

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VICKIE LYNN MARSHALL, :

4 Petitioner :

5 v. : No. 04-1544

6 E. PIERCE MARSHALL. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, February 28, 2006

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 11:13 a.m.

13 APPEARANCES:

14 KENT L. RICHLAND, ESQ., Los Angeles, California; on
15 behalf of the Petitioner.

16 DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.;
18 on behalf of the United States, as amicus curiae,
19 supporting the Petitioner.

20 G. ERIC BRUNSTAD, JR., ESQ., Hartford, Connecticut; on
21 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in 04-1544, Vickie Lynn Marshall v. E. Pierce
5 Marshall.

6 Mr. Richland.

7 ORAL ARGUMENT OF KENT L. RICHLAND

8 ON BEHALF OF THE PETITIONER

9 MR. RICHLAND: Mr. Chief Justice, and may it
10 please the Court:

11 This is a bankruptcy case, but it is a
12 bankruptcy case in which the Ninth Circuit has made --
13 come to the extraordinary conclusion that the Federal
14 bankruptcy court has no jurisdiction over the chief
15 assets of the bankruptcy estate. That asset, a -- a
16 tort cause of action, was to be the main source of the
17 payment to the creditors. And the Ninth Circuit came
18 to this conclusion because it gave a very broad
19 interpretation of the so-called probate exception to
20 Federal jurisdiction.

21 As I will explain, the Federal bankruptcy
22 jurisdiction statutes are incompatible with the concept
23 of having adopted a probate exception to Federal
24 jurisdiction, particularly to Federal bankruptcy
25 jurisdiction.

1 JUSTICE SCALIA: Any exception whatever.

2 MR. RICHLAND: That's correct, Your Honor.

3 There is no exception to that. The -- the statute
4 itself is structured in such a way that its
5 jurisdiction of the bankruptcy court depends on the
6 relationship of the matter to the bankruptcy estate.

7 JUSTICE SCALIA: So if -- if the contention
8 in the -- in the bankruptcy proceeding is that the will
9 which has been probated by the State probate court is,
10 in fact, not the true will and that under the true
11 will, the bankruptcy estate would get money, you think
12 the bankruptcy court would -- would have jurisdiction
13 to probate the will.

14 MR. RICHLAND: Yes, Your Honor. Now, the
15 question is, of course, that's an attack on a probated
16 will, I believe, and I think that this Court's
17 jurisprudence also supports the notion that --

18 JUSTICE SCALIA: All right. Well, I'm
19 willing to -- to move it back. I mean, that's --
20 that's even harder for you. But let's assume that the
21 will is in probate but has not yet been probated. Do
22 you think the bankruptcy court has jurisdiction to
23 decide which will is the true will?

24 MR. RICHLAND: Well, the -- the bankruptcy
25 jurisdiction statute states that --

1 JUSTICE SCALIA: Yes or no.

2 MR. RICHLAND: The answer is yes, it does,
3 and it must have that power to be able to do so because
4 the bankruptcy jurisdiction statute states that the
5 court has jurisdiction, in rem jurisdiction, exclusive
6 in rem jurisdiction --

7 JUSTICE GINSBURG: What if the rem --

8 MR. RICHLAND: -- over all assets of the --

9 JUSTICE GINSBURG: -- what if the rem is in
10 another court before the bankruptcy begins? What if
11 the res is within -- is in another court?

12 MR. RICHLAND: Yes, yes, Justice Ginsburg.
13 28 U.S.C., section 1334(e) states the bankruptcy court
14 shall have exclusive jurisdiction, in rem jurisdiction,
15 over the bankruptcy estate, and that has been
16 interpreted by the courts as meaning that it has
17 paramount jurisdiction in the sense that the normal in
18 custodia legis doctrine does not apply where it is a
19 bankruptcy court case.

20 JUSTICE GINSBURG: So even -- even if
21 property is in the custody of another court in the
22 probate proceeding and the bankruptcy proceeding comes
23 later, the bankruptcy proceeding would sweep whatever
24 assets are before the probate court into the
25 bankruptcy.

1 MR. RICHLAND: That -- that is correct, Your
2 Honor, and there have been courts that have held that
3 with respect --

4 JUSTICE SCALIA: Do you want to stand on this
5 position, Mr. Richland, or do you have a lesser
6 position --

7 MR. RICHLAND: Well, it's certainly not --

8 JUSTICE SCALIA: -- that -- that might cause
9 you to win? Because --

10 (Laughter.)

11 MR. RICHLAND: Well, it certainly is not
12 necessary, of course, to -- to -- for us to prevail in
13 this case. However, I think it is an important
14 principle to interpret the -- the bankruptcy
15 jurisdiction statute, look at the language of that
16 statute, and determine what Congress intended from
17 that. And -- and I think it also is a dangerous thing
18 to get into, implying exceptions into that statute.

19 But -- but let me state this. Obviously, in
20 this case we have an action, the -- the in rem
21 jurisdiction of the bankruptcy court over the chose in
22 action, that is -- is miles away from the probate of --
23 of a will. The particular cause of action involved
24 here was an interference with an inter vivos gift. And
25 I think it's important to realize that that was

1 intended to be a gift that would be complete during the
2 lifetime of the decedent. That fact means that this
3 case really has almost nothing to do with probate or
4 probate jurisdiction.

5 CHIEF JUSTICE ROBERTS: But you did file a
6 challenge to the probate of the will, didn't you, in
7 Texas?

8 MR. RICHLAND: There was a challenge filed to
9 the probate of the will originally by the -- the
10 brother of the respondent in this case, and eventually
11 yes, our client did join that some years later after it
12 was first filed. So that would have been an
13 alternative.

14 CHIEF JUSTICE ROBERTS: And wasn't the ground
15 for that that it would be inconsistent with the inter
16 vivos trust that you are asserting in the bankruptcy
17 court proceeding?

18 MR. RICHLAND: No, that was not the case,
19 Your Honor. The -- the grounds for that was the belief
20 that there had been undue influence with respect to the
21 will. But the inter vivos gift claim -- a tortious
22 interference with inter vivos gift claim -- that was
23 added only many years later in the year 2000. That was
24 3 years, 3 and a half years after that same action was
25 pending in the bankruptcy court. And the only reason

1 it was raised at that time was that respondent went to
2 the Federal court and said -- and interposed the
3 probate exception and argued at that time there is no
4 jurisdiction here. Therefore, out of an excess of
5 caution, our client went to the Texas probate court and
6 said, well, I will -- I will make this -- this claim
7 here.

8 In fact, once there was success in the
9 bankruptcy court and the bankruptcy court said, now I
10 have made a determination on that claim, our client did
11 dismiss claim and dismissed all affirmative claims with
12 respect to the probate estate.

13 I think the important thing to realize here,
14 with respect to both this particular claim and with
15 respect to the bankruptcy jurisdiction statute in
16 particular, is that the -- that the breadth of the --
17 what that statute does is, it -- it announces that
18 rather than having jurisdictional preclusions, there
19 will be preclusions based on abstention. It has broad
20 abstention provisions in section 1334(c), and indeed
21 section 1334(c)(2), which is the mandatory abstention
22 --

23 JUSTICE BREYER: You like this -- apparently
24 you like this argument, although you say you're miles
25 away from probate. Well, if you want to get into that

1 argument, I guess the strongest argument against
2 keeping it -- for keeping it is bankruptcy
3 jurisdictional statutes shouldn't be interpreted
4 differently than diversity jurisdiction or any other
5 statute, and Markham at least recognizes that there is
6 such a thing as the probate exception and that Congress
7 implicitly adopted it, just as they did the domestic
8 relations exception. Therefore, if we are going to
9 find for you on this ground, we'd have to go back and
10 overrule that case and a lot of other water that's
11 flowed over -- under the bridge or wherever the water
12 flows.

13 (Laughter.)

14 JUSTICE BREYER: And we ought to take what's
15 given as given, whatever the true meaning of
16 ecclesiastical courts having jurisdiction over certain
17 probate matters or not in the 18th century.

