctr., LLC v. Estate of Kirsch, 777 F. 3d 678 (4th Cir. 2015)

Court held probate exception did not preclude jurisdiction because case required court to interpret the terms of trusts, not the terms of a will; also, the judgment requested would not order distribution of property out of estate, and interest at issue was held by the trust, not the probate court.

Curtis v. Brunsting, 704 F. 3d 406 (5th Cir. 2013)

Action for breach of fiduciary duty against trustees of inter vivos trust held not to implicate probate exception because the Trust was not property within the custody of the probate court.

Evans v. Pearson Enters., 434 F.3d 839 (6th Cir. 2005)

The probate exception did not bar claim for breach of trust, an in personam action, because it was unrelated to any probate proceeding.

4. Trust Matters – Lower Courts

Downey v. Keltz, Case No. 2012 WL 280716 (N.D. Ill. 2012)

Probate exception did not bar claim for breach of fiduciary duty for failure to account, however, court for removal of trustee would affect the administration of the estate and thus fell within the probate exception.

Kiser v. Olsen, 2015 U.S. Dist. LEXIS 24889 (D. Ohio 2015)

The probate exception did not apply to bar action seeking constructive trust over property owned by an inter vivos trust because the trust property was not being administered or distributed through proceedings in a state probate court; court also considered that even if the probate exception had some application to inter vivos trusts, it did not in this case because there was an estate for decedent, and therefore no cognizable argument that the trust was a will substitute.

Lucas v. Acheson, 2015 U.S. Dist. LEXIS 19133 (D. Ala. 2015)

Action seeking to determine the amount of a beneficiary's share in a trust was properly before the court. Property conveyed to a trust is not part of a settlor's estate, therefore the trust is not in the custody of the probate court, and the probate exception is inapplicable to disputes concerning administration of the trust.

Marcus v. Quattrocchi, 715 F. Supp 2d 524 (S.D.N.Y. May 27, 2010)

The probate exception did not bar beneficiaries' claims based on tort, breach of fiduciary duty, fraud, and accounting because beneficiaries did not ask the court to probate a will, administer an estate, or exercise control over a res in state court custody. The Court notes that the probate exception is narrow and should not be used as an excuse to decline to exercise jurisdiction merely because an action involves a probate related matter.

Morin v. Blevins, 2007 WL 4557108, at *3 (E.D. Cal. Dec. 21, 2007)

Action concerning construction of trust instruments and demand for an accounting dismissed. "The power to compel an accounting lie at the heart of the probate court's jurisdiction over the administration of trusts and constitute a portion of the core of the court's authority to administer trusts. It is precisely these powers Plaintiff asks this court to envoke [sic]. The judicial assistance Plaintiff seeks lies squarely within the confines of estate administration . . ."); cf. *Balestra v. Balestra-Leigh*, 2010 WL 2836400, at *4 (D. Nev. July 15, 2010) (declining jurisdiction because a "determination of heirship and rights in distribution of an estate is clearly at the core of the probate court's functions");

Oliver v. Hines, 943 F. Supp. 2d 634 (D. VA 2013)

An action to invalidate an inter vivos trust was not subject to dismissal under the probate exception because the scope of the probate exception is limited to actual probate matters, and a suit to invalidate an inter vivos trust does not require a federal court to assume in rem jurisdiction over property subject to state court jurisdiction.

Powell v. Best, 2006 Bankr. LEXIS 4759 (E.D. Penn. 2006)

Probate exception does not apply to a determination of the validity of a trust because it would not disturb or affect the possession of property in the custody of the probate court.

Schembechler v. Schembechler, 2011 U.S. Dist. LEXIS 35765 (D. Ohio 2011)

The probate exception did not prevent claims for information regarding an accounting of a trust because such information would not interfere with pending probate of estate in Florida.

Slaugh v. Neidigh, 2016 U.S. Dist. LEXIS 110977 (D. Idaho 2016)

Complaint was essentially a declaratory judgment action that touched on issues of undue influence but also speaks to issues surrounding a trustee's powers, and was not barred by probate exception, although bid to have codicil declared invalid was not within the jurisdiction of the court.

