IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

MARK C. LASKA and
KATHERINE E. LASKA,

Plaintiffs,

v.

MARY JANE LASKA,

Defendant.

OPINION AND
ORDER

99-C-0649-C

- -

In this civil action, plaintiffs Mark C. and Katherine E. Laska contend that defendant Mary Jane Laska converted to her own use property that plaintiffs' grandfather had intended them to inherit. In an opinion and order issued on February 9, 2000, I declined to decide defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and instead ordered the parties to brief the issue whether the court could or should exercise jurisdiction over this case in light of the probate exception to diversity jurisdiction and the abstention doctrine. Briefing on that issue is now complete. I conclude that plaintiffs' claims are of the type traditionally subject to the probate exception to diversity jurisdiction because they are ancillary to probate matters; therefore, I will decline to exercise jurisdiction over plaintiffs' claims. Moreover, even

if this case were not directly ancillary to probate matters requiring application of the probate exception, I would decline to exercise jurisdiction over it under the abstention doctrine.

ALLEGATIONS OF FACT

Although on a motion to dismiss a complaint under Rule 12(b)(6), the court must take plaintiff's allegations of fact as true, the court is also empowered to determine such facts as are necessary to decide whether it has jurisdiction to hear a case. See Kanzelberger v. Kanzelberger, 782 F.2d 774, 777 (7th Cir. 1986). Plaintiffs' allegations of fact are included in the February 9 opinion and are repeated here in part only.

On May 14, 1990, defendant Mary Jane Laska entered into a pre-nuptial agreement with plaintiffs' grandfather, Richard Laska. The agreement did not grant defendant any property in addition to what she brought to the marriage. However, the parties did agree that they were free to transfer property to each other in their respective wills. Defendant and Richard Laska married the next day, May 15, 1990.

On or about August 8, 1991, Richard Laska suffered an injury, leaving him with diminished capacity for a period of time. On August 29, 1991, defendant obtained a durable power of attorney over Richard Laska's affairs.

On May 8, 1992, the pre-nuptial agreement was amended to provide defendant the use

of Richard Laska's residence, without cost, for twenty-four months following his death.

On November 3, 1993, Richard Laska established a revocable trust. The essential terms of the trust provided that following his death, defendant was to receive $2000 a month for life, along with the right to occupy her husband's principal's residence, without cost, for twenty-four months. The entire remaining trust estate was to be divided into two separate shares, with 33 1/3 % going to the "Richard D. Laska, Jr. Trust" and 66 2/3 % going to the "Grandchildren's Trust." Richard D. Laska, Jr. was the son of Richard Laska and father of the plaintiffs. He predeceased his father. Therefore, according to the terms of the "Richard D. Laska, Jr. Trust," the trust estate was to be paid out in equal shares to the plaintiffs. According to the terms of the "Grandchildren's Trust," plaintiff Kathryn Laska was to receive $5000 upon attaining age 21 and $10,000 upon attaining age 25. Plaintiff Mark Laska was to receive the amount necessary for his support, maintenance, medical care, and education until age 30, when one-half of the principal was to be paid over to him. Upon attaining age 35, plaintiff Mark Laska was entitled to the remaining principal.

On July 27, 1994, Richard Laska executed his will. He did not leave defendant any property in addition to what was provided in the pre-nuptial agreement and revocable trust. The will left the balance of Richard Laska's estate to the revocable trust.

Beginning on November 15, 1993 and continuing through September 21, 1998,

defendant caused the transfer of certain stock certificates from sole ownership by Richard Laska to joint tenancy with defendant. Also, she caused the purchase in joint tenancy of certain stock certificates with Richard Laska's funds. The current value of the stocks and accounts transferred to defendant or purchased in joint tenancy exceeds $300,000.

Richard Laska died on October 5, 1998. Following Richard Laska's death, the stocks and accounts held in joint tenancy passed to defendant. In addition, under the terms of the pre-nuptial agreement and revocable trust, defendant was entitled to the use of the residence for twenty-four months and $2000 a month for life. Under the terms of the will and the revocable trust, plaintiffs were entitled to the balance of Richard Laska's estate.

