

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No. 3:05-bk-13031-GLP

DAVID L. KELLEY and  
LINDA N. KELLEY,

Debtors

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ESTATE OF WINAFRED R. KELLEY;  
LARRY P. KELLEY, et al,

Plaintiffs,

vs.

Adv. No.: 06-61

DAVID L. KELLEY and  
LINDA N. KELLEY,

Defendants.

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**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

This Proceeding is before the Court upon Defendant, David L. Kelley's, Motion to Allow Permissive Joinder and Permissive Intervention as to Larry P. Kelley, as Administrator, Estate of Winafred R. Kelley; and Larry P. Kelley, individually. After a hearing held on July 19, 2006, the Court makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. On October 23, 2000, Winafred R. Kelley, passed away in Duval County, Florida. Winafred R. Kelley was the mother of Defendant, David L. Kelley and Plaintiff, Larry P. Kelley.

2. Winafred R. Kelley left a Last Will and Testament appointing David L. Kelley and Martha G. Brooks as personal representatives. Subsequently, an Ancillary Probate Estate was opened in Tennessee. The Ancillary Probate Court appointed almost all of Winafred R. Kelley's children as administrators. These administrators include: David L. Kelley, Martha G. Kelley Brooks, Larry P. Kelley and James F. Kelley as co-administrators.

3. On October 12, 2005, David L. Kelley and Linda N. Kelley ("Defendants") filed a Chapter Seven bankruptcy petition.

4. Larry P. Kelley and James F. Kelley ("Plaintiffs") subsequently filed an adversary proceeding against Defendants pursuant to 11 U.S.C. § § 523(a)(2)(A), (a)(4) and (a)(6). The debt that Plaintiffs seek to be determined nondischargeable is in regards to Defendants' undetermined liability in a case pending on the docket of the Probate Court in Nashville, Tennessee.

5. On March 2, 2006, Defendants filed a Motion to Dismiss the complaint. Plaintiffs subsequently filed an Amended Complaint and the Defendants withdrew their Motion to Dismiss.

6. On February 16, 2006, Defendant, David L. Kelley, filed a Motion to Allow Permissive Joinder and Intervention.

7. Defendant, David L. Kelley's counterclaim seeks to recover an award for the benefit of the Estate of Winafred R. Kelley, from Larry P. Kelley, Individually and as Administrator of the Estate of Winafred R. Kelley. The relief sought in the counterclaim does not involve the administration of Winafred R. Kelley's estate or the probate of her will. Further, the counterclaim does not seek to reach a *res* that is in the custody of the state court.

8. Defendant, David L. Kelley's, characterization of how the counterclaim is "otherwise related" to the case is quite tenuous. Additionally, whether the counterclaim could bring in additional funds to the bankruptcy estate or have any effect at all on the outcome of the bankruptcy proceeding is very speculative.

**CONCLUSIONS OF LAW**

In the instant case, the first issue for the Court's determination is whether the Court can exercise jurisdiction over Defendant, David L. Kelley's, counterclaim. If the Court determines it can properly exercise jurisdiction, the Court will then make a determination as to whether it is appropriate to grant Defendant, David L. Kelley's, Motion to Allow Permissive Joinder and Intervention pursuant to Bankruptcy Rules 7020 and 7024.

## Jurisdiction

The Supreme Court recently held that federal courts have the jurisdiction to determine the rights of creditors, legatees, heirs and other claimants against a decedent's estate, "so long as the federal court does not interfere with the probate proceedings." Marshall v. Marshall, 126 S. Ct. 1735 (2006). The Marshall case was highly touted in the media, and is perhaps better known as the "Anna Nicole Smith" case. Anna Nicole Smith, whose legal name is Vickie Lynn Marshall ("Ms. Marshall"), is the surviving widow of J. Howard Marshall ("J. Howard"). Following J. Howard's death, a titanic struggle ensued between Ms. Marshall and J. Howard's son, E. Pierce Marshall, in regards to how large a portion of J. Howard's massive estate, Ms. Marshall would be entitled to share in. In 1996, the probate proceedings in J. Howard's estate commenced in Harris County, Texas and Ms. Marshall subsequently filed a Chapter Eleven case in the Central District of California. E. Pierce Marshall then filed a proof of claim in Ms. Marshall's bankruptcy case as well as filing an adversary proceeding pursuant to 11 U.S.C. § 523(a)(6). Id. at 1742. Ms. Marshall then filed a counterclaim, alleging that E. Pierce Marshall had tortiously interfered with her expectation of a gift from her husband. Id. Ms. Marshall's counterclaim was dealt with as an adversary proceeding and the Bankruptcy Court entered a judgment that awarded Ms. Marshall substantive compensatory and punitive damages. Id. E. Pierce Marshall then filed a post-trial motion to dismiss for lack of subject-matter jurisdiction, which was subsequently denied by the Bankruptcy Court. Id. E. Pierce Marshall then appealed the decision of the Bankruptcy Court to the District Court. Id. at 1743. The District Court held that the probate exception did not interfere with Ms. Marshall's counterclaim. Id. The Ninth Circuit reversed the District Court and held that the federal probate exception did bar federal jurisdiction in Ms. Marshall's case. Id. at 1744. The Supreme Court granted certiorari, in order to resolve the confusion among the federal courts in regards to the breadth of the probate exception. Id.