18 MR. RICHLAND: Well, of course, if one looks
19 at 1334(c)(2), one sees that Congress itself
20 contemplated that there would bankruptcy jurisdiction
21 under circumstances where there was no diversity
22 jurisdiction and when there was no Federal question
23 jurisdiction. So it -- it certainly is true that
24 rolled into the whole notion of mandatory abstention is
25 the possibility that the bankruptcy court will have

1 before it matters over which there would be no
2 diversity jurisdiction.

3 JUSTICE SCALIA: But you could say the same
4 thing about diversity jurisdiction, that Congress
5 contemplated that there would be diversity jurisdiction
6 where there was no bankruptcy jurisdiction and no
7 Federal question jurisdiction. I mean, I don't see
8 what that proves.

9 MR. RICHLAND: Well, excuse me, Justice
10 Scalia, but what I think it does prove is that when
11 Congress enacted in 1978 the rather comprehensive
12 change that it made to the bankruptcy statutes, that it
13 intended to exercise as broad a jurisdiction as
14 possible so that the bankruptcy courts would be able to
15 control the bankruptcy estate and make determinations
16 as to how the creditors could best be protected.

17 Let me -- let -- yes. I'm sorry.

18 JUSTICE SCALIA: I'm just saying no more so
19 than -- than when Congress enacted diversity
20 jurisdiction. It intended it to apply, you know,
21 uniformly.

22 MR. RICHLAND: To -- to apply very broadly
23 according to its terms.

24 JUSTICE SCALIA: Yes.

25 MR. RICHLAND: And, of course, this Court in

1 -- first in Lear v. Armstrong said, yes, this applies
2 very broadly. However, there is an exception and the
3 exception is purely the probate of a will -- the
4 probate of a will and that alone. And this Court has
5 really hewn very closely to that very narrow limitation
6 since that point in time.

7 JUSTICE SCALIA: That's true.

8 MR. RICHLAND: I do think that it's
9 important, however, to realize that if one examines
10 this Court's probate exception jurisdiction over the
11 years, it has consistently determined that the -- the
12 narrowness of that exception must be confirmed, and as
13 late as the Markham case, this Court has held that --
14 that Federal courts have jurisdiction to decide all
15 kinds of issues with respect to wills, all kinds of
16 issues with respect to trusts. Certainly this Court
17 has said that it can determine questions such as how to
18 interpret the provision of a will. It has even held
19 that Federal courts can determine whether a will is
20 invalid. It can make that determinatio if the --

21 JUSTICE SOUTER: But none -- none of this has
22 to be done for you to win this case, does it?

23 MR. RICHLAND: You are absolutely correct.

24 JUSTICE SOUTER: Then I -- I wish we'd stick
25 to this case.

1 MR. RICHLAND: Well, I'm happy to do that,
2 Your Honor. This case is an outlier. I believe that
3 is true. This case is so far from the potential of any
4 probate exception that, although I felt that it was
5 important to be able to explicate the -- the principles
6 involved here, I --

7 JUSTICE SCALIA: You want to look moderate.

8 MR. RICHLAND: Oh --

9 JUSTICE SOUTER: Does this case involve
10 anything more than the enforcement of an in personam
11 tort judgment if you are to win?

12 MR. RICHLAND: It -- it would not. That is
13 all that's involved.

14 JUSTICE KENNEDY: Well, it did involve, at
15 least the bankruptcy court thought, the judgment
16 invalidating the inter vivos trust. Was that necessary
17 to the decision? Or am I -- correct me if I'm --

18 MR. RICHLAND: I -- I don't believe --

19 JUSTICE KENNEDY: -- correct me if I'm wrong
20 about that.

21 MR. RICHLAND: That is -- that is incorrect,
22 Justice Kennedy. It did not invalidate the inter vivos
23 trust. What it held was that as part of the evidence
24 that it was considering, in terms of the intent, the
25 donor's intent, that one portion of that inter vivos

1 trust, an amendment to it, had been forged, but it did
2 not invalidate it. In fact, it -- it expressly held
3 that the -- the inter vivos trust is valid, and that
4 was a basis for its conclusion that, indeed, this
5 particular claim was also valid. This claim was a
6 cause of action for interference with an inter vivos
7 gift.

8 JUSTICE BREYER: I guess what you're going to
9 hear in 5-10 minutes --

10 MR. RICHLAND: Yes.

11 JUSTICE BREYER: -- you might as well deal
12 with it now --

13 MR. RICHLAND: Yes. Why not?

14 JUSTICE BREYER: -- is that the inter vivos
15 -- a -- a claim for a -- the Texas tort of interference
16 with inter vivos gift, according to Texas law, must be
17 brought at the time of the probate proceeding. And for
18 that reason, it is bound up with probate, and for that
19 reason, they didn't have jurisdiction.

20 MR. RICHLAND: Well, A -- A, we do not
21 interpret Texas law as so providing.

22 JUSTICE BREYER: All right. Now, let's
23 suppose you're --

24 MR. RICHLAND: But -- but assuming --

25 JUSTICE BREYER: -- suppose they're right

1 about their interpretation.

2 MR. RICHLAND: Assuming that they're right
3 for that -- by their interpretation, this Court has
4 repeatedly said that it -- that a -- a State court
5 cannot -- by simply assigning matters that otherwise
6 would be heard by Federal courts to the probate court,
7 that it can, in effect, shield those --

8 JUSTICE BREYER: And the strongest case for
9 you on that is?

10 MR. RICHLAND: Oh, I think Hess --

11 JUSTICE BREYER: You said this Court has
12 repeatedly said. So what --

13 MR. RICHLAND: Said it over and over, but
14 Hess v. Reynolds from 1885, which says that merely the
15 convenience of a -- a State court to, you know, assign
16 matters to -- to its probate court. That was a case in
17 which a debt --

18 CHIEF JUSTICE ROBERTS: But -- but this case
19 involves a lot more than convenience. It involves a
20 substantial amount of assets that is either going to
21 pass to one person under probate or is not going to be
22 available for passing to that person because of the
23 inter vivos gift. That seems to be more closely
24 related to the core probate matters.

25 MR. RICHLAND: But in fact, Chief Justice

1 Roberts, I don't believe that's the case. Nothing
2 passed by way of probate in this case. The -- there
3 were no assets in the probate. What happened here was
4 that all of the assets -- and the record shows this,
5 and I don't believe it's -- that there is any dispute
6 here. All of the assets had passed to the respondent
7 in this case before the will and the trust were
8 actually submitted to the probate court.

9 Once again, this is a tort claim and it's a
10 tort claim only for an interference. If those assets
11 had never gone to respondent in this case, there would,
12 nevertheless, still be a good tort claim. If, for
13 example, those assets had been passed to respondent's
14 child or to another brother, the interference itself --

15 JUSTICE GINSBURG: Mr. Richland --

16 MR. RICHLAND: Excuse me, Justice --

17 JUSTICE GINSBURG: -- what seems to me to be
18 involved here is what is not uncommon in our Federal
19 system, that is, two proceedings, both dealing with the
20 same or closely related subject matter. It is not
21 infrequent that you have parallel proceedings in
22 Federal court and State court, and then the one that
23 gets finished first -- that judgment is binding on the
24 other. And as I understand it, the probate proceeding
25 concluded first before the district judge reviewed the

1 bankruptcy judge's opinion.

2 MR. RICHLAND: Justice Ginsburg, you're quite
3 correct that issues -- that -- that the principles of
4 preclusion ordinarily would deal with the kinds of
5 issues here, and -- and we think that that -- those --
6 that should be what governs this case.

7 But I don't believe that it is correct to say
8 that the probate court judgment preceded that of the
9 bankruptcy court. The bankruptcy court judgment came
10 first. A year later the probate court judgment then --

11 JUSTICE GINSBURG: Well, I'm -- I'm assuming
12 -- and correct me if I'm wrong about this -- that the
13 bankruptcy court makes a proposed opinion. It doesn't
14 become a binding opinion until it's affirmed by the
15 district court.

