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THE "PROBATE EXCEPTION" TO FEDERAL DIVERSITY JURISDICTION: MATTERS RELATED TO PROBATE

*Hamilton v. Nielsen*¹

Although a strict reading of the federal diversity statute seems to permit a federal district court to hear any matter so long as the statutory requirements are met,² federal courts have consistently refused to hear cases in certain areas.³ A widely stated generalization is that federal courts may not hear "probate matters."⁴ But an examination of the cases indicates that the limitation is not as straightforward as it might appear, for federal courts frequently become involved in cases which touch upon probate matters.

*Hamilton v. Nielsen*⁵ involved the estate of a testator who died in 1972. His will named coexecutors for the estate, which was valued at approximately \$2.5 million.⁶ The coexecutors were directed to pay the residue of the estate into a trust to be administered by a bank for the benefit of the testator's children. In 1977, the plaintiff, one of Hamilton's children, filed a diversity suit in the United States District Court for the Northern District of Illinois, charging the coexecutors with a breach of their duty to manage the

1. 678 F.2d 709 (7th Cir. 1982).

2. 28 U.S.C. § 1332 (1976) provides, in part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

3. Some of these exceptions to diversity jurisdiction are provided by statute. For example, 28 U.S.C. § 1359 (1976) prevents a federal court from exercising jurisdiction if a party is improperly or collusively joined. Federal courts also may not entertain an in rem action if the property is already in the hands of a state court. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *Key v. Wise*, 629 F.2d 1049, 1059 (5th Cir. 1980). An important area in which the federal courts will not act, even though diversity is present, is domestic relations. *See Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930); *In re Burrus*, 136 U.S. 586, 595-96 (1890); *Barber v. Barber*, 62 U.S. (21 How.) 186 (1858).

4. A count taken in 1956 indicated that statements to this effect had been made in approximately 250 reported federal cases. Vestal & Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 13 (1956).

5. 678 F.2d 709 (7th Cir. 1982).

6. *Id.* at 710.

estate skillfully.⁷ The district court reached the merits of the case, concluding that the coexecutors had not breached their duty.⁸ The United States Court of Appeals for the Seventh Circuit, after determining that it had subject matter jurisdiction, affirmed the finding as to liability but vacated and remanded in part.⁹

The court of appeals conceded that neither it nor the district court had the power to probate wills or interfere with probate proceedings but concluded that the district court had not exercised either power since the plaintiff was merely seeking money damages from the coexecutors.¹⁰ *Hamilton* is one of the most recent cases in which a federal court has reaffirmed the proposition that it may not entertain purely probate matters while recognizing that it had the power to entertain actions "related to probate."¹¹

The reluctance of federal courts to hear probate matters is based on the United States Supreme Court's interpretation of the equity jurisdiction granted to federal courts by the Judiciary Act of 1789.¹² According to the Court, the Act conferred upon federal courts the equity jurisdiction possessed by the High Court of Chancery in England in 1789.¹³ The current

7. *Hamilton v. Nielsen*, 513 F. Supp. 204 (N.D. Ill. 1981), *aff'd as to liability, vacated on other grounds*, 678 F.2d 709 (7th Cir. 1982). The plaintiff charged that the coexecutors were negligent in exercising an option to buy additional shares of stock and in failing to sell stock in 1972 while the price remained high. 513 F. Supp. at 208.

8. 513 F. Supp. at 208. The court noted that the only culprit in the case was the stock market and that the plaintiff had not shown that the actions of the coexecutors were careless in light of the facts and circumstances at the time. *Id.*

9. 678 F.2d at 715. The issue was whether the executors were entitled to have their attorneys' fees paid by the plaintiff. The court of appeals remanded the case to the district court to make a determination as to whether the Illinois courts would tax attorneys' fees in cases similar to this one. *Id.*

10. *Id.* at 710.

11. The Seventh Circuit has considered the probate exception in one case since *Hamilton*. In *Dragan v. Miller*, 679 F.2d 712 (7th Cir. 1982), the plaintiffs, relatives of the decedent, sought to have the defendants declared constructive trustees of the estate. The plaintiffs contended that the decedent was improperly influenced to bequeath his entire estate to the defendants. The district court dismissed the diversity suit. In affirming the decision of the district court, the court of appeals referred to the probate exception as "one of the most mysterious and esoteric branches of the law of federal jurisdiction." *Id.* at 713. Although the court criticized the reasoning behind the probate exception, it noted that the exception was too established in the federal system to be lightly discarded. *Id.*

12. Ch. 20, § 11, 1 Stat. 73, 78.

13. See *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909); *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1869). See also *Rice v. Rice Foundation*, 610 F.2d 471, 475 (7th Cir. 1979); *Lamberg v. Callahan*, 455 F.2d 1213, 1216 (2d Cir. 1972); *Starr v. Rupp*, 421 F.2d 999, 1004 (6th Cir. 1970).

diversity statute has been similarly interpreted,¹⁴ even though it speaks in terms of "all civil actions,"¹⁵ as opposed to the original Act's "suits of a civil nature at common law or in equity."¹⁶ Thus, in order to understand the probate exception to federal diversity jurisdiction, it is necessary to understand the limitations placed on the High Court of Chancery in 1789.

Chancery did not have jurisdiction to grant or deny probate of wills of personal property, to appoint or remove executors and administrators, or to grant divorces or annulments.¹⁷ These matters were within the jurisdiction of the English ecclesiastical courts. The ecclesiastical courts had *exclusive* jurisdiction only over the probate of a will involving purely personal property; a will involving real property could be proved in an ejectment action in the Court of Common Pleas or in a suit in Chancery.¹⁸ Probate proceedings in the ecclesiastical courts were in rem and proceeded according to the Roman civil law. A grant of probate bound everyone claiming personal property of the decedent. Proof of a will at common law or in equity, on the other hand, was an in personam proceeding, which bound only the parties and their privies. In 1789, the ecclesiastical courts had concurrent jurisdiction with the High Court of Chancery over proceedings to compel an executor or administrator to account for maladministration.¹⁹ Since federal courts have that equity jurisdiction possessed by the High Court of Chancery in 1789, and since pure probate matters were outside the jurisdiction of Chancery at that time, federal courts have held that pure probate matters are outside their jurisdiction.

14. See cases cited note 13 *supra*; see also *Jackson v. United States Nat'l Bank*, 153 F. Supp. 104, 107-08 (D. Or. 1957).

15. 28 U.S.C. § 1332 (1976).

16. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The pertinent provisions of that section are as follows:

[The] circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

The pertinent provisions of 28 U.S.C. § 1332 (1976) are set out at note 2 *supra*.

17. See *Allen v. M'Pherson*, 1 H.L.C. 191, 191, 9 Eng. Rep. 727, 728 (1847). See generally *Barnesly v. Powel*, 1 Ves. Sen. 284, 27 Eng. Rep. 1034 (1749); *Kerrich v. Bransby*, 7 Brown P.C. 437, 3 Eng. Rep. 284 (H.L. 1727); J. FONBLANQUE, *A TREATISE OF EQUITY* (A. Lausat 4th ed. 1835).

18. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 625-30 (7th ed. 1956); R. POUND, *ORGANIZATION OF COURTS* 136 (1940). See also J. FONBLANQUE, *supra* note 17, at 564; J. SCHOULER, *A TREATISE ON THE LAW OF EXECUTORS AND ADMINISTRATORS* § 10 (2d ed. 1889); Comment, *Federal Court Probate Proceedings*, 45 IND. L.J. 387, 387 n.1 (1970).

19. Statute of Distribution, 22 & 23 Car. 2, ch. 10, §§ 1, 2 (1670); 1 W. HOLDSWORTH, *supra* note 18, at 629; 3 *id.* at 556-61 (5th ed. 1942); 5 *id.* at 288-89, 316-20 (3d ed. 1945); 6 *id.* at 652-57 (2d ed. 1937).