5. Inheritance Torts

Firestone v. Galbreath, 25 F.3d 323, 1994 U.S. App. LEXIS 12446, 1994 FED App. 0178P (6th Cir.)

Court took jurisdiction to decide tort of intentional interference with expectancy under Ohio law.

Lefkowitz v. Bank of New York, 528 F.3d 102 (2nd Cir. 2007).

Court held that tort claims of breach of fiduciary duty and fraudulent misrepresentation, which sought "damages from [d]efendants personally," did not ask the court to exercise control over a res under a probate court's jurisdiction. "A federal court properly "exercise[s] its jurisdiction to 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) (internal quotation marks omitted). 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."

Popple v. Crouse, No. 06-CV-01567, 2007 U.S. Dist. LEXIS 58523, 2007 WL 2071627, at *1 (D. Conn. July 13, 2007)

Court allowed plaintiff's claims "for unjust enrichment, breach of fiduciary duty, conversion, and theft" to proceed, because "the purpose of this action is to recover assets allegedly in Crouse's possession so that they may be returned to the estate."

6. Beneficiary Designation Litigation

Belanger v. Salvation Army, 556 F.3d 1153, 2009 U.S. App. LEXIS 2057, 21 Fla. L. Weekly Fed. C 1437 (11th Cir.).

Personal Representative of Estate brought diversity action against charity over recovery of bank account paid to charity pursuant to a pay on death designation. Case was decided on the merits with no discussion of any jurisdictional issues.

Filsaime v. Caruso, 2015 U.S. Dist. LEXIS 4207 (E.D. Penn. 2015)

Action concerned the simple matter of whether or not the beneficiary designation of a life insurance policy has been superseded by collateral assignments of the policy between the decedent and certain lenders, and, as such, it is nothing more than a matter of contract interpretation. Because complaint sounds in contract and not in probate, the court may exercise jurisdiction over the matter.

Libonati v. Ransom, 664 F. Supp. 2d 519 (D. Md. 2009)

Dispute over transfer on death designation for bank allowed to proceed in diversity. As explained by the court:

However, as long as diversity requirements are met, federal jurisdiction over such a matter is entirely appropriate. First, Plaintiffs' claim is distinct and separate from the probate claim filed in Orphans' Court. There is no danger that this Court will interfere with the proceedings of the Orphans' Court, "save to the extent that the state court (will be) bound by the judgment to recognize" the rights adjudicated herein. *Akrotirianakis v. Burroughs*, 262 F. Supp. 918, 923 (D. Md. 1967) (concluding that federal court review of an executor's sale of the personal property of the decedent would not interfere with the Orphans' Court's administration of the estate). Second, this Court is not assuming probate jurisdiction; indeed, the Orphans' Court has no jurisdiction to hear the matter pending before this Court. Third, this Court will not be asserting control of property within possession of the Orphans' Court. Plaintiffs dispute the validity of an intervivos transfer of non probate assets, not the administration of res under the control of the probate court.

Lipari v. Sullivan, 2018 U.S. Dist. LEXIS 212127, 108 Fed. R. Evid. Serv. (Callaghan) 220, 2018 WL 6604251

Court allowed claim of undue influence regarding the change of a beneficiary designation form to proceed.

7. Interpleader

N.Y. Life Ins. & Annuity Corp. v. Cannatella, 550 Fed. Appx. 211, 214 (5th Cir. La. 2013)

Life insurance company interpleaded life insurance death benefit claimed by both former spouse and surviving spouse, applying state law as set forth in life insurance contract. Court also adjudicated whether death benefit was community property under applicable state law.

Minn. Life Ins. Co. v. Kagan, 724 F.3d 843, 845 (7th Cir. Ill. 2013)

Life insurance company interpleaded life insurance death benefit claimed by both surviving spouse and children from a former marriage. Change of beneficiary designation form had been allegedly filled out and signed, but not returned to insurance company. Court upheld rejection of

beneficiary designation, finding lack of substantial compliance with contract requirements for change of beneficiary.