16 MR. RICHLAND: Unless it's a core matter.

17 JUSTICE GINSBURG: Yes.

18 MR. RICHLAND: And here we claim that it is a
19 core matter.

20 JUSTICE GINSBURG: Well, if it isn't a core
21 matter. I think you lost on that in the district
22 court.

23 MR. RICHLAND: If it isn't a core matter,
24 then in any event the district court here held that
25 there was no preclusion, and it held it for a number of

1 reasons.

2 JUSTICE GINSBURG: But that was not reviewed
3 by the Ninth Circuit.

4 MR. RICHLAND: That's correct. That was not
5 reviewed by the Ninth Circuit. But that would be the
6 -- the appropriate manner of review.

7 JUSTICE GINSBURG: That would -- that would
8 be the -- if you -- if you're correct about the limits
9 of the probate exception, that issue would be open for
10 review by the Ninth Circuit.

11 MR. RICHLAND: It certainly would, Justice
12 Ginsburg. We agree with that.

13 And if I may reserve the rest of my time for
14 rebuttal.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MR. RICHLAND: Thank you.

17 CHIEF JUSTICE ROBERTS: Ms. Maynard.

18 ORAL ARGUMENT OF DEANNE E. MAYNARD

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

21 MS. MAYNARD: Mr. Chief Justice, and may it
22 please the Court:

23 Two independent principles require reversal
24 of the Ninth Circuit's decision.

25 First, the probate exception to Federal

1 jurisdiction is a will-specific rule and it does not
2 apply beyond the context of wills to other types of
3 will substitutes like inter vivos trusts.

4 Second, even with respect to wills, it is a
5 very narrow exception that is no bar to deciding the
6 rights to a decedent's estate, construing a will, or
7 determining the testator's intent.

8 There are only three things under this
9 Court's precedent that a Federal court cannot do. The
10 first is to probate a will, that is, to determine the
11 formal key requisites of the validity of a will;
12 second, to annul an already probated will; and three,
13 to take in rem jurisdiction over a res over which a
14 State court has already taken in rem jurisdiction. But
15 that is it, and none of those are applicable here.

16 The justifications for the probate exception
17 do not apply to will substitutes. The -- the probate
18 exception is based on the peculiar nature of a will,
19 that is, that unlike inter vivos trusts, unlike the
20 current modern will substitutes, a will is not valid --
21 it has no legal effect. This Court's opinions have
22 said that on several occasions -- unless it is
23 probated. Therefore, a will must be probated even if
24 there is no dispute about its validity before any title
25 can pass. Not so with trusts. In fact, that is the

1 whole point that people engage in the modern world
2 substitutes is to avoid the necessity to go to the
3 probate court in order to have their assets passed to
4 their heirs.

5 The second ground for this Court's probate
6 exception is the historical one based on the Court's
7 understanding of the limits of the equity courts in
8 England. Whatever the merit of that historical
9 analysis, it has not application to trusts, which have
10 always been the problems of equity.

11 The Federal Government has a strong interest
12 in the Court not expanding the Federal exception -- the
13 -- the probate exception to Federal jurisdiction,
14 particularly in the sweeping manner that the Ninth
15 Circuit has done. It is not uncommon for the tax
16 consequences of an estate planning instrument, such as
17 a trust, to turn on whether or not the trust is valid
18 or invalid. And the Congress has provided Federal
19 jurisdiction to the United States to bring its -- most
20 of its disputes in the Federal court system.

21 Secondly, more generally, Congress has
22 determined what types of disputes should be in the
23 Federal courts and has passed broad statutes providing
24 the courts with Federal jurisdiction that the courts
25 have an obligation to exercise, if it exists.

1 CHIEF JUSTICE ROBERTS: Except if it's a will
2 -- will-specific. In other words, you -- it seems to
3 me you're in for a penny and in for a pound. You
4 recognize the existence of this exception in certain
5 cases, and then you argue against it by saying, well,
6 Congress wrote the statutes broadly. The latter
7 argument disproves your first point.

8 MS. MAYNARD: I don't believe it does, and
9 perhaps I'm -- I'm -- I wasn't making clear what my
10 argument is. The Court has adopted a very narrow
11 probate exception with respect to the probating of the
12 will and annulling a probated will, but that is it.
13 And that analysis was based on a -- the historical --
14 the Court's view of the historical limits of courts of
15 equity and therefore was an interpretation of the
16 Federal diversity statute. Under the logic of
17 Ankenbrandt, one can assume -- one may -- the Court may
18 assume that's carried forward.

19 But certainly that -- for the reasons I've
20 said, that rationale, those justifications, for that
21 narrow will rule do not apply to trusts, which have
22 always been the province of equity, and especially
23 given the questionable historical underpinnings of the
24 exception, even the narrow exception that does appear
25 to exist, there's no justification for expanding that

1 beyond its current confines.

2 As this Court recognized in *Ankenbrandt*, the
3 lower courts had taken the -- the so-called domestic
4 relations exception beyond this Court's very narrow
5 limits, and this Court brought -- brought it back to
6 its origins. And -- and the Federal Government
7 believes that -- that the same would be appropriate
8 here with respect to the probate exception.

9 JUSTICE STEVENS: Ms. Maynard, it's my
10 understanding that a lot of this law developed out of
11 the dicta in the *Markham* case. Do you think the dicta
12 in the *Markham* case was an accurate description of the
13 prior history?

14 MS. MAYNARD: It was probably not a very
15 precise history, Justice Stevens. I do think one can
16 read *Markham*, however, especially if one reads it in
17 the context of the cases it cites for its principles,
18 to hold what we are saying now, which is that Federal
19 courts have no jurisdiction over pure probate matters,
20 that is, no jurisdiction to probate a will. And its
21 interference language, I believe, was its statement of
22 the *in rem v. in rem* jurisdiction principle, which in
23 fact isn't really a probate jurisdiction principle at
24 all.

25 JUSTICE SCALIA: What do you mean by no

1 jurisdiction to probate a will? Could -- could -- does
2 that exclude the possibility of a bankruptcy court
3 deciding for itself where there are contested wills
4 that in its in view the -- the right -- the valid will
5 is a certain one and that, therefore, the bankruptcy
6 estate includes this fund or doesn't include this fund?

7 Is that probating the will?

8 MS. MAYNARD: The -- the United States hasn't
9 taken a position on the broader argument about whether
10 or not the --

11 JUSTICE SCALIA: Well, if that isn't
12 probating a will, the exception for probating a will
13 doesn't -- doesn't amount to a hill of beans, does it?

14 MS. MAYNARD: If -- if the question you're
15 asking me is what does it mean to probate a will --

16 JUSTICE SCALIA: Yes.

17 MS. MAYNARD: -- the -- the probate of a will
18 requires determining that it has the appropriate formal
19 prerequisites, which in most States is appropriate
20 number of signatures that the testator was coherent,
21 competent to make a will and that there was no undue
22 influence.

23 JUSTICE SCALIA: Well, and that this is --
24 that this is the -- the last will and testament and
25 that there is not some other one.

1 MS. MAYNARD: That's true, yes, that there's
2 no competing will.

3 JUSTICE SCALIA: Okay. Now, can -- can the
4 bankruptcy court determine that, that the -- that the
5 proper will and testament of this decedent is this one?
6 We're not probating it. No, no.

7 MS. MAYNARD: The --

8 JUSTICE SCALIA: We don't pretend to probate
9 it. We're just saying that this happens to be the true
10 will and testament.

11 MS. MAYNARD: It's conceivable that if that
12 determination went to a -- an element of, for example,
13 a tort claim and that the person were not -- were not
14 seeking to take under the will, it is possible. This
15 Court's precedent doesn't address that precise
16 question. The United States hasn't taken a position on
17 whether or not bankruptcy jurisdiction, ala the logic
18 in Ankenbrandt, encompasses the narrow probate
19 exception that we concede exists because it's not
20 necessary to decide this case. The -- the petitioner's
21 claim is far beyond anything that the probate exception
22 has ever applied to.

23 The respondent suggests that States have an
24 overriding interest in having one forum resolve all
25 probate-related disputes. This Court has repeatedly,

1 for over 150 years, rejected that exact proposition --
2 Justice Breyer, *Payne v. Hook*, *Hess v. Reynolds*,
3 *McClellan v. Carland*, which this Court cited last term
4 in *Exxon Mobil* -- and it was the basis of Markham's
5 reversal of the Ninth Circuit decision that the Federal
6 jurisdiction is not determined by the scope and extent
7 of the State's decisions with respect to where to send
8 its own citizens with respect to disputes that don't
9 otherwise have a basis for Federal jurisdiction. The
10 only place in this --

11 JUSTICE GINSBURG: Ms. Maynard, you said at
12 one point it's not necessary for you to decide this,
13 but there is vast confusion in the lower courts about
14 the extent of the probate exception. And so I take it
15 that your -- what you began -- what you began with is
16 -- I wrote them down. That's it?

17 MS. MAYNARD: That's what the United States
18 believes the limit of the exception is, and the -- let
19 me be clear. The United States has a strong interest
20 in having this Court clarify the exception. That is
21 where the confusion lies in the court of appeals. That
22 is where the United States feels like its interests are
23 at risk. So although the petitioner's claim is well
24 outside the exception, the United States' interests lie
25 in having the Court clear up the confusion and reject

1 the sweeping and expansive view of the probate
2 exception that the Ninth Circuit has announced.

3 JUSTICE GINSBURG: And in addition to
4 Markham, what other case of this Court do you think
5 spells out the proper bounds?

6 MS. MAYNARD: I -- I think the -- Waterman
7 has a -- has a good summary of the -- of the limits. I
8 think even the two cases on which the respondent
9 principally rely, Sutton and O'Callaghan, lay out the
10 proper scope of the rule. Those -- both of those cases
11 involved a claim that depended on having a will that
12 had been probated declared invalid, and that is within
13 the narrow confines of the exception. But it is a
14 will-specific rule.

15 The -- and, Justice Stevens, back to your
16 question. The one thing about Markham is that there's
17 no general interference principle, and that's where the
18 --

19 JUSTICE STEVENS: We know there are a lot of
20 scholars who think that Markham is the source of most
21 of the confusion, and so that's why I was asking
22 whether you think we should -- to clear up, which
23 you're suggesting we should do, we should reexamine
24 some of that dicta or we should just stick to the
25 holding.

1 MS. MAYNARD: I would -- I would -- you can
2 -- it would be helpful to -- to clarify what the Court
3 meant in Markham. I think the holding in Markham is
4 correct.

5 CHIEF JUSTICE ROBERTS: With -- with new
6 dicta of our own?

7 (Laughter.)

8 MS. MAYNARD: It will probably be necessary,
9 to -- to rule on the case, to make some holding about
10 what the scope of the exception is, Your Honor. And
11 the -- the -- but, Justice Stevens, the --

12 JUSTICE SCALIA: We could just say whatever
13 its scope is it ain't this. I mean, couldn't we do
14 that?

15 MS. MAYNARD: The Court certainly could
16 resolve it that way, Your Honor.

17 But, Justice Stevens, the -- the -- Markham,
18 I do think, makes clear what interference is and is not
19 by its holding. And on page 494 of Markham, it says,
20 where the final judgment does not undertake to
21 interfere with the State court's possession, save to
22 the extent that the State court is bound by the
23 judgment to recognize the right adjudicated by the
24 Federal court. So that is not the type of interference
25 that runs afoul of the rule.

1 CHIEF JUSTICE ROBERTS: Thank you, Ms.
2 Maynard.

3 Mr. Brunstad.

4 ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

5 ON BEHALF OF THE RESPONDENT

6 MR. BRUNSTAD: Mr. Chief Justice, and may it
7 please the Court:

8 The probate exception exists precisely to
9 prevent what happened in this case, a Federal court
10 enjoining ongoing probate proceedings in the middle of
11 a probate trial, a Federal court determining that the
12 decedent's estate plan was invalid, a Federal court's
13 reallocation through a damage claim of the decedent's
14 assets, contrary to the value of the estate plan, a
15 Federal court's creation of a novel cause of action --

16 JUSTICE STEVENS: Well, is it -- is it
17 correct -- I just want to be sure I follow you -- that
18 they determined that the estate plan was invalid?

19 MR. BRUNSTAD: Correct, Justice Stevens. At
20 petition appendix 123 to 126, the district court
21 determined that the -- that J. Howard's living trust
22 was a forgery, that there were pages that were
23 substituted --

24 JUSTICE BREYER: But this is all -- this has
25 nothing -- I mean, I -- you have the total differently

1 -- different understanding than I do of this case, and
2 I did read Judge Carter's opinion. I thought that case
3 simply held that because your clients had interfered
4 with an effort by J. Howard to give quite a few
5 millions of dollars to Vickie Marshall -- because of
6 that interference, they had committed the tort of inter
7 vivos interference with a gift, and they had to pay
8 damages.

9 Now, they said a lot of things by way of what
10 the evidence was. Indeed, they did say, as you point
11 out, that your clients forged three pages of the will.

12 But that was simply evidence of their bad intent, and
13 it did not invalidate anything in the probate
14 proceeding, as I read it.

15 Now, what have I said that's not right?

16 MR. BRUNSTAD: Justice Breyer, the answer to
17 your question, I think, depends upon the fact that
18 opposing counsel has studiously avoided actually
19 reviewing what his claim is. I think we have to focus
20 on the -- her exact claim. As a matter of fact and as
21 a matter of law, she did not prevail --

22 JUSTICE BREYER: I'm not interested in what
23 he said. I'm interested in what Judge Carter said --

24 MR. BRUNSTAD: Correct, Your Honor.

25 JUSTICE BREYER: -- because that, it seems to

1 me, is -- and what is it that Judge Carter did that was
2 wrong in this respect?

3 MR. BRUNSTAD: Judge -- Judge Carter
4 understood quite clearly that in order for her claim to
5 proceed as a matter of fact and as a matter of law, he
6 had to invalidate her living trust. And let me explain
7 why that was so.

8 That was so because her claim is that J.
9 Howard intended to give her a catchall trust. The
10 argument is that Pierce blocked the catchall trust from
11 being funded by rendering the living trust irrevocable
12 in July of 1994. Judge Carter found that the catchall
13 trust was drafted in December of 1994.

14 She can only have a claim -- now, all of J.
15 Howard's assets were in the living trust. She can only
16 have a claim -- the catchall trust could only have been
17 funded or prevented from being funded if the living
18 trust was, in fact, validly rendered irrevocable. To
19 prevent -- to -- to counter that, she says, no, the
20 living trust was invalid. As a matter of fact, she can
21 have no claim unless the living trust is rendered
22 invalid. Judge Carter understood that and he expressly
23 concluded that it was a forgery.

24 Now --

25 JUSTICE SOUTER: Isn't -- isn't it the case

1 that she can have her claim and she can prove her
2 claim, but she may not be able to collect the judgment
3 unless the living trust is invalid? But that's not
4 what we're litigating here, is it?

5 MR. BRUNSTAD: Your Honor, as a matter of
6 law, she cannot have her claim because the two cases we
7 rely on, Neill v. Yett and Thompson v. Deloitte, the
8 two Texas cases, establish as a predicate to any
9 tortious interference claim, she must demonstrate that
10 the estate plan, the living trust, was invalid as a
11 matter of Texas law. And that is exclusively under
12 Texas law for the Texas probate court to decide.

13 Now --

14 JUSTICE SOUTER: Why does she have to show
15 that is invalid as distinct from showing that another
16 trust, favorable to her, was not created and it was not
17 created because of the tortious conduct of your client?

18 MR. BRUNSTAD: Because, Justice Souter, under
19 Texas law when the -- the probate court determines the
20 validity of an estate plan, it forecloses, as a matter
21 of law, all expectancies contrary to those that are
22 part of the estate plan.