Various other reasons also have been advanced in support of this judicially created probate exception to federal diversity jurisdiction. First, since a probate proceeding is in rem, a federal court cannot interfere with the state court proceeding while the state court has control of the property which is the subject of the lawsuit.²⁰ Second, probate is merely a requirement to make a will effective, and since the authority to make wills is derived from the states, probate matters are outside the scope of federal jurisdiction.²¹ Third, there is a strong state interest in probate which is reflected in the expertise of state courts in this area.²² Fourth, probate matters are not "cases or controversies" within the meaning of Article III of the United States Constitution.²³ Whatever the reasons, it is clear that the ex-

20. *See, e.g.*, *Markham v. Allen*, 326 U.S. 490, 494 (1946) (federal court is not to disturb or affect possession of property in custody of state court but may adjudicate rights in such property); *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939) (district court without jurisdiction where state court already administering trust when subsequent federal action alleging mismanagement filed); *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477 (1936) (even where district court acquires jurisdiction prior to state proceedings, circumstances may still require dismissal); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 44 (1909) (federal court cannot seize and control property in possession of state court); *Byers v. McAuley*, 149 U.S. 608, 614 (1893) (administrator appointed by state court is officer of that court; his possession of decedent's property cannot be disturbed by any other court); *Borer v. Chapman*, 119 U.S. 587, 600 (1887) (equity jurisdiction of federal court subject only to limitation that court cannot seize property in custody of state court); *Covell v. Heyman*, 111 U.S. 176, 180 (1884) (principle that federal court may not take control of property while in custody of state court applies to both writs of attachment and executions upon judgments); *Gaines v. Fuentes*, 92 U.S. 10, 21-22 (1875) (although federal courts have no jurisdiction over probate matters since probate proceedings are in rem, federal court may entertain suit between parties involving the validity or construction of a will); *In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 509 (1874) (court of equity will not entertain suit to set aside a will or the probate thereof since all persons are bound by decision of court having jurisdiction); *Lamberg v. Callahan*, 455 F.2d 1213, 1216 (2d Cir. 1972) (federal courts will not entertain disputes incidental or ancillary to in rem administration or estate in state probate custody); *Day v. Wilson*, 286 F.2d 274, 276 (10th Cir. 1961) (exercise of jurisdiction to enforce claim against personal property proper where federal court had in rem jurisdiction over property); *Robinson v. Georgia Savings Bank and Trust Co.*, 106 F.2d 944, 946 (5th Cir. 1939) (federal court may not interfere with administrator's possession of estate assets; it may determine, but not enforce, claims against the estate).

21. *See* *Sutton v. English*, 246 U.S. 199, 205 (1918); *Farrell v. O'Brien*, 199 U.S. 89, 110 (1905).

22. *See, e.g.*, *Rice v. Rice Foundation*, 610 F.2d 471, 477-78 (7th Cir. 1979) (scope of probate exception does not necessarily define area in which exercise of federal jurisdiction is appropriate); *Bassler v. Arrowood*, 500 F.2d 138, 142 (8th Cir. 1974), *cert. denied*, 419 U.S. 1116 (1975) (state courts have developed an expertise in probate matters which should discourage federal court intervention).

23. *See* *Galleher v. Grant*, 160 F. Supp. 88, 94 (N.D. Ill. 1958).

ception is easier to state than to administer.²⁴ The principal reason for this is that once it is decided that a matter is merely "related to probate," and not "purely probate," a federal court must weigh numerous factors in determining whether it should exercise its jurisdiction in the particular case.