OPINION

"The initial inquiry in any suit filed in federal court must be whether the federal court possesses subject matter jurisdiction." Rice v. Rice Foundation, 610 F.2d 471, 474 (7th Cir. 1979). Subject matter jurisdiction is what gives a federal court the power to act in a particular case. See id. "The probate exception (to federal diversity subject matter jurisdiction) is one of the most mysterious and esoteric branches of the law of federal jurisdiction." Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982). It "places matters of probate and estate administration outside the power of the federal courts." Rice, 610 F.2d at 474. As a creation of the judiciary,

the exception must be construed narrowly. See Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988). Nonetheless, the probate exception "is too well established a feature of our federal system to be lightly discarded." Dragan, 679 F.2d at 713.

Pure probate matters are outside federal jurisdiction. See Rice, 610 F.2d at 475. As the Supreme Court stated in Markham v. Allen, 326 U.S. 490, 494 (1945), "a federal court has no jurisdiction to probate a will or administer an estate." The probate exception extends to all suits "ancillary" to the probate of a will. Georges, 856 F.2d at 973. The concept of a matter being ancillary to probate also comes from Markham, in which the court stated:

> But it has been established by a long series of decisions of this Court that federal courts of equity jurisdiction 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.

Markham, 326 U.S. at 494. Thus, a suit or claim is ancillary to probate if "resolution of the suit by the federal court will result in 'interference' with state probate proceedings or the assumption of general probate jurisdiction." Georges, 856 F.2d at 974.

A claim is ancillary to probate if "allowing it to be maintained in federal court would impair the policies served by the probate exception to federal diversity jurisdiction." Dragan, 679 F.2d at 715-16; see also Georges, 856 F.2d at 973-74. Under this rule, a district court

may properly dismiss a suit even if an estate has been distributed in accordance with the terms of a will, the probate proceeding has ended, the plaintiffs are not seeking to enjoin or reopen the probate proceedings and the plaintiffs are not seeking to reach property in the hands of the court. Dragan, 679 F.2d at 713; Georges, 856 F.2d at 974.

The probate exception is thought to serve three policies:

1. The need for legal certainty concerning whether probate matters and will contests should be in state or federal courts; that is, the relative expertise of state courts with respect to their own probate law.
2. Judicial economy: by restricting probate matters and will contests to state courts, questions regarding a will's validity can be resolved concurrently with the task of estate administration.
3. Avoidance of unnecessary interference with matters of important state probate concerns.

15 Moore's Federal Practice § 102.92(2) (3d ed. 1999) (citing Dragan, 679 F.2d at 714, and Georges, 856 F.2d at 974).

Determining whether a claim or suit impairs the policies served by the probate exception depends heavily on state law. "The force of these considerations will vary from state to state depending on particular judgments made by each state and incorporated in its probate laws." Dragan, 679 F.2d at 715. As the court of appeals explained, "if a state has decided that a certain issue may be raised only in the original probate proceeding, this will strengthen the argument from judicial economy by indicating that the state believes that bifurcated

consideration of probate-related issues would produce judicial diseconomy." Id.

In addition, the court of appeals has stated that "[e]ven where a particular probate-like case is found to be outside the scope of the probate exception, the district court may, in its discretion, decline to exercise its jurisdiction. The nature of the issues presented in such cases can make discretionary abstention particularly appropriate." Rice, 610 F.2d at 477. The court added that "[t]he fact that a federal court may not directly interfere with state probate proceedings merely permits the exercise of federal jurisdiction, it does not require it." Id. In other words, even if a claim or suit does not fall within a narrow interpretation of the probate exception, the federal court may decline to exercise jurisdiction in its discretion if the issues raised are closely related to probate matters.