23 JUSTICE SOUTER: Well, let me -- let me stop
24 you there because this is something I didn't understand
25 in the brief. You speak of the Texas probate court

1 determining the validity of an estate plan.

2 MR. BRUNSTAD: Correct.

3 JUSTICE SOUTER: I take it the Texas probate
4 court determined the validity of a will here.

5 MR. BRUNSTAD: Correct.

6 JUSTICE SOUTER: It determined the validity
7 of -- of a pourover trust. Is that correct?

8 MR. BRUNSTAD: Yes, Your Honor, it did.

9 JUSTICE SOUTER: All right.

10 MR. BRUNSTAD: The living trust.

11 JUSTICE SOUTER: All right.

12 Isn't it the case that the two Texas
13 determinations can be respected and still, in the
14 Federal court, enter a judgment for tort liability
15 against your client?

16 MR. BRUNSTAD: No, Justice Souter, and the
17 reason why is because her cause of action is a State
18 law cause of action, and under Texas law, putting aside
19 the fact that no Texas court has ever recognized a
20 cause of action for tortious interference --

21 JUSTICE SOUTER: That's in -- you may be
22 right on that, but that's not what -- what we're here
23 for.

24 MR. BRUNSTAD: Right. Putting that aside,
25 under Texas law -- and the Deloitte case and the Neill

1 v. Yett case conclusively established this, and there's
2 no contrary decisions in Texas -- that once the probate
3 court determines an estate plan is valid, it
4 conclusively determines the universe of persons with
5 legitimate expectancies.

6 JUSTICE SOUTER: But when you speak of estate
7 plan, you are -- you seem to be talking in global
8 terms; i.e., that there could have been no other
9 disposition of assets by the decedent or on behalf of
10 the decedent except those which the Texas court is
11 recognizing, the trust, the will. Is that what the
12 Texas court does, or does the Texas court say, the will
13 is good, the trust is good?

14 MR. BRUNSTAD: The Texas courts have
15 conveniently described for us Justice -- Justice Souter
16 --

17 JUSTICE SOUTER: In other words, is it
18 preclusive of everything else? That's what I'm getting
19 at.

20 MR. BRUNSTAD: Yes, exactly so, Justice
21 Souter. And in the Thompson case itself, the -- the
22 Texas court says, when the probate court admitted the
23 1989 will to probate, it necessarily found that Mr.
24 Thompson signed the will with testamentary capacity and
25 that it reflected his intent, was not the result of

1 coercion or under influence, and was valid. And the
2 court continued, as a matter of law, the final probate
3 court judgment bars any claim that appellees tortiously
4 interfered with any --

5 JUSTICE BREYER: But that -- that sounds to
6 me like a matter of preemption, but -- but -- or not
7 preemption but, you know, res judicata.

8 But just out of curiosity or -- because I
9 think it is relevant, did the Texas probate court have
10 in front of it the documents among the lawyers that the
11 district judge, Judge Carter, relied upon in showing
12 that there was an intent to create the catchall trust?

13 MR. BRUNSTAD: Yes, Justice Breyer.

14 JUSTICE BREYER: It had all those documents.

15 MR. BRUNSTAD: Yes, Justice Breyer.

16 Everything that the district court had and more was
17 examined, adjudicated in the 5-and-a-half-month jury
18 trial in the Texas probate court exhaustively.

19 CHIEF JUSTICE ROBERTS: So why isn't that, as
20 Justice Breyer prefaced his question, an issue of
21 preclusion rather than, as you frame it, an issue of
22 jurisdiction?

23 MR. BRUNSTAD: Chief Justice Roberts, the
24 probate exception has always been jurisdictional, and
25 the reason why it can't be subsumed by res judicata or

1 collateral estoppel -- we believe we win on those
2 grounds, but the reason why the probate exception can't
3 be subsumed within those doctrines is because it
4 applies even before you have a State court judgment.
5 It prevents a Federal court from determining an estate
6 plan from being invalidated --

7 JUSTICE GINSBURG: Why should it? The
8 probate exception is court-created. Congress passed no
9 law that said it. Congress gave the Federal courts
10 jurisdiction in certain categories of cases and
11 expected them to exercise that jurisdiction. Since our
12 jurisdiction is statutory and the probate exception was
13 made up by the courts, shouldn't we interpret it as
14 narrowly as possible, perhaps even do away with it
15 because it lacks any statutory basis?

16 MR. BRUNSTAD: Justice Ginsburg, the probate
17 exception, like the domestic relations exception, is
18 best conceived as a presumption that when Congress
19 establishes a font of Federal jurisdiction, it does not
20 intend that jurisdiction to be extended to interfere
21 with probate proceedings. That is properly a
22 jurisdictional doctrine in this case because it is
23 never appropriate for a bankruptcy court to invalidate
24 or validate a will and -- or an estate plan. And that
25 is a necessary element of Vickie's claim.

1 JUSTICE KENNEDY: Well, you say -- you say an
2 -- an estate plan. Most people would think insurance
3 policies are part of their estate plan, and if it's
4 alleged that there was a fraudulent alteration of the
5 beneficiary designation in the insurance policies, is
6 that within the Texas probate court jurisdiction?

7 MR. BRUNSTAD: Justice Kennedy, no. Here we
8 have -- when I say estate plan, I mean the living trust
9 and the will operating together.

10 JUSTICE KENNEDY: Well, there's -- there's a
11 further irony here in that revocable trusts are always
12 promoted on the grounds that it keeps us out of
13 probate. And now you're -- you're insisting that it
14 has to be in probate.

15 MR. BRUNSTAD: Well, Justice Kennedy, the
16 living trust here did two things that a will does. It
17 provided for the succession of J. Howard's property
18 upon his death, and it provided for the payment of his
19 last -- last illness expenses and his -- his debts. It
20 is quintessentially a will substitute in the sense that
21 it also provides for the succession of his property.
22 In this case --

23 JUSTICE SCALIA: But it isn't probated.
24 That's -- it is, indeed, a will substitute. The whole
25 purpose of doing it is to avoid probate.

1 MR. BRUNSTAD: But in this case, Justice
2 Scalia, the will and the -- the living trust acted
3 together. The probate court had exclusive jurisdiction
4 over both of them and the challenges to them. Vickie
5 challenged the living trust, even before J. Howard
6 died. Those proceedings continued on in the probate
7 court, and --

8 JUSTICE KENNEDY: Well, but as Justice Breyer
9 indicated, can't you just, for purposes of
10 understanding the cause of action as asserted by Vickie
11 Marshall here, just say, we will assume the trust is
12 valid, we will assume the will is valid? All we're
13 saying was that there's a tort and he's going to be
14 liable to us in tort.

15 MR. BRUNSTAD: Because, Justice Kennedy,
16 again, the critical element of her cause of action is
17 the invalidity of the trust as a matter of fact and
18 law.

19 JUSTICE BREYER: Why? Why? Why? That is to
20 say, what the finding is, is that there was a different
21 matter, a catchall trust, and he told the lawyers, go
22 draw it up so I can give gifts to her, the increase in
23 the value of my property during the 13 months we're
24 married, do it, and they never did it. Now, that seems
25 to have nothing whatsoever to do with the GRAT trust or

1 with the will. It just happens that those are
2 evidentiary, what went on there, of what likely
3 happened with the catchall trust.

4 So I don't see why those are necessary. I
5 don't see why they're more than evidentiary, and I
6 don't see whether or not those are barred, those
7 particular facts have anything to do with this, as far
8 as jurisdiction is concerned.

9 Now, explain to me why I'm wrong.

10 MR. BRUNSTAD: Certainly, Justice Breyer.
11 First of all, Texas has the right to prescribe the
12 elements of its own causes of action, and under Texas
13 law, her cause of action depends upon two critical
14 things, a legitimate expectancy J. Howard intended to
15 do this for her, and the second, tortious conduct of
16 some kind. Her claim -- she tries to meet those two
17 critical elements by showing two things. One, that J.
18 Howard intended to give me this -- this gift in the
19 form of this -- this trust, and that it was tortiously
20 interfered with because the living trust was rendered
21 irrevocable.