It is well settled that federal courts may neither probate wills nor administer estates, since these are pure probate matters.²⁵ Beyond this, it is difficult to distinguish between matters related to probate and those that are purely probate. For example, the rules are not absolute as to whether a federal court may annul or set aside the probate of a will.²⁶ A federal court may, however, order an accounting of an estate, provided that the accounting does not look solely to distribution of that estate.²⁷ In addition, it is generally held that a federal court may not order a distribution of property that is in custody of a state court.²⁸ Finally, although a federal court may exercise jurisdiction over proper actions before a final judgment is made in state probate proceedings,²⁹ the federal court judgment must be presented

24. Professor Wright has noted that "[t]he exception from the diversity jurisdiction as to probate matters is far from absolute [It] turns . . . on unclear distinctions of the utmost subtlety." C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 25, at 98 (3d ed. 1976).

25. *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Sutton v. English*, 246 U.S. 199, 205 (1918); *Byers v. McAuley*, 149 U.S. 608, 619 (1893); *In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 509 (1875); *Rice v. Rice Foundation*, 610 F.2d 471, 474 (7th Cir. 1979); *Bassler v. Arrowood*, 500 F.2d 138, 141 (8th Cir. 1974); *Starr v. Rupp*, 421 F.2d 999, 1004 (6th Cir. 1970); *Republic of Iraq v. First Nat'l Bank of Chicago*, 350 F.2d 645, 648 (7th Cir. 1965); *Akin v. Louisiana Nat'l Bank of Baton Rouge*, 322 F.2d 749, 751 (5th Cir. 1963).

26. Apparently, the state practice is controlling in this area. If the state, by statute or custom, permits an independent action for this purpose, the federal court may also entertain the action. *Sutton v. English*, 246 U.S. 199, 205 (1918). In *Ledbetter v. Taylor*, 359 F.2d 760 (10th Cir. 1966), the court considered whether the federal district court had jurisdiction to declare a certain assignment of real property void. In affirming the dismissal of the action, the court noted that the judgment was supported by local law and policy. *Id.* at 762.

27. *See Waterman v. Canal-Louisiana Bank and Trust Co.*, 215 U.S. 33, 45 (1909) (accounting can only be had in probate court having jurisdiction of matter); *In re McDonald's Estate*, 42 F.2d 266, 269 (D. Minn. 1930) (federal court has no power to adjust account of administrator). *Cf. Payne v. Hook*, 74 U.S. (7 Wall.) 425, 431 (1869) (court has jurisdiction to compel executors and administrators to account).

28. *See Byers v. McAuley*, 149 U.S. 608, 614 (1893). The conclusion that federal courts may not order the distribution of property which is in the custody of a state court follows from the rule that federal courts may not disturb or affect possession of property in the custody of a state court. *See* cases cited note 20 *supra*.

29. *See Markham v. Allen*, 326 U.S. 490, 491-92 (1946) (suit by Alien Property Custodian to determine Custodian's asserted right to share in decedent's estate which was being administered in state probate court); *Ingersoll v. Coram*, 211 U.S. 335, 336-37 (1908) (suit in federal court to subject certain interests in decedent's

to the probate court for payment where the probate court already has control of the property which will be used to satisfy the judgment.³⁰ While the holdings in these recurring situations have been fairly uniform, it often is difficult to apply the rules to new situations.

In *Markham v. Allen*,³¹ the Supreme Court stated the general rule that although a federal court may not probate a will or administer an estate, it does have equity jurisdiction to entertain suits in favor of creditors, legatees, heirs, and other claimants to establish their claims against an estate.³² The Court noted, however, that this is true only to the extent that the federal court does not interfere with the probate proceedings or take control of property in custody of a state court.³³ Thus, once it is established that the subject matter of the lawsuit does not involve a purely probate matter, the question becomes whether the federal court's action will interfere with the state court proceeding. Federal courts have developed certain tests to determine whether interference will result if the federal court hears the probate matter.

