MASSACHUSETTS TRIAL COURTS:
ABUSE AND DECEPTION REGARDING THE PROBATE EXCEPTION
TO DENY DUE PROCESS AND ACCESS TO OTHER COURT JURISDICTIONS
NECESSITATING A CALL FOR ITS STATUTORY OVERRIDE

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INTRODUCTION

After discussing the genesis of the probate exception and the confusion generated and perpetuated by probate courts, this paper will attempt to demonstrate how the Massachusetts trial courts have used this exception to deny due process and clear its dockets.

GENESIS OF THE PROBATE EXCEPTION

The initial frame of reference for judicial practice in the United States was eighteenth century English court practice in which the English ecclesiastical courts had no jurisdiction to probate wills concerning real property, but could probate wills and administer estates concerning personal property.[1] Real property passed to the devisee without probate upon death of the testator.[2] Subsequent title disputes were within the jurisdiction of common law courts,[3] and English ecclesiastical courts dealt strictly with the personal estate.[4] Chancery courts dealt with equity issues and appointment of guardians for individuals and property.[5]

The Judiciary Act of 1789 [6] gave jurisdiction to the lower federal courts over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and…the suit is between a citizen of the State where the suit is brought and a citizen of another State."[7] Article III of the U. S. Constitution cites no express limitation on federal judicial power [8] and no such limitation is contained in the grant of federal question[9] or diversity jurisdiction. [10]

The language of the Judiciary Act has been and continues to be construed by given courts as limiting the grant of jurisdiction to suits that would have fallen within the jurisdiction of common law English courts and the English High Court of chancery, [11] and placing the probate of wills and administration of estates, which had been vested in England's ecclesiastical courts,

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[1] J. William Holdsworth, A History of English Law 625 (7th ed. 1956).
[2] Lewis M. Simes & Paul E. Basye, The Organization of the Probate Court in America: I, 42 Mich. L. Rev. 965, 971 (1944).
[3] Roscoe Pound, Organization of Courts 78 (1940).
[4] Supra note 2 at 971.
[5] Lewis M. Simes & Paul E. Basye, The Organization of the Probate Court in America: II, 43 Mich. L. Rev. 113, 130 (1944); J. William Holdsworth, A History of English Law 625 (7th ed. 1956).
[6] Ch. 20, §13, 1 Stat. 73 (1789).
[7] Id. at § 11.
[8] U. S. Const. Art. III, § 2.
[9] 28 U.S.C. §1331 (1994).
[10] 28 U.S.C. § 1332 (a) (1994).
[11] Dragen v. Miller, 679 F.2d 712, 713 (7th Cir. 1982); Georges v. Glick, 856 F. 2d 971, 973 (7th Cir. 1988); Ahston v. Paul Found, 918 F. 2d at 1065, 1071 (2d Cir. 1990); Simes & Basye, supra note 5 at 130, 132 (1944).

outside the jurisdiction of the common law and chancery courts. Such tortuous construction has negatively impacted the statutory grant of subject matter jurisdiction to U.S. federal courts. [12]

In colonial times it was common for wills to be probated and estates administrated legislatively rather than judicially.[13] In Massachusetts, as in other states, said powers were initially exercised by the governor and council and then by the General Court.[14] Then toward the end of the colonial period, specialized probate courts were developed in Massachusetts; [15] however, in many cases the general courts persisted in exercising given probate jurisdiction,[16] and appeal from the probate judges was still heard by the governor and council.[17]

"[T]here was no ecclesiastical court in America;"[18]and "[t]he drafters of the Judiciary Act may well have viewed chancery's deference to such courts as nothing but a quirk of English legal history and an anachronistic vestige of the Reformation."[19] Furthermore, in the modern diversity statute the phrase "all suits of a civil nature at common law or in equity" is replaced with the seemingly more comprehensive phrase "all civil actions."[20]

Moreover, upon analysis of the only other implied exception to federal court jurisdiction,[21] the Supreme Court in Ankenbrandt v. Richards [22]relied on the Constitution's plain language in Article III, § 2 and stated that it "contains no limitations on subjects of a domestic relations nature,"[23] and the "domestic relations exception exists as a matter of statutory construction" [24] - i.e., not constitutionally mandated. The Court opined that it had determined that it had jurisdiction over appeals from territorial courts dealing with divorce, and had upheld the exercise of original jurisdiction by D.C. federal courts hearing divorce actions; thus, the power to hear such cases must be within Article III's grant of subject matter jurisdiction.[25]

Therefore, it would follow that since the domestic relations exception to federal court jurisdiction, once exclusively vested in ecclesiastical courts like the probate exception, has been ruled not to be constitutionally mandated, then neither is the probate exception.[26] This reasoning