22 JUSTICE BREYER: Well, that's just one of the
23 things.

24 MR. BRUNSTAD: But it's --

25 JUSTICE BREYER: Among other things that went

1 on were they hired private detectives to go after
2 Vickie from the bed. I mean, you've read that opinion
3 and they're like about 30 things in there. And I grant
4 you that one of those things is the fact that three
5 pages of the living trust, according to the judge, were
6 created after the event of that trust and slipped in
7 without his knowledge. I mean, it's quite a story.

8 MR. BRUNSTAD: Of course, Your Honor --

9 JUSTICE BREYER: And -- and so I -- but as I
10 read it, there were many, many, many things involved
11 here, and this is just one of them. So how can Texas
12 say that you have to prove this particular one as -- as
13 opposed to proving a lot of others?

14 MR. BRUNSTAD: Justice Breyer, of course, as
15 an aside, we went to great pains in the Ninth Circuit
16 to demonstrate why all those findings were clearly
17 erroneous and not based on the evidence.

18 But assuming them to be so, which we dispute,
19 again, looking at her claim, that is the critical
20 element of her claim. If, in fact, there -- if, in
21 fact, the living trust was made revocable, then at any
22 point in time, he could have funded, if -- if he had it
23 as revocable until his death, he could have funded her
24 gift that she alleges and she would have no damage
25 claim. It is because of the trust becoming irrevocable

1 that he was prevented from doing it. That is her
2 claim.

3 JUSTICE SOUTER: Yes, but her claim is assume
4 it's been made irrevocable. I just want some money
5 from this guy.

6 MR. BRUNSTAD: Correct.

7 JUSTICE SOUTER: That's all she's saying, as
8 I understand it. She -- she can -- as I understand her
9 cause of action, it can proceed on the assumption the
10 will is valid, the -- the trust is valid. Just give me
11 the money that I would have had.

12 MR. BRUNSTAD: Justice Souter, as a matter of
13 Texas law, she cannot establish a legitimate
14 expectancy. Again, once the probate court -- and the
15 probate court alone has the right to determine the
16 validity of an estate plan. Once the probate court has
17 determined that as a matter of Texas law, all claims
18 about expectancies contrary to those provided in the --
19 in the plan are foreclosed. That's the Thompson case
20 and the Neill case.

21 JUSTICE GINSBURG: You're arguing a
22 preclusion question, and if the Ninth Circuit thought
23 it had jurisdiction, it could have tested what you say
24 about Texas law. There's no finding in this record of
25 what Texas law is other than what you have just told

1 us, and perhaps you're right and perhaps you're not.
2 But the Ninth Circuit said the Federal door is closed
3 to this probate exception, and that's what we're here
4 to decide.

5 MR. BRUNSTAD: Justice Ginsburg, preclusion
6 will also not work. Res judicata and collateral
7 estoppel will also not work because the parties in the
8 Federal proceeding are merely a subset of the parties
9 in the probate court. The probate court's judgment is
10 unique because it has a binding-against-the-world
11 effect. Federal courts cannot pull chunks of the
12 critical issues into the Federal courts because doing
13 so creates an inconsistency of judgments potentially.
14 Where the Federal court only has part of the parties
15 before it, the Federal court has all -- the probate
16 court has all the parties before it. The probate
17 court's judgment is binding against the world --

18 JUSTICE GINSBURG: I think it -- it may be
19 that there's another side to that story. For example,
20 I think the bankruptcy court was heard from first.
21 Arguably, that's binding on the Texas court. Whether
22 the bankruptcy court was right or wrong, it would get
23 full faith and credit. That's one argument.

24 Another is perhaps you can explain to me how
25 this all started because I thought that there was a

1 claim made against her in the bankruptcy court for
2 defamation. Then the claim that she asserts is a
3 compulsory counterclaim. She has to make it there or
4 she'll lose it.

5 MR. BRUNSTAD: No, Justice Ginsburg, the
6 claim was not a compulsory counterclaim. The action
7 which was -- that Pierce commenced in the -- in the
8 bankruptcy court was merely to ask the bankruptcy court
9 to decide that if he had a debt against -- if he had a
10 claim against her she owed him money, it would be
11 nondischargeable in bankruptcy. She then used that
12 opportunity to pursue this tortious interference claim
13 against Pierce that she was already pursuing in the
14 probate court. So because there was a prior pending
15 proceeding where she had made the claim --

16 JUSTICE GINSBURG: I -- I didn't understand
17 the pleading to say if I have a claim, it would be
18 nondischargeable. I thought he made a claim. He made
19 -- filed a claim for defamation in the bankruptcy
20 proceeding.

21 MR. BRUNSTAD: Justice Ginsburg, Pierce did
22 not ask the bankruptcy court to decide the claim. He
23 only -- he only asked for the bankruptcy court to
24 decide whether it was nondischargeable or not.

25 But even so -- even so, I think it's

1 important to recognize --

2 JUSTICE GINSBURG: He would have to say I
3 have a claim because the bankruptcy court is not going
4 to decide a hypothetical if he has a claim. He has to
5 at least assert I have a claim.

6 MR. BRUNSTAD: But bankruptcy judges do that,
7 Justice Ginsburg. They decide only the
8 nondischargeability aspect of claims rather than the
9 claims themselves.

10 JUSTICE GINSBURG: It has to be a real claim.
11 It can't be if I have a claim.

12 MR. BRUNSTAD: No, Justice Ginsburg, because
13 the nondischargeability jurisdiction in bankruptcy is
14 unique. You allow the claim to be determined in a
15 proper court of competent jurisdiction, and then the
16 bankruptcy court decides whether it's nondischargeable
17 or not. That's how it should proceed particularly
18 where, as here, her claim requires, as -- in order for
19 it to -- to be valid, to determine the validity or
20 nonvalidity of J. Howard's estate plan.

21 Now, the United States --

22 CHIEF JUSTICE ROBERTS: Counsel, I don't -- I
23 don't see how the interference with the probate court
24 that you're articulating is any greater than the
25 interference in Markham. In Markham, it was a decision

1 by the Federal court that these claimants were not
2 going to claim under the will. Why is -- isn't that
3 even greater than the interference you're complaining
4 of?

5 MR. BRUNSTAD: No, Chief Justice Roberts.
6 You can readily divide the Court's precedents into
7 categories, those where there was impermissible
8 interference and therefore no jurisdiction, and those
9 where there isn't. On the impermissible interference
10 side, you have a case like a Federal court cannot
11 determine the validity of an estate plan, *Armstrong*,
12 *Gaines v. Chew*. A Federal -- a Federal court cannot
13 determine --

14 JUSTICE SCALIA: Was it an estate plan or a
15 will?

16 MR. BRUNSTAD: In *Sutton* --

17 JUSTICE SCALIA: I mean, you -- you -- you're
18 stretching the probate concept from determining whether
19 the will is valid or invalid and who inherits under the
20 will to also determining what goes into the probate
21 estate, that is, the insurance policies, the trust, and
22 so forth. That to me is -- is something quite
23 different from probating a will.

24 MR. BRUNSTAD: Justice Scalia, the probate
25 exception protects the integrity of the succession

1 process. If the documents you're looking at deal with
2 the succession of the property, as the living trust and
3 will do in this case, it is encompassed within the
4 probate exception in Sutton --

5 JUSTICE SOUTER: No, I don't -- I don't see
6 your -- your logic there. Of course, it protects the
7 succession process, but it does not follow that
8 everything that implicates a succession process falls
9 within the probate exception.

10 MR. BRUNSTAD: Correct. Correct, Justice
11 Souter. But here the succession was determined under
12 the living trust, and in Sutton v. English, that's
13 exactly the same scenario. Moses Hubbard left a --

14 JUSTICE SOUTER: If -- if there had been a
15 joint bank account, the succession would have been
16 determined based on the validity of the joint bank
17 account, and that certainly wouldn't have fallen within
18 the probate exception.