estate to a lien); *Lawrence v. Nelson*, 143 U.S. 215, 216 (1892) (suit to charge decedent's administrator with amount of federal court judgment against him); *Clark v. Bever*, 139 U.S. 96, 100 (1891) (suit against decedent's administrator to recover amount unpaid for stocks); *Hess v. Reynolds*, 113 U.S. 73, 74 (1885) (federal court may not remand case which had been removed to federal court to avoid prejudice of state court against citizen of another state); *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 426 (1868) (suit to establish plaintiff's right to distributive share in decedent's estate); *Foster v. Carlin*, 200 F.2d 943, 944-45 (4th Cir. 1952) (suit asking that trust be declared void, that settlement was vitiated by fraud, that deceased died intestate, and that receiver be appointed for a corporation); *Rosenberg v. Baum*, 153 F.2d 10, 12 (10th Cir. 1946) (suit in federal court while state probate proceeding pending to impress a trust upon certain real estate and to have accounting of estate); *O'Connor v. Slaker*, 22 F.2d 147, 148 (8th Cir. 1927) (suit to have plaintiffs declared heirs at law of decedent and to have title quieted in them as against administrator; federal court not to decide who was entitled to decedent's estate under will); *Chase Nat'l Bank v. Sayles*, 11 F.2d 948, 952 (1st Cir. 1926) (suit against executors and legatee to enforce assignment within jurisdiction of federal court).

30. In *Yonley v. Lavender*, 88 U.S. (21 Wall.) 276 (1874), the court considered the question whether a federal court can execute a judgment against the estate of a decedent while the estate is being administered in state court. In answering the question in the negative, the Supreme Court held it improper for a non-resident holder of a federal court judgment to take precedence over resident creditors who did not have the right to sue in federal court. *Id.* at 280. The proper procedure was for the holder of the federal court judgment to present that judgment to the state probate court for execution and payment. The federal court judgment gave no prior lien on estate property but merely compelled the administrator to recognize the judgment in the payment of debts. *Id.*

31. 326 U.S. 490 (1946).

32. *Id.* at 494.

33. *Id.*

The majority approach, first set out in *Sutton v. English*,³⁴ focuses on the route the lawsuit would take if brought in the state court system.³⁵ In *Sutton*, the decedent's heirs brought an action in the district court and sought an accounting, a decree setting aside a joint will, and partition of the decedent's property.³⁶ The district court dismissed for lack of subject matter jurisdiction.³⁷ The Supreme Court affirmed, holding that where a state, by statute or custom, grants parties the right to bring an action at law or a suit in equity to annul a will or set aside probate, federal courts may enforce the same remedy provided the requirements for diversity jurisdiction are met.³⁸ The Court noted, however, that this test applies only if the suit is independent of probate, not merely incidental or ancillary to it.³⁹ An important issue in this context is the effect of a state statute that grants broader jurisdiction to the probate court than was possessed by the English ecclesiastical courts in 1789. The question then becomes whether a federal court, under the *Sutton* approach, is precluded from exercising its jurisdiction solely because the action, if brought in the state court system, could be heard only in a specialized probate court as opposed to a state court of general jurisdiction. Generally, the answer is no. Where the action is within the established equity jurisdiction of a federal court (i.e., within the equity jurisdiction of Chancery in 1789), the court may entertain the action even though a state statute gives exclusive jurisdiction to a probate court.⁴⁰

34. 246 U.S. 199 (1918).

35. See *Bassler v. Arrowood*, 500 F.2d 138, 142 (8th Cir. 1974) (if claim enforceable in state court of general jurisdiction, argument more persuasive for exercise of federal jurisdiction); *Ledbetter v. Taylor*, 359 F.2d 760, 761 (10th Cir. 1966) (since federal jurisdiction entirely derivative and state law unclear, district court properly dismissed action); *Fakouri v. Cadais*, 147 F.2d 667, 670 (5th Cir. 1945) (under state law, suit to set aside will and probate was independent and could be brought in state court of ordinary jurisdiction, so federal jurisdiction properly invoked). See also C. WRIGHT, *supra* note 24, § 25, at 99.

36. 246 U.S. at 203.