Elinoff v. UBS Fin. Servs., No. 11 C 1027, 2011 U.S. Dist. LEXIS 78913 (N.D. Ill. July 20, 2011)

Competing declaratory relief and interpleader claims dismissed over ownership of brokerage accounts:

Here, UBS refused to pay Elinoff because it faced conflicting claims to the account. Accordingly, the "practical effect" of Elinoff's suit would be "similar to that of a successful will contest" because Elinoff seeks possession of a portion of Mildred's assets and there is currently pending in the Circuit Court of Cook County a probate matter regarding Mildred's assets and Estate. *Id.* (finding that the probate exception applied even where no state court probate proceedings had been initiated); *cf. Hamilton v. Nielsen*, 678 F.2d 709, 710 (7th Cir. 1982) (allowing federal jurisdiction where the probate of the will in state court had essentially concluded and the federal suit did not "seek to change the distribution of the assets of the estate."). Elinoff's suit seeks a determination of the ownership of assets and, as such, is closely related and ancillary to a will contest. The Court therefore finds that Elinoff's lawsuit falls within the probate exception and the Court will avoid interfering with ongoing state court proceedings. That Elinoff's UBS account is more akin to a trust or a "will substitute" than a will does not alter the Court's analysis. *Storm*, 328 F.3d at 947 (applying probate exception to a matter involving an *inter vivos* trust and noting that "we are loath to throw open the doors of the federal courts to disputes over testamentary intent simply because a decedent chose to use a will substitute rather than a traditional will.").

III. Federal Question Litigation of Inheritance Disputes

Some claims and causes of action that arise under Federal law may only be brought in Federal court, such as bankruptcy proceedings. Other causes of action under Federal law may be brought in state or Federal court, unless the statute giving rise to the cause of action limits the jurisdiction to the Federal system.²² A claim for benefits under ERISA, for example, may be brought in state or Federal court. 29 U.S.C. Section 1132.

It is presently uncertain whether the "probate exception" applies to federal question jurisdiction, precluding the case from being heard in the Federal court system. The probate exception is thought to have arisen only for diversity jurisdiction purposes, and some courts have accordingly restricted its application to diversity jurisdiction. The Eleventh Circuit has held that the probate exception to federal question jurisdiction does not apply.

Care should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called "probate exception" to statutory diversity jurisdiction. That exception relates only to 28 U.S.C. § 1332 (1982), and has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases. *Cf. Covell v. Heyman*, 111 U.S. 176, 179-80, 4 S. Ct. 355, 357, 28 L. Ed. 390 (1884) (property in custody of state

²² *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981).

court may be disturbed by federal court "exercis[ing] jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States").

In re Goerg, 844 F.2d 1562, 1565 (11th Cir. Ga. 1988) (footnotes omitted)

Courts in the Third Circuit have suggested, but not explicitly stated, that the probate exception does not apply in federal question cases.²³

The Six Circuit²⁴ and the Seventh Circuit have held that the probate exception does bar jurisdiction of federal questions. In *Jones v. Brennan*, 465 F.3d 304, 306-308 (7th Cir. Ill. 2006), the Court explained:

When Congress in the Judiciary Act of Sept. 24, 1789, § 11, 1 Stat. 73, conferred on the federal courts a diversity jurisdiction limited to "all suits of a civil nature at common law or in equity," which is narrower than Article III's definition of the federal judicial power, probate and domestic relations were, the courts interpreting the statute held, excluded because they were thought to be part of neither common law nor equity. *Marshall v. Marshall*, supra, 126 S. Ct. at 1746; *Lloyd v. Loeffler*, supra, 694 F.2d at 491; *Csibi v. Fustos*, supra, 670 F.2d at 136; *13B Wright, Miller & Cooper*, supra, at 460. Congress used the same language when in the Judiciary Act of March 3, 1875, § 1, 18 Stat. 470, it conferred a general federal-question jurisdiction on the federal courts, by which time the probate and especially the domestic-relations exceptions had become established in the case law. E.g., *Barber v. Barber*, 62 U.S. (21 How.) 582, 584, 16 L. Ed. 226 (1859); *Case of Broderick's Will*, supra. The implication is that the exceptions were probably intended to apply to federal-question cases too.