[12] Dragen, 679 F. 2d at 713; Georges, 856 F. 2d at 973; Ashton, 918 F. 2d at 1071.
[13] Supra note 3 at79.
[14] Wales v. Willard, 2 Mass. 120, 124 (1806) (Parsons, C.J.).
[15] Pound, supra note 3 at 79; supra note 2 at 1002.
[16] Id.
[17] 21 Sean M. Dumphy, Massachusetts Practice Series, Probate Law and Practice §1, 1 (2d ed. 1997)
[18] Dragen, 679 F. 2d at 713.
[19] Ashton v. Paul Found, 918 F. 2d at 1065, 1071 (2d Cir. 1990).
[20] 28 U.S.C. §1332 (a) (1994).
[21] Anthony B. Ullman, Note, The Domestic Relations Exception to Diversity Jurisdiction, 83 Colum. L. Rev. 1824, 1840 (1983).
[22] 504 U.S. 689, 691 (1992).
[23] Id. at 695.
[24]Id. at 699-700.
[25] Id. at 696-97.
[26] See supra note 24.

is underscored in Gaines v. Fuentes [27] where the Supreme Court found the scope of federal judicial power under Article III broader than the scope of federal jurisdiction in the Judiciary Act of 1789, § 12. [28] The court agreed that Congress had constitutional authority to vest federal courts with subject matter jurisdiction over probate-related matters.[29] The findings of this court strongly support the conclusion that the probate exception is only a statutory limitation and not a constitutional one.

CONFUSION GENERATED AND PERPETUATED BY PROBATE COURTS

State probate courts have confused the rationale for the probate exception as well as its scope. The Supreme Court has tried to clarify the "misconceptions" of the state courts. In Markham v. Allen,[30] the Supreme Court stated that "[i]t has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."[31] Thus, a federal court "[m]ay exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court."[32]

In Marshall v. Marshall, [33] Justice Stevens stated that he did not believe that any probate exception to federal jurisdiction existed and that the origins of the probate exception were "an exercise in mythography."[34] The Supreme Court held that the probate exception only applies (1) where a federal court is asked to probate or rescind a will; (2) administer a decedent's estate; or (3) its exercise of jurisdiction would interfere with property in the custody of a state probate court.[35] Thus, "[i]f jurisdiction otherwise lies, then the federal court may, indeed must exercise it."[36]

[27] 92 U.S. 10 (1875).
[28] Id. at 17.
[29] Id. at 26.
[30] 326 U.S. 490 (1946).
[31] Id. at 494.
[32] Id. at 494.
[33] 547 U.S. 293, 126 S. Ct. 1735, 1746, 164 L. Ed. 2d 480 (2006).
[34] 126 S. Ct. at 1750-1751.
[35] 547 U.S. 293, 312 (2006).
[36] Id at 1748.

The Supreme Court has stated that federal courts have a "virtually unflagging obligation…to exercise the jurisdiction given them;"[37] and dismissing a suit over which a probate court would likely lack jurisdiction is an abuse of discretion.[38]

Since Marshall, federal courts can no longer use the "probate court exception" to dismiss "widely recognized tort[s]" –e.g., breach of fiduciary duty, fraudulent misrepresentation, conversion, unjust enrichment, wrongful death, and RICO just because the issues intertwine with proceedings in probate court.[39]

Therefore, probate courts cannot be allowed to block federal jurisdiction over a range of issues well beyond probating a will or administering a decedent's estate;[40] **moreover, a [probate or] district court cannot dismiss a claim concerning accounting of assets removed from the decedent's estate while the decedent was alive. "[T]he removal of [those] assets from [the decedent's] estate during [her] lifetime [removed] them from the limited scope of the probate exception [as in the Eklund case]."[41]**

CHARACTER OF THE MASSACHUSETTS PROBATE COURTS

In some probate courts, judges need not be lawyers or have legal training.[42] Also, it has been established that probate courts have a reputation for bias and corruption.[43]

The Massachusetts Family & Probate Court System has been failing for some time.[44] This court system has been and continues to be subjected to audits but deficiencies never seem to be corrected. Examples of some of these deficiencies, as delineated in "Justice Endangered: A Management Study of the Massachusetts Trial Court," Harbridge House, Inc. (1991), are as follows:

1) "[T]he Trial Court …is a system in name only, operating on automatic pilot and carried forward more by past momentum than by any compelling vision of the future."

2) "[T]he Trial Court can control neither the increase in the number and complexity of cases filed before it nor the resources available to it."