19 MR. BRUNSTAD: Because the joint -- where you
20 have the equivalent of tenancies in the entirety, I'd
21 say that's a separate issue.

22 Here, however, the living trust performed all
23 the functions of a traditional will, unlike a joint
24 bank account. In the Sutton case, you had both a will
25 and a trust, just like in this case. There, Moses

1 Hubbard left a will and a trust. Mary Jane Hubbard
2 enjoyed the benefits of the trust for her life.

3 JUSTICE SOUTER: Does -- does Texas law
4 provide that a -- a living trust must be executed and
5 administered with the formalities of a will?

6 MR. BRUNSTAD: Not quite the same, Justice
7 Souter. Not quite the same.

8 JUSTICE SOUTER: Then -- then you have to get
9 beyond our probate exception cases to cover the living
10 trust.

11 MR. BRUNSTAD: But in Sutton v. English,
12 there was both a will and a trust, exactly the same as
13 here. The plaintiffs were just going after the
14 property. We just want the assets. We're saying we're
15 not touching the trust and the will. This Court held
16 -- this Court held, wait a minute. Only the Texas
17 probate courts may determine whether these instruments
18 are valid or not.

19 CHIEF JUSTICE ROBERTS: Yes, but she's not --
20 she's not even going after the assets in this case.
21 She's asserting an in personam claim against the
22 individual. Correct?

23 MR. BRUNSTAD: She is, but that's exactly the
24 same as Broderick's Will, Chief Justice Roberts, an in
25 personam claim against the beneficiaries of the

1 allegedly invalid estate plan to impose a constructive
2 trust on them to get the money. No matter how you dice
3 it or splice it in this case, she is doing an end run
4 around the probate proceeding.

5 JUSTICE BREYER: I don't think they're going
6 to impose a constructive trust, are they? All -- all
7 they're going to say is pay her the money.

8 MR. BRUNSTAD: But why are they going to say
9 pay her the money?

10 JUSTICE BREYER: They're going to say it
11 because they make a finding that through a whole
12 variety of various devices, all of which were listed,
13 that J. Howard, who wanted to give her money through
14 something called the catchall trust was prevented in
15 about 15 ways. And even if you're right that there's a
16 Texas finding that those three pages weren't slipped
17 in, well, how do we know? Maybe it was a valid GRAT
18 trust, but if only they hadn't tried to isolate J.
19 Howard from contact with her, J. Howard would have
20 figured out what had happened before he died and he
21 would have told his lawyers, hey, cut this out. Do
22 what I want. Revoke it. But all that is just
23 hypothetical. I'm just using that to show you why I
24 think this is evidentiary not a matter of what the
25 elements of the crime are -- or the elements of the

1 tort are.

2 MR. BRUNSTAD: What's not evidentiary,
3 Justice Breyer, is the fact that in order to prove a
4 legitimate expectancy, she must establish that the
5 validated estate plan is in fact invalid. And under
6 Texas law, that can only be done in the probate court.

7 JUSTICE BREYER: What's the cite on that that
8 I -- that I need for --

9 MR. BRUNSTAD: Well, in our brief we cite to
10 many, many cases, Your Honor. I would -- I would
11 specifically refer you to --

12 JUSTICE BREYER: You're saying you can't
13 bring an inter vivos trust -- an inter vivos --
14 interference with an inter vivos gift action in Texas
15 unless you show that a will, for example, is invalid.

16 MR. BRUNSTAD: That's correct, Your Honor,
17 and those are the Neill v. Yett and the Thompson --
18 Thompson v. Deloitte cases, which I was reading to
19 before. And the Court said as a matter of law, the
20 final probate court judgment bars any claim that
21 appellees tortiously interfered with any inheritance
22 expectancy because, in light of the final invalid
23 probate court judgment, appellant has --

24 JUSTICE SCALIA: But that -- but that's res
25 judicata. I mean, that -- that isn't necessarily a --

1 an application of -- of any probate exception.

2 MR. BRUNSTAD: Justice Scalia, it is not res
3 judicata for the following reason. Not only may a
4 Federal court not determine the validity or invalidity
5 after the probate court, it may no do so before the
6 probate court has had a chance --

7 JUSTICE SCALIA: You say that, but that case
8 doesn't say that.

9 MR. BRUNSTAD: That case doesn't say that.

10 JUSTICE SCALIA: What -- what case do you
11 have that says that?

12 MR. BRUNSTAD: The cases -- there is no
13 specific case where someone has tried to litigate a
14 tortious interference claim in Federal court before the
15 probate court has had -- has had its say.

16 Under Texas law, however, because of the
17 preclusive effect of that determination, Vickie would
18 be able to come to the probate court and say, look, J.
19 Howard intended to give me this. It's a finding of
20 intent. That's preclusive on the probate court. The
21 probate court would be perhaps prohibited from saying,
22 oh, I can't determine under -- that the valid estate
23 plan gives the intent to somebody else.

24 JUSTICE SCALIA: But the mere fact that you
25 have jurisdiction to say something does not mean that

1 if -- if some other court says the same thing first,
2 you won't be bound by that.

3 MR. BRUNSTAD: The problem, though, Justice
4 Scalia, is that the probate court is supposed to make
5 that finding in a judgment good against the world. But
6 all of a sudden, part of the world who has done an end
7 run around the probate proceeding has now gone to some
8 other court for a critical determination of fact that
9 the probate court must decide and always must decide in
10 determining the validity of an estate --

11 JUSTICE GINSBURG: You -- you are suggesting
12 an extraordinary setup with a State court being able to
13 preclude other courts from dealing with related, not
14 identical matters, and that's just not the way our
15 system works. You can bring duplicative proceedings in
16 different courts. One will finish first and that will
17 bind the others. But I -- I never heard of a State
18 court being able to say, because we are a probate
19 court, that you -- you couldn't bring a tort case
20 someplace else.

21 MR. BRUNSTAD: Justice Ginsburg --

22 CHIEF JUSTICE ROBERTS: The -- the only court
23 I've heard of that can do that is the Federal
24 bankruptcy court.

25 MR. BRUNSTAD: Just as a Federal bankruptcy

1 court is in rem and executes and enters some judgments
2 good against the world with respect to some issues, a
3 probate court does the same thing. You have exactly
4 the same reason why the probate court does it as in the
5 bankruptcy court.

6 Now, this Court has recognized in *Tilt v.*
7 *Kelsey*, for example, that the State has a sovereign
8 interest in deciding the scope of its probate procedure
9 that the State may, this Court said in *Broderick's*
10 *Will*, provide for the probate court to enter a judgment
11 good against the world, whether the person was a party
12 to the proceeding or not. If a -- if a Federal court
13 can predetermine --

14 JUSTICE GINSBURG: That's the definition of
15 an in rem judgment, but she's suing for an in personam
16 judgment an individual, not an estate, just for a plain
17 old money judgment.

18 MR. BRUNSTAD: But in a race to judgment,
19 Your Honor, if the Federal court gets to decide this
20 critical issue of intent before the probate court, it
21 preempts the probate court from doing its core probate
22 function of validating or invalidating an estate plan.
23 That would render our probate system unworkable. That
24 is why --

25 JUSTICE STEVENS: Mr. Brunstad --

1 MR. BRUNSTAD: -- this is a jurisdictional
2 doctrine.

3 Yes, Justice Stevens.

4 JUSTICE STEVENS: May I ask you two
5 questions? First, if there were no such animal as the
6 probate exception, would there have been bankruptcy
7 court jurisdiction over your claim?

8 MR. BRUNSTAD: We argue no, Justice Stevens,
9 because as we argued in the Ninth Circuit, there was
10 not even bankruptcy jurisdiction because the other side
11 never responded to our argument that the outcome of
12 this case would not result in any money going to
13 creditors of her estate.