If a claim is brought in state court concerning a Federal question, any defendant may seek removal of the cause of action to Federal court. 28 U.S.C. Section 1441(c).

A. Bankruptcy Court

Bankruptcy court do not typically adjudicate inheritance disputes for two reasons. First is the probate exception set forth in *Marshall*. Second is the constitutional prohibition of bankruptcy courts to adjudicate claims.

23 "Although the Third Circuit has never addressed the issue, it has repeatedly described the probate exception as an "exception to diversity jurisdiction," see *Three Keys*, 540 F.3d at 222, 226, 227; *Golden ex. rel. Golden v. Golden*, 382 F.3d 348, 352, 354, 357 (3d Cir. 2004); *Marshall v. Lauriault*, 372 F.3d 175, 179-82 (3d Cir. 2004); *Moore v. Graybeal*, 843 F.2d 706, 709 (3d Cir. 1988), and has determined that the domestic relations exception — a judicially-created jurisdictional limitation that is closely related to the probate exception — does not apply in federal question cases, see *Flood v. Braaten*, 727 F.2d 303, 307 (3d Cir. 1984) ("[T]he domestic relations exception per se applies only to actions in diversity.")"

United States v. Tyler, 2012 U.S. Dist. LEXIS 34093, 11-12 (E.D. Pa. 2012)

24 *Tonti v. Petropoulos*, 656 F.2d 212, 215 (6th Cir. 1981) (finding that "the federal courts have no probate jurisdiction" in a 42 U.S.C. § 1983 action).

The case of *Ortiz v. Aurora Health Care, Inc.*, 665 F.3d 906 (7th Cir.2011) held that a bankruptcy court lacked constitutional authority to enter final judgment on debtors' claims that were grounded in Wisconsin law.

Although bankruptcy courts do not normally hear inheritance matters, there are some exceptions.

In *West v. Chrisman*, 518 B.R. 655 (M.D. Fla. 2014), the bankruptcy court adjudicated the proper amount of a personal representative's fee.

B. ERISA

The Employee Retirement Income Security Act ("ERISA") is a comprehensive employee benefits statute governing employer and employee rights and obligations. Most retirement plans established by private sector employers are governed by ERISA.

ERISA provides a comprehensive framework, inter alia, of the rules pursuant to which benefits will be paid to employees and their survivors for plans governed by ERISA. Employee benefit claims governed by ERISA can be brought in state court or in Federal court. The federal courts have exclusive jurisdiction of ERISA claims, with the general exception of claims for benefits or to enforce or clarify rights under Section 502(a)(1)(B). Claims under Section 502(a)(1)(B) may be brought either in federal court or state court. Also, claims styled as state-law causes of action might be determined to be, in substance, ERISA causes of actions, allowing federal question jurisdiction.

A few examples of ERISA litigation include:

Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285 (U.S. 2009)

ERISA preempts state law regarding who can inherit from an ERISA governed life insurance benefit.

Carpenter's Pension Trust Fund – Detroit and Vicinity v. Century Truss Company, 2015 U.S. Dist. LEXIS 39106 (E.D. Mich. 2015)

Probate exception plainly applied to bar action seeking recovery against Estate, because funds are currently in the hands of the state probate court. As an action *in rem*, the Court's exercise of jurisdiction would implicate the purposes of the probate exception because it would disturb the state court's probate proceedings over property in its custody.

Fluker v. Anderson, No. 4:06-cv-3394, 2008 WL 115103, at *2 (S.D. Tex. Jan. 10, 2008)

Court held that the probate exception was inapplicable where the plaintiff's claim sought to recover funds transferred outside of probate proceedings that were not in the custody of the state

Metro. Life Ins. Co. v. Gicana, 2018 U.S. Dist. LEXIS 56960, 2018 WL 1634115

Court permitted interpleader of life insurance proceeds from ERISA plan, and cross claims of claimants, to proceed. "Here, the Court is not probating a will, administering an estate, or touching any property that is in the probate court's custody. Rather, the Court is being asked to determine the proper [*8] beneficiary to certain ERISA plan life insurance and retirement

proceeds, none of which is part of an estate or in the custody of the probate court. Therefore, the probate exception does not apply, and the Court may exercise jurisdiction over the Crossclaims.”