In Marshall, the Supreme Court held that the "probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction." Id. at 1748.

The Supreme Court reasoned that since Ms. Marshall's claim did not involve administration of the estate, the probate of a will, nor did it seek to reach a *res* in the custody of the state court, that the probate exception was not applicable. Id.

Additionally, the Court clarified the language it had used in one of its previous decisions that dealt with the probate exception. Id., Markham v. Allen, 326 U.S. 490, 66 S.Ct. 296, 90 L. Ed. 256 (1946). The language used in Markham, which the Court recognized was "not a model of clear statement" is as follows, "[W]hile a federal court may not 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." Id. at 494. In Marshall, the Supreme Court discussed how the lower federal courts have "puzzled" over the meaning of the words "interfere with probate proceedings" and how some courts have interpreted those words to block federal jurisdiction over a variety of issues that extend well beyond the probate of a will or administration of a decedent's estate. Marshall, 126 S. Ct. at 1748. The Supreme Court clarified the "interference" language used in Markham, by stating that it comprehended the language in Markham as "essentially a reiteration of the principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*." Id.

In the instant case, David L. Kelley, as administrator, is seeking an award against Larry P. Kelley individually and as administrator of Winafred R. Kelley's estate for damages resulting from his alleged breach of fiduciary duty and conversion. The relief sought in the counterclaim does not involve the administration of Winafred R. Kelley's estate, or the probate of her will. Further, the counterclaim does not seek to reach a *res* that is in the custody of the state court. The Supreme Court in Marshall made clear that due to the confusion over the words "interfere with probate proceedings," federal courts have been applying the probate exception in an overly broad scope. Id. Thus, as Defendants' counterclaim does not "interfere" with the probate proceedings the probate exception is not applicable and does not prevent the Court from exercising jurisdiction.

Plaintiffs also argue that jurisdiction is not proper because the counterclaim of David L. Kelley is neither a core or non-core proceeding. Bankruptcy

courts have jurisdiction over “all civil proceedings arising under Title 11, or arising in or related cases under Title 11.” 28 U.S.C. § 1334(b). “The jurisdictional grant in § 1334(b) is divided into core and non-core proceedings.” In re Wesche, 178 B.R. 542, 543 (Bankr. M.D. Fla. 1995). “Core proceedings are proceedings which have no existence outside of bankruptcy.” In re Gardner, 913 F.2d 1515 (10th Cir.1990). Non-core proceedings “do not depend on the bankruptcy laws for their existence and could proceed in another court.” Id.; In re Woods, 825 F.2d 90 (5th Cir.1987). This Court has previously held that at a minimum non-core proceedings must be related to the bankruptcy case. Wesche, 178 B.R. at 543. A related proceeding is defined as “any proceeding that would have any effect at all on the outcome of the bankruptcy proceeding.” Id.; In re Auto Dealer Services, Inc., 96 B.R. 360, 362 (Bankr.M.D.Fla.1989); In re Woods, 825 F.2d 90 (5th Cir.1987); In re Gardner, 913 F.2d 1515.

Clearly, Defendant, David L. Kelley’s, counterclaim is not a core proceeding. Accordingly, the Court must determine whether the counterclaim is a non-core proceeding, which at a minimum is related to the bankruptcy case. Plaintiffs argue that the relief sought in the counterclaim is in the form of damages allegedly owed to Winafred R. Kelley’s probate estate and that the damages sought are neither in the form of setoff or money or property that would be due the bankruptcy estate. Defendant, David L. Kelley, however, asserts that the counterclaim is “otherwise related” to the case under Title Eleven because it has the possibility of bringing in additional funds to the bankruptcy estate. Defendant reasons that if he were successful as to the counterclaim, that the testamentary portion devised to Larry P. Kelley would be diminished and the portion devised to himself, would be enhanced and such distribution would go to the Chapter 7 Trustee for the benefit of the estate.

The Court agrees with the Plaintiffs and finds that Defendant, David L. Kelley’s, characterization of how the counterclaim is “otherwise related” to the case is very tenuous. Accordingly, it would be too speculative for the Court to conclude that the counterclaim could bring in additional funds to the bankruptcy estate or that it would have any effect at all on the outcome of the bankruptcy proceeding. Therefore, the Court cannot properly exercise jurisdiction over the counterclaim as it is not related to the bankruptcy case. As the Court does not have jurisdiction over the counterclaim, there is no need for the Court to make a

determination as to the merits of Defendant, David L. Kelley’s, Motion to Allow Permissive Joinder and Intervention pursuant to Bankruptcy Rules 7020 and 7024.

### CONCLUSION

Based upon the above, Defendant, David L. Kelley’s, Motion to Allow Permissive Joinder and Intervention will be denied as moot. The Court will enter a separate order that is consistent with these Findings of Fact and Conclusions of Law.

Dated this 25 day of September, 2006 in Jacksonville, Florida.

/s/ George L. Proctor  
George L. Proctor  
United States Bankruptcy Judge

Copies to:  
Albert Mickler  
Lance Cohen