1. Conversion claim

Plaintiffs allege that defendant converted for her own benefit funds that belonged to the decedent and that the decedent intended to give plaintiffs. They correctly describe their "main claim" as "basically a claim for conversion." Pltfs' Br., Dkt. #13, at 3. The Supreme Court of Wisconsin has held that in a case involving allegations of conversion of the property of a decedent, it is only the estate that can maintain a cause of action for conversion because title to personal property passes from the decedent to his or her legatees through the estate. See

Peters v. Kell, 12 Wis. 2d 32, 41, 106 N.W.2d 407, 413 (1960). In this case, it is unclear whether the allegedly converted property would have passed via the deceased's will to the revocable trust, and thus have passed through the probate estate, or would have been titled to the revocable trust before the deceased's death, and thus not passed through the probate estate. If the property would have passed through the probate estate, then Peters makes clear that only the estate may maintain an action for conversion. In addition, Wisconsin has created a procedure by which interested persons who believe an estate inventory does not include "property which should be included in the estate" can maintain an action "in the court where the estate is being administered." Wis. Stat. § 879.63. Wisconsin's preference that such claims be resolved in the court in which the estate is being administered strongly favors application of the probate exception. See Dragan, 679 F.2d at 715 (". . . [I]f a state has decided that a certain issue may be raised only in the original probate proceeding, this will strengthen the argument from judicial economy by indicating that the state believes that bifurcated consideration of probate-related issues would produce judicial diseconomy."). Moreover, because the probate proceeding is apparently still open (plaintiffs do not refute defendant's assertion that it is), allowing plaintiffs to proceed on their conversion claim runs the risk of inconsistent determinations by this court and the state court on such issues as (1) whether the allegedly converted property would have passed to the revocable trust via the will;

(2) whether the conversion claim can be brought by plaintiffs or solely by the estate; and (3) whether the claim should be brought in the court where the estate is being administered. In addition, if the allegedly converted property should be subject to ongoing estate administration because it should have passed via the will, then this court risks assuming "control of the property" that should be "in the custody of the state court." Markham, 326 U.S. at 494. It is the avoidance of this type of risk that justifies the continued vitality of the probate exception and abstention doctrine. Clearly, if the probate proceeding is ongoing and if under Wisconsin law, plaintiffs' conversion claim can be brought only by the estate in probate court, that claim is ancillary to the probate proceeding. Even if the probate exception did not require dismissal of the conversion claim, I would exercise my discretion to abstain from hearing the claim because this matter is so closely intertwined with the probate proceeding.

2. Interference claim

Closely bound to the plaintiffs' claim for conversion is their claim for tortious interference with an expected inheritance. From the conclusion that the probate exception and abstention doctrine counsel against allowing plaintiffs to maintain their conversion claim in this court, it follows that this court should abstain from exercising jurisdiction over the interference claim. Again, the risk is that parallel state and federal proceedings might lead to different

factual and legal conclusions regarding the same matters. If plaintiffs or the estate must bring the conversion claim in state court, allowing them to bring the closely related interference claim in federal court would be both inefficient and potentially inconsistent and would undermine the policy considerations behind the probate exception and abstention doctrine.

In addition, resolving plaintiffs' interference claim requires some expert knowledge of Wisconsin's unique marital property system, the complexity of which is demonstrated in part by the parties' continued debate about the effect of the deceased's and defendant's "joint tenancy" of the allegedly converted property. Joint tenancy as a species of property ownership was abolished in Wisconsin for newly acquired property with the adoption of the marital property system in 1986 and replaced with a species called survivorship marital property. See Wis. Stat. § 766.60(4); see also Howard S. Erlanger & June M. Weisberger, From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later, 1990 Wis. L. Rev. 769, 779. Although federal courts could become adept at sorting through the Wisconsin marital property system, state courts already are; thus, the probate exception's interest in efficiency is served by leaving such matters to the state courts.

In short, although the probate exception to diversity jurisdiction must be construed narrowly, plaintiffs' claims appear to fall within its bounds. The probate proceeding is ongoing, it is unclear whether plaintiffs have standing to bring their conversion claim under Wisconsin

law and resolution of plaintiffs' claims requires experience with Wisconsin marital property law that Wisconsin judges are uniquely able to provide. The risk of inconsistency and inefficiency require application of the probate exception or, at a minimum, discretionary abstention.

ORDER

IT IS ORDERED that the complaint of plaintiffs Mark C. Laska and Katherine E. Laska is DISMISSED for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Entered this _____ day of May, 2000.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge