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FILED
SEP 27 2000
CLERK U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
San Jose, Calif.

ENTERED
SEP 27 2000
CLERK U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
San Jose, Calif.

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re

VICKIE LYNN MARSHALL,

Debtor.

E. Pierce Marshall,
Plaintiff,

vs.
Vickie Lynn Marshall,
Defendant.

Vickie Lynn Marshall,
Counterclaimant,

vs.
E. Pierce Marshall,
Counterdefendant.

Case No. LA 96-12510-SB
Adv. No.: LA 96-01838-SB
Chapter 11
**MEMORANDUM OF
DECISION FOLLOWING TRIAL.**

DATE: October 27, 1999
TIME: 2:00 p.m.
COURTROOM: 1576

I. Introduction

Debtor Vicki Lynn Marshall, also known as Anna Nicole Smith (hereinafter VM), is the surviving widow of J. Howard Marshall II (hereinafter JHM), who was said to be the richest man in Texas.¹ Nonetheless, Pierce Marshall (hereinafter PM), JHM's second son from a prior marriage, contends in the probate case in Texas that JHM died essentially penniless. In this adversary proceeding the court finds that PM tortiously interfered with VM's expectancy of an inheritance, which she would otherwise have obtained by exercising her right of a "widow's election" under Texas law. The damages, however, remain to be determined upon the completion of the probate case, which is now in trial in Texas.

II. Findings of Fact

This adversary proceeding came on for trial on October 27, 1999 and proceeded for five days over a period of two weeks. The court has heard the testimony of the witnesses who testified at trial, considered the testimony of those that appeared through deposition transcripts, and evaluated the credibility of all of the witnesses. Insofar as the testimony of any witness conflicts with the findings herein, the court finds that such testimony is not credible.

VM filed this bankruptcy case on January 25, 1996, a few months after the decease of her husband JHM. In part she filed this case because she had not received any inheritance from her deceased husband. His estate remains tied up in a probate proceeding in Texas, where a trial is now in process.

VM is also known as Anna Nicole Smith, a name under which she has pursued an acting and modeling career. JHM promoted and encouraged this career before and during their marriage and paid for acting lessons for her. VM appeared as a centerfold Playmate model in the March, 1992 issue of Playboy Magazine and in three later issues, including her selection as the Playmate of the Year. She is also known for her

television appearances as a model for Guess Jeans.

After a courtship that lasted some two years, VM agreed to marry JHM in June, 1994, and they were married immediately. At that time JHM was 69 years old, and VM was approximately 25. This was the third marriage for JHM, and the second for VM. JHM had two sons from his first marriage, J. Howard Marshall III and PM. VM had a son from her prior marriage. While a prenuptial agreement was drafted, it was never signed by the parties.

As an inducement to marry him, JHM promised VM that he would leave her half of what he had. JHM made this promise repeatedly, both before and after the marriage.

JHM's wealth consisted principally in his ownership of approximately 16% of the outstanding shares of stock in Koch Industries, Inc. (hereinafter KII), a petroleum corporation and the second largest privately held corporation in the United States. At the time of JHM's death, this stock was worth approximately \$1.4 billion. Given the vast increase in oil prices since 1985, the court assumes that the stock is now worth more than \$2 billion. During the time that JHM and VM were married, the value of the stock increased by \$449,754,134. The KII stock was held by Marshall Petroleum, Inc. (hereinafter PMI), whose shares were held entirely by Marshall family interests. The 16% interest in KII was particularly valuable, because in the early 1980's this had turned out to be the controlling interest in deciding a family dispute between two factions of the Koch family. Most of the income of KII was reinvested in the business; less than ten percent was distributed to shareholders.

In 1981 JHM set up a Living Trust to hold his assets, and the PMI stock eventually was transferred into the trust. JHM was the trustee of the trust, which was revocable up to the time of his marriage to VM. At the time of VM's marriage to JHM, PM and his family were the sole beneficiaries of the trust; neither VM nor J. Howard Marshall III had any beneficial interest in its assets. PM contends that essentially all of JHM's assets were in the Living Trust at the time of his death.

¹Testimony in a prior trial in this bankruptcy case indicates that there may have been one Texan more wealthy than JHM at the time of his death.

As² soon as PM learned of his father's marriage to VM, he contacted Edwin Hunter, to take action to assure that VM did not receive any of the assets in the Living Trust. In response, Hunter devised a plan to make the trust irrevocable, so that VM would not have a right to any of its assets, and the assets would be protected for PM and his family. PM was concerned because his father had been especially generous to Lady Walker, his father's mistress for many years who had died in 1980, and he feared that his father would be equally generous to VM.

The next week PM and Hunter met with JHM to review a document entitled, "J. Howard Marshall, II Post Nuptial Fine Tuning of Estate Plan" (hereinafter the Fine Tuning Document). This document contained proposed amendments to the Living Trust. Apparently, JHM signed the document.³ JHM relied on PM and Hunter to inform him of the contents of the document.

However, the change that made the Living Trust irrevocable was not in the Fine Tuning Document at the time that JHM apparently signed it. This change was added to page two of the Document at a later time,⁴ and likely after JHM's

²The text in bold print consists in findings that the court makes as sanctions for the discovery violations that are discussed *infra*.

³The court is informed that the authenticity of JHM's signature on the trust amendment is at issue in the Texas Probate Court. This issue is left for decision by that court.

⁴After trial, VM moved to reopen the record to submit the testimony of Donald J. Fandry, an expert who has examined the Fine Tuning Document. The court finds his testimony uncontradicted that the second page of the Document, which contains the provision making the trust irrevocable, is very different from the remaining pages of the document in the following respects: (1) this page alone lacks a watermark; (2) this page is missing a number of the staple holes that appear in the pages before and after, which result from a number of restaplings of the original document; (3) this page was printed with a different printer from the rest of the document.

death.⁵

After his father's death, PM continued his plot to prevent VM from obtaining any family assets. PM stated that, if VM tried to get any of the assets, "it would be World War III." Indeed, the court finds that PM has adopted a scorched earth approach to the conduct of this litigation, and has done his best to make it look like World War III.

III. Attorney-Client Privilege and Work Product

PM failed and refused to produce many thousands of pages of documents, on the alleged grounds of attorney-client privilege or attorney work product. PM also refused to submit these documents to the court for examination to determine whether the stated grounds for refusal to produce the documents were legitimate.

A. Legal Standard

A party claiming a privilege has the burden of showing that the privilege applies. *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997). Federal common law governs the application of a privilege in an adjudication based on federal law. *United States v. Blackman*, 72 F.3d 1418, 1423-24 (9th Cir. 1995). Where state law provides the applicable substantive law, privilege issues are governed by that state's law. In this case, the causes of action at issue are governed by Texas law. Thus Texas law governs the issues of attorney-client privilege and work product.

To invoke the attorney-client privilege, the claimant must show the following: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by a client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal

⁵The court also holds that, whatever the evidence may show, the findings in this paragraph are adopted as sanctions for PM's discovery violations, as discussed *infra*.

proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. See *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437 (E.D. Pa. 2000); *Bio-Rad Laboratories, Inc. v. Pharmacia, Inc.*, 130 F.R.D. 116 (N.D. Cal. 1990).

For each document, to satisfy condition (2) for a non-attorney, PM must show, as to each recipient, (a) the recipient's name, (b) the position that the recipient held at the time, (c) if the recipient received the document as a corporate official or employee, how the recipient is a member of the control group.

PM has not made an adequate showing on any of these issues, as to any of the documents at issue. While the names of some of the authors and recipients are given, none is identified as an attorney. The positions of the non-attorneys at the relevant times are not given, nor is any explanation given of how they qualify as members of the control group. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

The court has serious reservations about the legitimacy of the attorney-client privilege and work product claims. PM did provide for *in camera* inspection more than 100 documents that were in the possession of Jeff Townsend. The court found that approximately 13 of the documents were subject to a legitimate claim of attorney-client privilege or work product. For most of the remaining documents, the court found no good faith contention that either rule applied. The non-qualifying documents included such items as transmittal letters, annual statements of KH, a videotape of JHM's arrival at VM's home to visit her after their marriage, and photographs of VM taken on vacation after JHM's death. The court infers from this evidence that most of the attorney-client privilege and work product claims for the Hunter documents are equally meritless.

Because PM failed to carry the burden of showing the applicability of either the attorney-client privilege or the attorney work product doctrine, all of the documents on the privilege log should have been produced to plaintiff in this litigation. They were not. The court has previously made its findings on this subject in its memorandum of May 20, 1999, which are incorporated herein by reference. The court concludes and finds that all of the privilege and work product claims relating to the Hunter documents were also spurious and were made in bad faith. The court now imposes sanctions for PM's refusal to produce these documents.

B. Sanctions for Discovery Violations

The court issued its findings and sanctions order on the discovery violations on May 20, 1999.⁶ The court subsequently vacated that order. Meanwhile, PM has done nothing to vitiate his refusal to produce the documents at issue for an *in camera* inspection.

The sanctions to be imposed in consequence of the refusal to produce the documents are imposed in two fashions. First, this opinion includes findings of fact and conclusions of law that are imposed as sanctions for the failure and refusal to provide the documents for *in camera* inspection. The applicable findings and conclusions that are imposed as sanctions are highlighted in bold. Second, additional conclusions of law are based both on the evidence before the court and the applicable law and as sanctions for the discovery violations. These conclusions are identified in footnotes (or, in one instance, in the text).

Furthermore, Edwin Hunter testified at the trial, over VM's objections based on Hunter's failure to produce the Hunter documents or to submit them to the court for *in camera* inspection. The court now sustains those objections, and strikes Hunter's testimony.

IV. Tortious Interference with Expectancy of Inheritance

Texas law clearly recognizes tortious interference with inheritance as a valid cause of action. The leading Texas case is *King v. Acker*, 725 S.W.2d 750, 754 (Tex. App. 1987); see also *Brandes v. Rice Trust, Inc.*, 968 S.W.2d 144, 146-47 (Tex. App. 1998). In *King* the court sustained a claim for tortious interference with an expected inheritance, in an action brought against the decedent's second wife by the decedent's two children from his first marriage. The court found that the second wife improperly attempted to assign 500 shares of stock to herself from the decedent, while he was in a coma, pursuant to a power of attorney that the jury found the decedent

⁶The court issued a prior set of findings and sanctions on January 21, 1999, which were vacated by the district court and remanded for more specific findings.

had not signed.

King was the first published opinion declaring that Texas law recognizes a cause of action for tortious interference with inheritance rights. Following courts from other states, the court relied on RESTATEMENT (SECOND) OF TORTS § 774B (1977), which provides:

One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance . . . that he would otherwise have received is subject to liability to the other for loss of the inheritance

RESTATEMENT (SECOND) OF TORTS § 774B (1977). The court further supported its conclusion by stating:

It is well understood that the law affords a remedy for every invasion of a legal right. Under the maxim "where there is a right, there is a remedy," equity will not suffer a right to be without a remedy.

King, 725 S.W.2d at 754. On these grounds the court upheld an award of both compensatory and punitive damages against the decedent's second wife for using the forged power of attorney to transfer stock from the decedent to herself while he was unconscious.

In *Brandes* the decedent's sister and her children brought an action against Rice University for tortiously interfering with their expectancy to inherit some \$4 million in municipal bonds, that the decedent transferred to the university on his deathbed. The court ruled for the university, because the decedent's will would not have left the bonds to the plaintiffs if the transfer to the university had not been made. *King*, 966 S.W.2d at 149.

Texas case law does not specify the elements of a cause of action for tortious interference with expectancy. Other jurisdictions, however, have generally held that a plaintiff must prove the following five elements: (1) the existence of an expectancy; (2) a reasonable certainty that the expectancy would have been realized, but for the interference; (3) intentional interference with that expectancy; (4) tortious conduct involved with

the interference; and (5) damages. See, e.g., *Doughty v. Morris*, 871 P.2d 380, 384 (N.M. Ct. App. 1994); see also James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Traps*, ARIZ. ATT'Y, 26, 27 (Jan. 2000); Dennis D. Reaves, *Tortious Interference with an Expected Gift or Inheritance*, J. MO. B. 563, 564 (1991).

Tortious interference with an expected inheritance can happen in a variety of ways. First, it may result from an interference with the testator's acts of execution, alteration or revocation of a will. Second, it may result from the suppression, spoliation, destruction or intentional loss of a will. Third, the decedent may be wrongfully induced to make an *inter vivos* transfer that results in a deprivation of inheritance. See generally, Marilyn Marnai, *Tortious Interference with Inheritance: Primary Remedy or Last Recourse*, 1991 CONN. PROBATE L.J. 295, 295-97 (1991). In this case VM contends that PM's wrongful conduct resulted in transforming the Living Trust from a revocable trust to an irrevocable trust.

A. Existence of an Expectancy

There is no doubt in this case that VM had an expectancy to receive a substantial portion of JHM's wealth after his death. JHM repeatedly told her that she would receive half of what he owned after his death. However, JHM never made a will with any provision for her.

Presumably JHM relied on VM's right to elect against the will to obtain her share of his property. Under Texas law, VM is entitled to elect against the will, and to receive half of the community property that passed into his estate. See, e.g., *Wheeler v. United States*, 116 F.3d 749, 755 (5th Cir. 1997) (applying Texas law); *Wurth v. Schar*, 327 S.W.2d 72, 76 (Tex. Civ. App. 1959). VM's right to this minimum inheritance is based solely on her marriage to JHM, which continued to exist until the date of his death.

Under Texas law, the income from separate property during a marriage is community property. See TEX. FAM. CODE ANN. §§ 3.001(2), 3.002 (West 2000); *Arnold v. Leonard*, 273 S.W. 799, 802 (1925); W. Michael Wiest, *Trust Income, Separate or Community Property?*, 51 BAYLOR L. REV. 1149, 1153 (1999).

Likewise, where income from separate property is reinvested instead of distributed, under Texas law the increase in value of the

property during the marriage is community property. Most of the income of KII was reinvested in the business: less than ten percent was distributed to the shareholders.

The mere promise of a donor or testator to provide a benefit on which the donor or testator has taken no action may be insufficient to prove the existence of a valid expectancy. Reaves, *supra*, at 564. However, VM's expectancy in this case does not turn on a provision for her in JHM's will. Her right to elect against the will and to receive half of the community property provides an independent basis for her expectancy.

B. Reasonable Certainty of Expectancy But For Defendant's Conduct

VM must show with a reasonable degree of certainty that she would have received the expectancy but for PM's interference. Comment d to section 774B states in relevant part:

[T]here must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator or that the gift would have been made inter vivos if there had been no such interference. . . . Complete certainty is [often] impossible. It is not required. If there is reasonable certainty established by proof of a high degree of probability that the testator would have made a particular legacy or would not have changed it if he had not been persuaded by the tortious conduct of the defendant and there is no evidence to the contrary, the proof may be sufficient that the inheritance would otherwise have been received. The fact that it was the defendant's tortious act that makes it not possible to prove with certainty may be taken into consideration by the court.

RESTATEMENT, *supra*, cmt. d.

VM has adequately shown the likelihood that VM would have received half of the community property but for PM's actions in making

the Living Trust irrevocable. Because JHM's will made no provision for her, VM is entitled to elect against the will, or to make the "widow's election" under Texas law, pursuant to which she is entitled to receive half of the community property that passes through JHM's estate. VM's entitlement to this inheritance would have legitimately disappeared only in consequence of events such as an agreement with JHM to treat the income as separate property, her divorce from JHM or a total loss in value of Koch Petroleum. No such events occurred. Therefore, this element is satisfied.

C. Intentional Conduct

The only obstacle to VM's receiving this portion of JHM's estate is the purported transaction whereby the trust was made irrevocable after JHM's marriage to VM.

Tortious interference with expectancy is an intentional tort. A plaintiff must show an intentional invasion or destruction of plaintiff's prospective interest or expectancy of which the defendant had actual knowledge. Reaves, *supra*, at 564. The proof must show that the defendant was aware of his or her interference and, in fact, intended to interfere with the expectancy. Marmel, *supra*, at 301.

Upon learning of his father's marriage to VM, PM took quick action to assure that this did not interfere with his own expectation that he and his family would inherit all of his father's wealth. He consulted with Edwin Hunter, to see what could be done to preserve the existing family estate plan, i.e., to preserve his own entitlement to the entire estate and to cut VM out of any inheritance from JHM.

Hunter devised a plan to make the Living Trust irrevocable, which would accomplish this purpose. PM avidly embraced this possibility, and directed Hunter to prepare the documents to accomplish this.

Whether in fact the documents that purport to make this change are genuine and effective to carry out this purpose will be decided by the Probate Court in Texas. If they are effective, PM will have accomplished this purpose. There is no doubt that this conduct was intentional.

D. Independently Tortious Conduct

The most important element of tortious interference with the expectancy of an inheritance is that the defendant's conduct must be tortious.

The most typical examples of this tort occurs where a testator has been induced to make or not to make a bequest by fraud, duress, defamation or tortious abuse of fiduciary duty, or the tortfeasor has forged, altered or suppressed a will (or a document making a gift). RESTATEMENT § 774B, *supra*, cmt. c; see also Fassold, *supra*, at 27. In contrast, persuading a testator to eliminate an expectancy through legitimate means is not enough to satisfy this element. See Reaves, *supra*, at 564.

PM's tortious conduct in this case consisted in his altering the Fine Tuning Document, by changing one page of the document to insert a provision that purported to make the Living Trust irrevocable. This independently tortious conduct supports VM's claim for tortious interference with her expectancy of an inheritance from her deceased husband JHM.

E. Damages

VM claims that her damages equal half of everything Howard owned. VM's expert Wayne Elggren presented evidence on her behalf that half of the Living Trust's interest in MPI, as of August 31, 1999 totaled \$820,489,480.⁷

The court finds that this is the wrong measure of damages. Under Texas law, VM's "widow's election" permits her to receive half of only the community property upon JHM's death. See Tex. PROB. CODE § 46(b) (West 2000). She is not entitled to half of the separate property. *Id.* The MPI stock in the Living Trust remained separate property belonging to JHM during his marriage to VM, or would have absent the wrongful transaction making the trust irrevocable. However, the increase in value of the stock during the marriage, as well as the dividends, were community property.⁸ See *Trawick v. Trawick*, 671 S.W.2d 106, 108-09 (Tex. App. 1984).

⁷The direct testimony on valuation presented by the experts was submitted for trial in the form of written declarations, which were then subject to cross-examination at trial.

⁸The court also holds that, whatever Texas law may provide, the conclusions in this sentence are imposed as sanctions for PM's conduct in refusing to provide discovery, as discussed *supra*.

Elggren presented evidence that the MPI stock increased in value from \$741,470,693 on June 27, 1994 to \$1,640,978,961 on August 31, 1999 (immediately before the trial in this adversary proceeding), for an increase of \$899,508,268. VM's half share of this sum is \$449,754,134. The court finds this testimony credible, and that this is the appropriate amount to use in determining VM's damages.

PM's expert Mike Hill, who did not testify at trial, opined that the community property value of the KII stock was \$170 million. Hill did not appear at trial, which made it difficult for the court to evaluate his credibility. In consequence, the court finds that his testimony on this subject is not credible. In addition, the court disregards Hill's testimony as sanctions for PM's discovery violations, as discussed *supra* and as provided in the court's order of May 21, 1999.

VM has actually been damaged only to the extent that she does not receive her share of the community property in the probate action in Texas.

The probate action is in trial now, and the amount that VM receives in that proceeding must be deducted to determine the damages that PM has inflicted on her.

In addition, the damages awardable to VM must be reduced by an appropriate share of the estate taxes and probate expenses that would be imposed on JHM's estate if the trust had not been made irrevocable before his death. This calculation remains to be determined.⁹

F. Punitive Damages

Under Texas case law, damages available for the tortious interference with an expectancy of an inheritance may include consequential damages, emotional distress or actual harm to reputation, and punitive damages. *King*, 725 S.W.2d at 754; see also Fassold, *supra*, at 29; Reaves, *supra*, at 565. VM has not shown any consequential damages, emotional distress or harm to reputation. However, she does claim entitlement to punitive damages against PM.

It appears to the court that, under Texas law, this is an appropriate case for the assessment of punitive damages. However, the determination

⁹It is possible that the probate action in Texas will make determinations relevant to this issue.

of the amount of punitive damages must await the calculation of the compensatory damages. This calculation, in turn, must await two matters: (1) the Probate Court's determination of the amount, if any, that VM is entitled to from JHM's estate, and (2) the calculation of VM's proportionate share of the estate taxes and other estate expenses that would be applicable if all of the community property had passed through the probate estate.

V. Conclusion

The court concludes that VM has shown, by a preponderance of the evidence admitted at trial and the findings imposed as sanctions against PM for discovery abuses, that PM has tortiously deprived her of her expectancy of an inheritance. VM's expectancy was based on her "widow's election", i.e., her right to elect against JHM's will, which made no provision for her.

The damages are \$449,754,134, minus several deductions. The deductions include any amount that VM actually recovers in the pending Probate Court action in Texas, and her share of constructive estate taxes and other expenses of administration. In addition, VM is entitled to punitive damages, in an amount that remains to be determined after her actual damages are calculated.

Dated: September 27, 2000



Samuel L. Bufford
United States Bankruptcy Judge