37. *Id.* at 205. The appellants contended that the district court had original jurisdiction on the ground that state courts of general jurisdiction could have entertained the suit. *Id.*

38. *Id.*

39. *Id.* The determination as to whether an action is incidental or ancillary to state proceedings is made under state law. See C. WRIGHT, *supra* note 24, § 25, at 99 n.19.

40. See *Waterman v. Canal-Louisiana Bank and Trust Co.*, 215 U.S. 33 (1909):

The rule stated in many cases in this court affirms the jurisdiction of the Federal courts to give relief of the nature stated, notwithstanding the statutes of the state undertake to give to state probate courts exclusive jurisdiction over all matters concerning the settlement of accounts of executors and administrators in the distribution of estates.

Id. at 43-44. See also *Akin v. Louisiana Nat'l Bank of Baton Rouge*, 322 F.2d 749, 754 (5th Cir. 1963) (federal jurisdiction cannot be defeated by state statute prescribing proper forum for the action).

The minority approach looks to the nature of the plaintiff's claim, not to the route it would take in state court.⁴¹ The question becomes whether the federal court must pass on the validity of a will. For example, if the action in federal court is based on a claim that the decedent's will is invalid, the court would be required to rule upon the validity of a will, which is a direct interference with probate.⁴² On the other hand, if the validity of the will is admitted and the claim is based on an assertion that the plaintiff has a right to share in the distribution, the federal court can decide the suit without interfering with the state proceedings.⁴³ The minority approach originated in *Waterman v. Canal-Louisiana Bank and Trust Co.*,⁴⁴ where the plaintiff sued the decedent's estate, arguing that certain bequests to named charities had lapsed because they did not exist as named and that he should be entitled to those bequests as the decedent's heir.⁴⁵ The plaintiff also sought an accounting. The Court held that the power to require an accounting was outside the scope of the district court's jurisdiction but found that the federal court could determine the rights as between the parties without interfering with the state proceedings.⁴⁶

One or the other of these approaches has been adopted by most federal

41. See *Rice v. Rice Foundation*, 610 F.2d 471, 476 (7th Cir. 1979) (discussion of minority approach). In *Starr v. Rupp*, 421 F.2d 999 (6th Cir. 1970), the court purported to adopt the minority approach. *Id.* at 1007. But the case actually was decided on the fact that Ohio had vested jurisdiction over the claim in its probate court to the exclusion of the state courts of general jurisdiction. Thus, *Starr* was really decided on the basis of the majority approach in that it looked to the route the suit would have taken had it been brought in the state court system. *Id.* at 1006.

42. In *Akin v. Louisiana Nat'l Bank of Baton Rouge*, 322 F.2d 749, 754 (5th Cir. 1963), the court noted that the suit was not one to annul a will and that, in fact, the plaintiff had asserted the validity of the probated will. Thus, the court held that the district court had improperly dismissed the suit. But in *Mitchell v. Nixon*, 200 F.2d 50 (5th Cir. 1952), the court, in affirming the district court's dismissal, noted that the action was not merely a dispute between parties who had accepted a will but a dispute as to its construction as well. The court characterized the action as a defense to probate, a part of a proceeding in rem. *Id.* at 52.

43. See *Akin v. Louisiana Nat'l Bank of Baton Rouge*, 322 F.2d 749, 754 (5th Cir. 1963).

44. 215 U.S. 33 (1909).

45. *Id.* at 41-42.

46. *Id.* at 45. In support of this finding, the *Waterman* Court stated:

In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the estate . . . for it is the result of the cases that . . . the jurisdiction of the probate court may not be interfered with . . . Still, we think there is an aspect of this case within the Federal jurisdiction, and for which relief may be granted to the complainant . . .