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[37] Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976).
[38] U.S. v Pikna, 880 F. 2d 1578, 1582 (2d Cir. 1989).
[39] Supra note 33 at 1748; Lefkowitz v. Bank of New York, 528 F. 3d 102, 104 (2d Cir. 2007).
[40] Supra note 33 at 1748.
[41] Wisecarver v. Moore, 489 F. 3d 747, 750-751 (6th Cir. 2007).
[42] Supra note 5 at 138-40.
[43] Charles Rembar, The Law of the Land: The Evolution of Our Legal System 71 (1980); Ronald Chester, Less Law, but More Justice?: Jury Trials and Mediation As Means of Resolving Will Contests, 37 Duq. L. Rev. 173, 178-81 (1999); Erwin Chemerinsky, Federal Jurisdiction §5.3 at 290 (3d ed. 1999).
[44] S. Eklund, Guardianship Abuse of the Elderly: A Violation of Constitutional Rights Precipitating An Extreme Punitive Civil Penalty 8 (2011).

3) Trial Court efficiency "is impaired by its existing fragmented and overly complex departmental structure…- a collection of medieval fiefdoms" – i.e., "seven separate organizations" which "encourage wasteful administrative practices."

4) "Vague or apparently conflicting provisions of the laws governing Trial Court Administration raise serious questions about the ability of the management system to hold accountable or discipline local managers."

5) "[C]ourt business is scheduled largely for the convenience of the Trial Court and its employees rather than the public."

6) There are existing threats to the quality of the bench and its performance" – i.e., "the inadequacy of both pre-bench and recurrent training;" also [the existence of] a "large number of judicial vacancies."

7) There is "judicial opposition to performance evaluation; little substantive communication between the SJC and the Trial Court leadership on administrative matters; few attempts at consultation between the SJC, the OCAJ and the administrative justices of the Trial Court departments; and **lack of accountability on the part of the judges making decisions since judges are appointed for life**."

8) "[T]here is a widespread feeling inside and outside of the system that **no one is truly in charge of or accountable for the performance of the Trial Court."**

9) "Under M.G.L. Chapter 211, the Supreme Judicial Court (**SJC) has the power of general superintendence of all courts of inferior jurisdiction**, but … this power has remained largely unexercised."

10**) "[T]he SJC and the departmental Chief Administrative Justices…avoid difficult administrative decisions."**

Many of the same deficiencies persist and are reiterated in an article by Dan Ring in the Republican (dated 5/2/10) entitled Massachusetts Trial Court Suffers from Organizational Dysfunction.

In the Eklund case ,with close parallels to the Simon and Zaltman cases,[45] the guardian ignored SJC Rule 1:07 (7) paying herself every month without court approval; engaged in accounting irregularities; ignored the ward's wishes on every level; ignored the ward's request to remove the guardian; violated such constitutional rights as notice and the right to attend hearings; left the ward without funds for medication and clothing; failed to

[45] In re Guardianship of Kenneth E. Simon, Lawyers Weekly No. 15-001-10 ; In the Guardianship of Zaltman, 65 Mass. App. Ct. 678; 843 N.E. 2d 663, 2006.

remove less than adequate caregivers; failed to repair leaks from around the chimney into the living room and failed to address other home maintenance issues; removed the ward from her home and forced her to travel twice a week for 1 ½ months in the winter between non-ergonomically suited lodging in Tyngsboro and Woburn causing her sever emotional distress which exacerbated her heart conditions, and put her at risk by placing her in a home with an individual who was on medication for depression and who was mandated to undergo counseling for child abuse; authorized a chemical restraint because Mrs. Eklund was distraught at being removed from her home and then placing Mrs. Eklund back into her home 1 ½ months later because the chemical restraint did not work and her cardiac issues were difficult to regulate; threatened family members who objected to the guardian's "care" of Mrs. Eklund; filed baseless contempt charges against these family members; engaged in unnecessary court actions to increase fees; used PrimeCare as a liaison to protect herself from liability; and depleted estate assets to the extent that Mrs. Eklund was forced to stay in rehabilitation facilities from December, 2009 until her death in March , 2010. During said stay, Mrs. Eklund lost more than 20 pounds and succumbed to a systemic infection that was less than adequately addressed in two of the three facilities.[46]

Once the liquid assets were depleted, the guardian started to liquidate real property. The guardian's goal from the beginning, as stated to Mrs. Eklund's daughter, was to pay herself every month and see that Mrs. Eklund learned to live without family and friends. Said guardian also documented that her goal was to see that there was no money left for heirs.[47] This guardian's conduct parallels that of the lawyers In re Guardianship of Kenneth E. Simon, Lawyers Weekly No. 15-001-10 – i.e., she used "the legal process to intimidate anyone who got in the way of [her] agenda…[and was] far less concerned with the ward and [her] health than [she was] with getting rid of [family who objected to her conduct] and the ward's money." "[She apparently] figured [she] could get away with it" and that "the estate could afford it."