C. FEGLI

The Federal Employees' Group Life Insurance Program (“FEGLI”) is the largest group life insurance program in the world.²⁵ Claims against the Federal government for benefits under FEGLI must be brought in Federal court. Claims concerning FEGLI benefits, not directly against the Federal government, may be brought in Federal or state court.

In *Hillman v. Maretta*, 133 S. Ct. 1943 (U.S. 2013), the Court explained:

“The Federal Employees’ Group Life Insurance Act of 1954 (FEGIA), 5 U. S. C. §8701 et seq., establishes a life insurance program for federal employees. FEGIA provides that an employee may designate a beneficiary to receive the proceeds of his life insurance at the time of his death. §8705(a). Separately, a Virginia statute addresses the situation in which an employee’s marital status has changed, but he did not update his beneficiary designation before his death. Section 20-111.1(D) of the Virginia Code renders a former spouse liable for insurance proceeds to whoever would have received them under applicable law, usually a widow or widower, but for the beneficiary designation. Va. Code Ann. §20-111.1(D) (Lexis Supp. 2012). This case presents the question whether the remedy created by §20-111.1(D) is pre-empted by FEGIA and its implementing regulations. We hold that it is.”

D. Copyright

Copyright law is governed exclusively by Federal law. Copyright law can control, under some circumstances, the inheritability of copyrights, and their renewal, and termination by inheritors of copyrights.

The ownership of a copyright, as between competing heirs in an estate, could be resolved in state court. However, the published decisions typically involve the estate and/or heirs against third parties and almost always involve claims of infringement. Therefore, because an infringement claim or other remedy under the Copyright Act is virtually certain to be brought with a claim regarding ownership, the copyright cases can be heard in federal court.

In, *Estate of Maier v. Goldstein*, 2017 U.S. Dist. LEXIS 191294, (N.D. Ill. 2017) the court explained

[W]hile divvying up an estate falls squarely within the probate exception, merely increasing it does not." *Id.* Like *Gustafson* and *Jimenez*, this case involves claims that could add to Maier's estate, but would not reallocate the estate's assets among competing claimants or otherwise interfere with the estate administration.

Defendants argue that this case "interfere[s]" with a probate proceeding, *Wolfram*, 78 F. Supp. 3d at 763, because it affects property that might in the *future* become part of the estate if this Court determines "that the intellectual property belongs to the Maier estate."

²⁵ <https://www.opm.gov/healthcare-insurance/life-insurance/>, October 27, 2019.

R. 50 at 2. But under *Gustafson* and *Jimenez*, what matters for purposes of the probate exception is whether the case interferes with property that is *currently* part of the estate. *Gustafson*, 546 F.3d at 400; *Jimenez*, 597 F.3d at 24. This is also what the *Wolfram* court explained in a later passage that defendants ignore: "a claim only interferes if it seeks a judgment against a specific thing and that thing is *currently* subject to the *in rem* jurisdiction of a state court. . . . If [as in *Gustafson*] the assets need to be added to the estate they are, of course, not currently [*13] a part of the estate and so not (yet) under control of the probate court." 78 F. Supp. 3d at 763-65 (emphasis added).

The probate exception thus does not deprive the Court of its exclusive jurisdiction over plaintiff's copyright claim and original jurisdiction over plaintiff's Lanham Act claims. And because "there is at least one colorable federal claim not barred by the probate exception," this Court "has jurisdiction over the plaintiff's state law claims by virtue of the court's supplemental jurisdiction." *Jones*, 465 F.3d at 309.

Of course, if there is no claim under the Copyright Act or the plaintiff does not plead one, dismissal is a possibility. The Central District of California dismissed a case involving inherited copyrights where insufficient Copyright Act remedies were pled to keep the dispute in federal court. *Sowande v. Moore*, 2012 U.S. Dist. LEXIS 199164 United States District Court for the Central District of California September 24, 2012, Decided; September 24, 2012, Filed

Federal courts have exclusive jurisdiction over actions that arise under federal copyright laws, but a case does not arise under federal copyright laws merely because the subject matter of the action involves a copyright. 28 U.S.C. § 1338; *Topolos v. Caldewey*, 698 F.2d 991, 993 (9th Cir. 1983); *Vestron, Inc. v. Home Box Office, Inc.*, 839 F.2d 1380, 1381 (9th Cir. 1988) ("Although the action clearly involves a copyright, this fact alone does not satisfy federal jurisdictional requirements.") (citations omitted). In general, "courts decide whether a case arises under the copyright laws by focusing on the nature of the principal claim asserted by the plaintiff." *Topolos*, 698 F.2d at 993. This has variously been described as the "primary and controlling purpose," the "principal issue," the "fundamental controversy," and the "gist" or "essence" of the plaintiff's claim. *Id.* (citations omitted); see also *Dolch v. United. Cal. Bank*, 702 F.2d 178, 180 (9th Cir. 1983).

The Ninth Circuit follows the majority rule as outlined in *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), to determine if copyright subject matter jurisdiction exists. See *Scholastic Entertainment v. Fox Entertainment Group, Inc.*, 336 F.3d 982, 986 (9th Cir. 2003). Under that rule, "an action 'arises under' the Copyright Act 'if and only if' (1) the complaint seeks a remedy expressly granted by the Copyright Act; (2) the complaint requires interpretation of the Copyright Act; or (3) federal principles should control the claims." *Id.* at 986 (citation omitted).

In an action for infringement plaintiff necessarily must establish ownership of a valid copyright and copying by the defendant. Generally, "when such ownership is the sole question for consideration . . . federal courts [are] without jurisdiction." *Topolos*, 698 F.2d at 994; see also *XCEL Data Sys., Inc. v. Best*, 2009 U.S. Dist. LEXIS 34904, at *21

(E.D. Cal. Mar. 31, 2009) ("questions involv[ing] the 'bare declaration of ownership' . . . fall[] within the purview of state law, as opposed to the question presented here which demands application of federal copyright laws to determine the parties' respective ownership interests").

Plaintiff's claim is not one for copyright infringement. Rather, Plaintiff's claim is, in essence, one for state-law fraud in which she Plaintiff seeks damages and an order transferring "ownership of the copyrights of Fela Sowande to the Plaintiff upon determination of the validity of Plaintiff's claim to a position of inheritance pursuant to [the Copyright Act]." (See Opp'n at 16-17.) This suit, then, "is merely one to establish valid title" to copyrighted works, and "[t]herefore, the case is not one which arises under the copyright laws so as to invoke the jurisdiction of this Court." Elan Associates, Ltd. v. Quackenbush Music, Ltd., 339 F. Supp. 461, 462 (S.D.N.Y. 1972).

E. Indian Affairs - NAGPRA

State courts, typically ones that handle probate matters, control where and how a deceased's remains are handled.

A Federal statute, the Native American Graves Protection and Repatriation Act, 25 U.S.C. Section 3301 et seq. provides protection and control to Native American cultural items, which include human remains, funerary objects, sacred objects, and objects of cultural patrimony.

NAGPRA provides Native Americans an interest of ownership or control of these protected items in two circumstances: (1) if the items are found excavated or discovered on federal or tribal lands, and (2) if the items are possessed or controlled by museums (other than the Smithsonian Institution) receiving federal funds.