Id. The court in *Rice v. Rice Foundation*, 610 F.2d 471, 476 n.8 (7th Cir. 1979), discussed the *Waterman* case and noted that federal jurisdiction was proper since the plaintiff did not seek to set aside the validity of the probate of the will.

courts, but at least one circuit has not expressed a preference for either the majority or minority approach. The Seventh Circuit, which decided *Hamilton*, recognizes both approaches as legitimate and refuses to declare either test to be solely correct. Instead, it takes the position that both are merely guidelines to aid in resolving the question whether a federal court should entertain an action which is related to probate.⁴⁷

The jurisdictional issue is not settled by a finding that the federal court would not interfere with a state action by taking the case. Even if a particular case meets the requirements of the majority or minority test, a federal court will use abstention principles⁴⁸ to determine if it should refrain from hearing the case. The finding that a probate related case is within the jurisdiction of the district court only permits, but does not require, the court to hear the case.⁴⁹ The usual reasons advanced in support of abstention in probate related cases are the expertise of state courts in probate matters⁵⁰ and the strong interest of the states.⁵¹ As a result of abstention in probate related cases, it is evident that not all federal courts agree on the scope of the probate exception.

47. See *Rice v. Rice Foundation*, 610 F.2d 471, 476 (7th Cir. 1979):

We express no view at this time as to whether either or both approaches should be used by the district court on remand, or whether an entirely new test should be devised. The approaches outlined above are not hard and fast rules; rather they were formulated to aid in the resolution of the difficult jurisdictional issue presented when probate-like actions are filed in federal court.

The court also suggested that the district court consider reported cases with similar facts. *Id.* at 476 n.10.

48. "Abstention" is the term for the refusal of a federal court to exercise the jurisdiction given it by statutes or the constitution. Professor Wright breaks abstention down into four major categories. The second category, "to avoid needless conflict with the administration by a state of its own affairs," appears to encompass the probate exception. C. WRIGHT, *supra* note 24, § 52, at 218.

49. *Rice v. Rice Foundation*, 610 F.2d 471, 477 (7th Cir. 1979).

50. See *Bassler v. Arrowood*, 500 F.2d 138, 142 (8th Cir. 1974), *cert. denied*, 419 U.S. 1116 (1975) (state courts deal with these problems daily and have developed expertise which should discourage federal courts from intervening). In support of this proposition, the court in *Rice v. Rice Foundation*, 610 F.2d 471 (7th Cir. 1979), noted that "the scope of the probate exception does not necessarily define the area in which the exercise of federal judicial power is appropriate." *Id.* at 477.

51. In *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509 (2d Cir. 1973), a case which involved the domestic relations exception to federal diversity jurisdiction, the court said:

[T]here is particularly strong reason for abstention in cases which, though not within the exceptions for matters of probate and administration or matrimony and custody actions, are on the verge, since like those within the exception, they raise issues "in which the states have an especially strong interest and a well-developed competence for dealing with them."

Id. at 516 (quoting C. WRIGHT, *supra* note 24, § 25, at 84 (2d ed. 1970)).

Regardless of the historical origins of the probate exception, it is necessary to determine whether it serves any useful function. Although it is difficult to counter the "strong state interest" argument,⁵² the assertion that state courts have more expertise in probate matters is relatively weak. Federal judges sitting in diversity actions routinely apply state law. Federal judges arguably are as capable in matters related to probate as their counterparts in state courts of general jurisdiction. One court has noted that federal courts have gained some experience in probate related matters due to the increased use of will substitutes such as life insurance and joint bank accounts.⁵³ In addition, certification of difficult questions to the highest state court is available in some cases to assist federal courts in the application of state law to a particular question.⁵⁴

The promotion of legal certainty and judicial economy have also been advanced as policy goals thought to be served by the probate exception.⁵⁵ As to legal certainty, the belief is that there is less chance of a different result if probate matters are limited to state courts.⁵⁶ This argument is not persuasive, since the *Erie* Doctrine⁵⁷ contemplates the same result without

52. One possible counter-argument, however, is that the state's interest should give way to the individual's interest in a fair trial. One justification given for the existence of the diversity jurisdiction of federal courts is the protection of an out-of-state litigant from the state courts' alleged bias in favor of their own residents. *See Dragan v. Miller*, 679 F.2d 712, 714 (7th Cir. 1982) (possible bias of state court in favor of its own citizens might frustrate decedent's intentions).

53. *See id.* at 715 (diversity action to have plaintiffs declared constructive trustees of decedent's estate).

54. A Florida statute, for example, provides:

The supreme court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States . . . that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

FLA. STAT. ANN. § 25.031 (West 1974). Missouri has no similar provision.

55. *See Dragan v. Miller*, 679 F.2d 712, 714 (7th Cir. 1982).

56. *See id.* at 714:

If an issue may end up being litigated in either a state or a federal court, its resolution is less certain, less predictable, than if it can be litigated in one or the other forum only, even if the same substantive law is applied. Certainty is desirable in every area of the law but has been thought especially so with regard to the transfer of property at death.

57. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Under *Erie*, a federal court, although allowed to use its own procedural rules, must use state substantive law when sitting in diversity actions. The use of state substantive law should result in

regard to whether the action is heard in a federal or state forum, and there is no reason to believe that it would not also work with probate matters. As for judicial economy, the argument that efficiency is served by keeping probate matters in state courts is easily countered. Federal courts may be capable of even greater efficiency in probate matters since responsibility for estate assets and liabilities could be placed in one forum in cases where the assets are actually located in what would be several state probate jurisdictions.⁵⁸

The probate exception has also been criticized on the ground that it is based solely on English practice.⁵⁹ The probate exception arose from the jurisdiction of the English ecclesiastical courts; America, this argument goes, did not have an ecclesiastical court.⁶⁰ It must be noted, however, that some jurisdictions do have specialized probate courts for dealing with matters that once were handled exclusively by the English ecclesiastical courts.⁶¹ It also is frequently the case, even in states which have vested probate jurisdiction in courts of general jurisdiction, that probate matters are assigned to a particular judge.⁶² Thus, it is arguable that the American court system does have something akin to the English ecclesiastical courts.

Despite criticism of the probate exception, the doctrine continues to be applied in federal courts. Although federal courts will entertain probate related actions in proper cases, a plaintiff desiring a federal forum must overcome numerous obstacles before it will be available. First, the jurisdictional requirements must be met and it must be established that the action does not involve a matter classified as pure probate. Second, the plaintiff

the federal court reaching the same result as the state court. *See generally* C. WRIGHT, *supra* note 24, §§ 55-60.

58. *See* Comment, *supra* note 18, at 397:

This . . . consideration becomes important in several urban areas of the country. A decedent who lived in New Jersey but operated a business in New York City would otherwise be forced to invoke the jurisdiction of several local probate courts in two states for final disposition of the estate. A similar problem exists in Kansas City, Chicago, Louisville and other cites [sic] located near state jurisdictional boundaries [sic]. A federal court could expand its jurisdiction through Fed. R. Civ. P. 4(a) over state boundary [sic] lines thereby dealing with the estate in one proceeding.

59. *See* Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982).

60. *See id.* But, the court said, "However shoddy the historical underpinnings of the probate exception, it is too well established . . . to be lightly discarded . . ." *Id.*

61. In those jurisdictions that do have specialized probate courts, it is arguable that the probate court is, in effect, akin to the English ecclesiastical court.

62. In Missouri, for example, probate matters are handled in the associate circuit court but are often assigned to a particular associate circuit judge. In Hamilton v. Nielsen, 678 F.2d 709, 710 (7th Cir. 1982), the district court noted that Illinois had abolished separate probate courts and had vested the probate jurisdiction in its courts of general jurisdiction.

must establish that, under state law, his action is neither incidental nor ancillary to probate. Third, it must be shown that no interference with state proceedings will result if the federal court entertains the action. Fourth, should the issue arise, the plaintiff must be prepared to convince the federal court that it should not abstain from hearing the case since a federal court has the power to abstain from hearing matters which are merely related to probate. Since there seems to be no present inclination to overrule the probate exception entirely, increased availability of the federal forum will require either new legislation or a reexamination of the policy on the part of the federal judiciary.

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