Approximately two weeks prior to Mrs. Eklund's death, this so-called guardian told a clinician at Newton-Wellesley Hospital that she did not appreciate how ill Mrs. Eklund was until that conversation with that clinician. Mrs. Eklund paid the price for the failed Middlesex Probate court system. [48]

Had state legislation establishing multidisciplinary teams with District Attorneys to investigate elder abuse been in place, then perhaps there would have been somewhere to seek

[46] Supra note 44 at 23, 24.
[47] Id. at 24.
[48] Id.

help. There was, however, no assistance provided by any state agency mandated to assist the elderly. [49]

When violations of SJC Rule 1:07 in the Eklund case were presented to the Judge with said oversight, there was no response. When state agencies were contacted about other abuses in the Eklund case, these agencies deferred to the guardian. The Middlesex Probate court in 2009 did not appreciate that it was required to appoint counsel on behalf of Mrs. Eklund when said counsel was requested, requiring repeated attempts to deal with ill informed probate clerks. Mrs. Eklund was subjected to a guardian who went to court to argue to increase the dosage of a chemical restraint, which was counter indicated based on cardiovascular parameters, by stating to the judge that she and her hired physician had conducted drug experimentation on Mrs. Eklund while she was in a rehabilitation facility without the apparent knowledge of her attending clinician. When said attending clinician was queried about the guardian's drug experimentation, the attending physician emphatically stated that that rehabilitation facility did not engage in experimentation on patients and that she, as the attending, was the only person who determined medication and the respective doses. Only in this instance did the judge have pause concerning the guardian's request. The dose increase was denied; and furthermore, the guardian's current dosage was not adhered to because medical parameters dictated otherwise. [50]

Mrs. Eklund was forced to stay in a rehabilitation facility against her will and waste away because allegedly there was no money for her to return home while the guardian cashed an annuity in December, 2009 for apparently reasons other than the benefit of Mrs. Eklund.[51]

At every turn, it appeared that the court displayed bias for the guardian and against Mrs. Eklund and those advocating for her. Due process protections were violated and a deception fostered that the probate court must determine if non-probate issues and federal subject matter issues could be transferred to an appropriate venue. To this end, a motion was filed in December 2009. However, the probate court never acknowledged or acted on the motion. In retrospect, this inaction is understandable in light of the fact that probate courts are courts of limited jurisdiction and do not have jurisdiction over these non-probate issues and federal subject matter issues. A probate court cannot divest a federal or concurrent state court of jurisdiction to hear such actions as those sounding in breach of fiduciary duty or malfeasance by a lawyer and/or guardian. Thus, a probate court has no authorization to transfer such claims to an appropriate venue; but what is quite disconcerting is **the court's deception on the public to the contrary, and other agencies – e.g., Middlesex District Attorney, Massachusetts Attorney General, etc. aiding and abetting in this deception – i.e., hiding behind an invalid expansion of the probate exception to avoid increasing their work load.**

[49] Id.
[50] Id. at 24, 25.
[51] Id. at 25.

CONCLUSION

England's King Edward III stripped the ecclesiastical courts of its power to directly administer estates due to clergy converting decedents' estates for their own purposes.[52] Today, the probate courts, the U.S. equivalent of ecclesiastical courts, allow guardians/lawyers to pillage a decedent's assets in a manner similar to ecclesiastical practice in pre-fourteenth century England.[53] To add insult to injury, litigants are denied important federal rights when courts claim a probate exception to probate-related suits filed under RICO or other federal statutes or filed regarding in personam claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent concealment, fraudulent misrepresentation, etc.[54] or wrongful death claims.[55]

In the Eklund case, scrutiny should have been applied to the violation of constitutionally guaranteed substantive and procedural due process deprivations of which a reasonable person in the former guardians' positions, as lawyer and fiduciaries, should know. Depriving a vulnerable adult of liberty and property interests demands heightened inquiry of the offending actors' conduct. [56]

These former guardians, who were in a position of trust and owed a direct fiduciary duty to the one who was stripped of her constitutional rights either through such questionable standards as substituted judgment or a substantial change in circumstances, used the probate proceedings merely as a back-drop against which to perpetrate such conduct as breach of fiduciary duty, violation of SJC Rule 1:07, reckless/negligent oversight of care given to their "ward," infliction of emotional and physical distress on their "ward," and violation of the Rodgers cases – using said cases as "a vehicle for assembly line involuntary psychiatric drugging orders" against a non-institutionalized individual who had the right to refuse to submit to invasive and potentially harmful medical treatment whether she was competent or incompetent.[57]

Concealment of excessive billing, laying waste to the ward's home, false imprisonment with the aid of involuntary psychiatric drugging orders and breach of fiduciary duty, questionable transfer of assets among other conduct delineated in all filed documents including complaints, amended complaints, petitions, accountings, and attachments in derogation of the ward's intent are all actionable under a variety of legislative remedial statutes and common law to be applied broadly and interpreted expansively (42 U.S.C. § 1983 civil Rights/Due Process XIV Amendment; RICO; Americans with Disabilities Act, etc.)

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[52] J. Willaims Holdsworth, A History of English Law 625, 627 (7th ed. 1956).
[53] Id.
[54] Lefkowitz, supra note 39.
[55] Richard Bryant v. Jamison Turney, 2012 U.S. Dist. LEXIS 138345.
[56] Supra note 44 at 23.
[57] Id.

As previously stated, any use of an alleged exclusive "probate jurisdiction" over federal remedial legislation lacks legislative or legal support; and the "probate exception" cannot divest a federal or concurrent state court of jurisdiction to hear such actions sounding in breach of fiduciary duty or malfeasance by a lawyer and/or guardian.

The "ward's" designation as a "vulnerable adult" remained uncontested at the time of deprivation. Her liquid assets were virtually depleted, real estate was sold, and she was forced to remain in rehabilitation facilities while the former guardian was threatening to file a Medicaid application. Said former guardian acted repeatedly in said fashion with her selected group of colleagues.[58]

Each complaint and amended complaint explained how said fiduciaries and their cohorts, either directly or indirectly, subjected the "ward" to exploitation and abuse.

Probated statutes, rules, and procedures relative to the ward's guardians, fiduciaries and lawyers acquiring her (the protected person) assets, cash, home, real property, pensions, marketable (or unmarketable) securities, social security checks, and retirement benefits and converting said assets to their own accounts without Court authorization (e.g., violation of SJC Rule 1:07) or oversight, without hearing or notice until months or years post-deprivation are bereft of a constitutional lineage as a "probate exemption" to the Due Process and Equal Protection clauses.

Here, said guardian and lawyer extorted compliance of the "ward" and family members objecting to their conduct by threatening, intimidating, and abusing process by carrying out in the face of non-compliance a scheme to improperly protract the ward's false imprisonment, subject the ward to emotional and physical distress, engage in vexatious litigation/abuse of process/malicious prosecution while engaged in unfettered liquidation of assets up until the moment of Mrs. Eklund's death..

Based on concealment of financial information/accounting irregularities, violation of SJC Rule 1:07, excessive billing (as verified by a third party review) and the aforementioned limitations and questionable conduct of the Probate Court, a jury trial was requested to address all of the delineated issues, which according to the ruling in Wisecarver,[59] are removed from the "limited scope of the probate exception" because "the removal of [those] assets from [Mrs. Eklund's] estate was during [her] lifetime;"[60] and thus the complaint contained prayer for relief that did not fall within the limited probate exception.[61]

Also, as Congress has indicated, exploitation of disabled individuals should "invoke the sweep of congressional authority including the power to enforce the 14th Amendment … in order

[58] Id.
[59] Supra note 41.
[60] Id.
[61] Id.

to address major areas of discrimination faced by people with disabilities," (§ 12102, ADA), including disabled individuals under guardianship. Mrs. Eklund should not have been stripped of her constitutional rights and subjected to such abhorrent conduct by an individual who was allegedly in place to act in her best interest and only for her benefit and not to financially profit at Mrs. Eklund's expense.

In the Eklund case, the Middlesex probate court denied substantive and procedural due process and equal protection rights, and its decisions violated the Taking Clause.[62]

If the Massachusetts SJC and OCAJ will not finally designate someone who "is accountable to manage the Trial Court as a whole;" stop avoiding difficult administrative decisions; stop allowing this dysfunctional system to destroy lives and contribute to the untimely death of individuals forced into and ensnared by this system; start holding its courts and justices accountable for the organizational and administrative failures; and stop acting as bystanders allowing these travesties to continue,[63] then Congress must consider enacting a statutory override of the probate exception.

[62] See Willaims v. Adkinson, 792 F. Supp. 755, 757 (M.D. Ala. 1992).
[63] "Justice Endangered: A Management Study of the Massachusetts Trial Court," Harbridge House, Inc. (1991).