Regarding human remains, once the cultural affiliation of Native American Human Remains is established, a lineal descendant of the Native American or the tribe may request the return of the remains. Section 3005(a). See also *Geronimo v. Obama*, 725 F.Supp. 2d 182 (D. D.C. 2010), denying an attempt by descendants of the legendary Apache warrior, Geronimo, to recover his remains from Yale University.²⁶

In *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255 (3rd Cir. 2014), a dispute arose over the burial location of Jim Thorpe, noted by the court to possibly be "the greatest Olympian of all time." The plaintiff attempted to apply NAGPRA to the dispute, in an attempt to relocate the body to

²⁶ "The plaintiffs assert that they are lineal descendants of the legendary Apache warrior, Geronimo. (Compl. P 1.) Geronimo surrendered to federal troops in 1886. He was held prisoner in Florida and Alabama, and eventually was transferred to Fort Sill, Oklahoma where he was buried "in the dress of a chief with his possessions" upon his death. (Id. PP 28-29, 31, 40.) According to the complaint, in 1918 or 1919, a group of Yale University students who were members of the organization named the Order of Skull and Bones opened the tomb of Geronimo and removed his skull, other bones, and items that were buried with Geronimo's body, eventually transporting them to the Order's premises on the Yale campus. (Id. P 43.) The plaintiffs seek an order under 25 U.S.C. § 3002 stating that they are Geronimo's lineal descendants entitled to Geronimo's remains, requiring defendants to surrender any such objects they possess, and awarding money damages to the plaintiffs for wrongful seizure and possession of the remains." Skull and Bones is a secret society at Yale University, whose members have included Steven Mnuchin, Stephen Schwarzman, George W. Bush, George H.W. Bush, John Kerry, William F. Buckley, Jr., and Paul Giamatti.

Indian lands. The Court took jurisdiction over the dispute, but ultimately denied the requested relief.

F. Supreme Court review of State Supreme Court Decision

The rarest form of federal jurisdiction over an inheritance controversy is direct Supreme Court review of a State Supreme Court decision.²⁷ The United States Supreme Court has original jurisdiction over decisions of a State Supreme Court, providing that the state court efforts on the matter are final.²⁸

Two significant Supreme Court decisions had significant impact on probate and inheritance matters nationwide.

In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (U.S. 1988), the Supreme Court struck down a state court creditor notification provision that required only publication of a creditor claims period. Tulsa required that reasonably ascertainable creditors of an estate had to be provided actual notice of a claims period, as opposed to just publication. This decision forced a change to the creditor claims process in probate in many states across the country.

In *Egelhoff v. Egelhoff*, 532 U.S. 141 (U.S. 2001), the decedent designated his wife as the beneficiary under a life insurance policy and pension plan, both provided by his employer and governed by ERISA. The couple divorced, and the decedent dies two months later, without changing his beneficiary designations. State law in the case, like most states nationwide, provided that any beneficiary designation for a nonprobate asset in favor of a spouse was automatically revoked upon divorce.

The ERISA plan at issue provided that benefits would be paid according to the plan documents. Because the beneficiary designations had not been changed, the plan documents designated the former wife as the beneficiary.

The Court held that the ERISA statutes, allowing benefits to be paid according to the plan documents, preempted the state statute that would have revoked the beneficiary designation in the former wife's favor. "[t]he statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents. We conclude that the Washington statute has a "connection with" ERISA plans and is therefore preempted."

27 U.S.C. Section 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 *Jefferson v. City of Tarrant*, 522 U.S. 75 (U.S. 1997)

G. Removal

In general, a civil action pending in state court may be removed by a defendant to Federal court if there is Federal subject matter jurisdiction.²⁹ The Defendant removes the action to Federal court by filing a Notice of Removal in the appropriate Federal District Court within 30 days after service of the complaint. The Notice of Removal must contain a short and plain statement of the grounds for removal, together with all pleadings and orders served upon the defendant.³⁰ The Notice of Removal must also be filed and served in state court, which causes an immediate stay in the state court unless and until the case is remanded back to the state court.³¹

One exception to removal jurisdiction is that a case cannot be removed if any of the defendants properly joined and served is a citizen of the state in which the action is brought.³²

If a party contends that removal was improper, that party may move the district court to remand the case to state court. The motion for remand must be brought within 30 days after the Notice of Removal; however, if the remand is founded upon a lack of subject matter jurisdiction, the motion for remand can be filed at any time.³³

29 28 U.S.C. Section 1441.

30 28 U.S.C. Section 1446.

31 28 U.S.C. Section 1446(d).

32 28 U.S.C. Section 1441(b)(2).

33 28 U.S.C. Section 1447.