14 JUSTICE STEVENS: So your -- you would
15 prevail even if there were no probate exception in your
16 view.

17 MR. BRUNSTAD: That's our argument. The
18 Ninth Circuit did not address that ground, Your Honor.

19 JUSTICE STEVENS: And my -- my second
20 question is I noticed you quoted from a Minnesota Law
21 Review about 250 cases, and the -- your opponent
22 pointed out that the -- the next sentence of the
23 article said the holdings don't support the
24 generalization. And I would just like to ask you,
25 apart from the Markham case, what is the case -- what

1 holding of a case lends the greatest support to your
2 probate exception argument.

3 MR. BRUNSTAD: Justice Stevens, I think that
4 the Sutton case is the closest. The next closest is
5 Broderick's Will. Sutton again involved both a trust
6 and a will and was a construction of Texas law, which
7 we say the Court has already decided in Sutton, and
8 Texas law, which is undisputed, has the effects which
9 we say it has in the brief. They did not contest,
10 Justice Ginsburg, our construction or interpretation of
11 Texas law.

12 I think also that the Court's decisions in
13 Tarver and Fouvergne and also Ellis and O'Callaghan --

14 JUSTICE STEVENS: I'm not asking you to rank
15 them. I don't want a list of cases that have a lot of
16 dicta because some of these cases went off on laches,
17 some went off a lot of different grounds than -- than
18 -- some of them don't even mention probate.

19 MR. BRUNSTAD: Justice Stevens, I think that
20 it's -- it would be helpful if I could give you a
21 thumbnail sketch breaking down, what I was trying to do
22 earlier, between those where there's impermissible
23 interference and those where there's not impermissible
24 interference. The United States' characterization I
25 think is incorrect.

1 For example, again, this Court has determined
2 there's no jurisdiction for a Federal court to
3 determine the validity of an instrument. That's the
4 first case in *Armstrong v. Lear* and also *Gaines v.*
5 *Chew*.

6 Also, this Court has determined there's no
7 Federal jurisdiction to determine the invalidity of an
8 estate plan. That's *Tarver, Fouvergne*, and
9 *O'Callaghan, Broderick's Will, Sutton*, and *Ellis*.

10 This Court has determined that Federal courts
11 do not have jurisdiction to administer the probate
12 estate. That's *Byers v. McAuley*.

13 This Court has determined that there is no
14 Federal jurisdiction to take possession of the assets
15 in the probate court. That is also *Broderick's Will*.
16 I'm sorry. That is *Byers v. McAuley*.

17 This Court has determined one may not impose
18 a constructive trust on the beneficiaries as, in
19 essence, a way to get property to them. That's
20 *Broderick's Will* and *Sutton*.

21 This Court has determined there's no
22 jurisdiction to recover property from the beneficiary
23 because of an alleged invalidity of a will. That's --
24 that's the *Ellis* case.

25 This Court has determined there's no

1 jurisdiction for the Federal court to direct an
2 accounting from the administrator. That's the Waterman
3 case.

4 This Court has determined there's no
5 jurisdiction to interfere with the State court's
6 possession of the assets, again Waterman, Williams,
7 Yonley, and Borer.

8 Now, no jurisdiction. It's always been a
9 jurisdictional doctrine.

10 And for the same reasons this Court refused
11 to recharacterize the -- the domestic relations
12 exception as a abstention doctrine, the Court should
13 also decline to do so here under the probate exception.

14 Now, the other side of the schema is when is
15 it permissible for a Federal court to undertake a
16 probate-related matter. Well, if the State allows the
17 claim, particular claim, to be brought outside its
18 exclusive probate system, then Federal courts may
19 entertain jurisdiction as well.

20 JUSTICE BREYER: By the way, in Texas if you
21 have to go through all this probate stuff and
22 everything, and they want to claim 15 years ago my
23 mother gave a ring to my cousin who stole it, is that
24 precluded to bring that tort action when the person
25 who, you know, was supposed to get it finds out about

1 it?

2 MR. BRUNSTAD: Justice Breyer, all claims of
3 incomplete gift, which Vickie's claim is here, compete
4 with an estate plan.

5 JUSTICE BREYER: So -- so, in other words, if
6 it -- when the guy is 2 years -- 15 years old, he gives
7 a ring to somebody, and now he dies at age 93, and when
8 they find out about that incomplete gift at age 15,
9 nobody can bring a lawsuit anymore. You have to go to
10 the probate court.

11 MR. BRUNSTAD: If in fact the ring passed
12 under his valid estate plan, yes. Because the ring
13 passed under the valid estate plan, you have to
14 overturn the estate plan before you say the property
15 goes somewhere else.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MR. BRUNSTAD: Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Mr. Richland, you
19 have 4 minutes remaining.

20 REBUTTAL ARGUMENT OF KENT L. RICHLAND

21 ON BEHALF OF THE PETITIONER

22 MR. RICHLAND: Thank you, Your Honor.

23 Justice Breyer, to answer your question about
24 whether the Texas court had all of the material before
25 it that was before the bankruptcy court, the answer to

1 that can be seen at page 45 of the appendix where the
2 district court judge says that there were 400 boxes of
3 documents.

4 JUSTICE BREYER: Yes, but did those documents
5 -- did those boxes contain the key documents --

6 MR. RICHLAND: They did.

7 JUSTICE BREYER: -- about the catchall trust?

8 MR. RICHLAND: They did. They contained the
9 -- perhaps the most key documents, which were the
10 billing records that showed that that trust was
11 actually drafted. The trust, of course, never saw the
12 light of day, but those billing records reflected that.

13 And none of that was in front of the Texas probate
14 court.

15 In addition, Justice Breyer, you mentioned
16 that there were a number of other instances of tortious
17 misconduct that were found by Justice Carter, in
18 addition to the forging of the -- of the irrevocability
19 point. Indeed, Justice Carter found that there were
20 massive transfers of J. Howard's assets to Pierce
21 Marshall in his last days, and those asset transfers
22 were made in exchange for notes that were payable years
23 in the future. This was after J. Howard had been
24 diagnosed with terminal cancer, after he had had a
25 heart attack. Annuities were used to pay for those as

1 well. So that he was essentially stripped of all of
2 his assets by the time he was dead. There was -- there
3 were no assets in the probate estate at that time.

4 Justice Ginsburg, I would refer you to
5 appendix page 42 where the -- the district court
6 indicates that both a proof of claim and an adversary
7 complaint were first filed by Pierce Marshall in the
8 bankruptcy court, and that is, indeed, what caused,
9 several months later, the compulsory counterclaim to be
10 filed in a response.

11 Mr. Brunstad indicated that what happened
12 here was that while the claim was pending in Texas, it
13 was then brought to the bankruptcy court presumably
14 because there was some dissatisfaction on Ms.
15 Marshall's part as to how the Texas probate court was
16 going. In fact, page 1 of our reply brief details very
17 specifically the fact that the first time that the
18 tortious interference with gift claim was made was in
19 the bankruptcy court as the compulsory counterclaim.

20 And I would just conclude by stating that the
21 cause of action that was at issue here was really a
22 very common one. It's the -- not in and of itself, but
23 it's common to make a claim against the estate in debt
24 or that a gift was given, and that may, indeed,
25 diminish the estate that is eventually passed. But

1 that doesn't invalidate any of the estate planning
2 documents. It simply means that something that might
3 otherwise have been within the estate was not included
4 in the estate.

5 That's really all that happened here. The
6 claim was for tortious interference with gift. That,
7 indeed, may have diminished the amount or may not have
8 since J. Howard was actually quite an active man at the
9 time that he made this -- this gift or intended to make
10 the gift, and was still doing business deals. He may
11 have increased his -- his assets enormously at that
12 point in time.

13 But in any event, what it certainly does not
14 do is, it does not invalidate an estate plan. It does
15 not invalidate a will, and it certainly didn't
16 invalidate the trust or the will in this case.

17 If there are any further questions, I'd be
18 happy to answer them.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 MR. RICHLAND: Thank you.

21 CHIEF JUSTICE ROBERTS: The case is
22 submitted.

23 (Whereupon, at 12:14 p.m., the case in the
24 above-entitled matter was submitted.)

25