

COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO

JOAN FLEISCHMANN TOBIN	:	CASE NO. C95125
Executrix of the Estate	:	
of Dorette K. Fleischmann	:	ENTRY DISMISSING FOR LACK
	:	OF SUBJECT MATTER
Plaintiff,	:	JURISDICTION
	:	
-vs-	:	
	:	
JAMES S. WACHS, Trustee, et al.	:	
	:	
Defendant	:	
	:	
	:	
	:	

This cause came to be heard on May 4, 1995 before Judge Wayne F. Wilke and concerned Defendants' motion to dismiss for lack of subject matter jurisdiction. Present before the Court were Robert A. Pitcairn, Jr., representing Defendants, and Michael R. Schmidt, Michael S. Insel and Robert E. Crotty, representing Plaintiff. Based upon oral argument and the briefs submitted by each party, the Court finds the following:

FINDINGS OF FACT

Plaintiff herein, Joan Fleischmann Tobin, is the personal representative of the Estate of Dorette K. Fleischmann (decedent). Defendants are James S. Wachs, Paul Sittenfeld, Robert B. Deans, Jr., and the law firm of Frost & Jacobs. Decedent died on March 3, 1994 and her estate is being administered in Florida. The decedent was the income beneficiary of a marital trust established by her husband, Julius Fleischmann. At the time of his death, Julius Fleischmann owned 100% of the stock of two corporations, Neapolitan Enterprises Co., Inc. and Caribbean Gardens Co., Inc., both of which owned, rented, managed and developed real property. Mr. Fleischmann died on

October 22, 1968, a resident of Hamilton County, Ohio. He was survived by his wife, Dorette K. Fleischmann, and three children.

In accordance with Item X of his will, the residue of Mr. Fleischmann's estate was divided and distributed to a trust established for the benefit of his spouse (Item XI trust) and trusts established for the benefit of his three surviving children, (Item XII trusts) to wit: Dorette L. Fleischmann Viets, Charles Fleischmann, III and Joan Fleischmann Tobin. Defendants James Wachs and Robert Deans are Trustees of the Trust established for Dorette L. Fleischmann Viets, while Defendants James Wachs and Paul Sittenfeld are Trustees of the Trust established for Charles Fleischmann, III. The Trustees of the Joan Fleischmann Tobin Trust are Charles M. Long and the Fifth-Third Bank and are not party defendants.

From the residue of Mr. Fleischmann's estate, 88% of the stock of both corporations was distributed to the marital trust and the remaining 12% of the stock of both corporations was distributed equally to the three children's trusts. Additionally, Mr. Fleischmann gave his wife an unrestricted and exclusive power to appoint by her Last Will and Testament to any person, including her estate, the entire corpus or any part of the marital trust.

In December, 1986, the Trustees of the marital trust and the three children's trusts dissolved Neapolitan Enterprises Co., Inc and distributed its assets to a newly formed partnership, Neapolitan Enterprises Co. ("Neapolitan"). Simultaneously, the Trustees dissolved Caribbean Gardens Co., Inc. and distributed its assets to a newly formed partnership, Caribbean Gardens Co. ("Caribbean"). Defendant Frost & Jacobs is a law firm engaged in the practice of law in Cincinnati, Ohio. Defendants Frost & Jacobs allegedly provided legal counsel to the trustees of both the marital and children's trusts and were involved in the dissolution of the corporations and the formation of the Neapolitan and Caribbean partnership agreements. The General Partners in both partnerships were the marital trust and the three children's trusts. The marital trust owned an 88% interest and the three children's trusts each owned a 4% interest in both partnerships. On March 3, 1994, Dorette K. Fleischmann died testate, and her will was admitted to probate by the Circuit Court for Collier County, Florida. The decedent, in her will, exercised the power of appointment over the entirety of

the marital trust in favor of her estate. Because of that act, the marital trust Trustees have requested the other partners of Neapolitan and Caribbean to either consent to the admission of the estate as a Substituted Partner or to reform the partnership agreement. Currently, the estate owns 88% of the partnership assets but those assets are controlled by a minority (8%) of the partnership. The Trustees for the Joan Fleischmann Tobin Trust (4% interest) consent to the estate's request.

Defendants Wachs and Frost & Jacobs, it is alleged, created a provision in the partnership agreement that no new partners would be admitted to the partnership without the unanimous consent of the remaining partners. Plaintiff alleges the partnership agreement altered the control mechanism of the marital trust assets by granting Defendants and Item XII Trustees the power to control the marital trust assets. Furthermore, it is alleged Defendants Wachs and Frost & Jacobs drafted the admissions provision so that Mrs. Fleischmann's direct exercise of her power of appointment could be frustrated by the unanimous consent requirement.

Plaintiff alleges Defendants Wachs, Sittenfeld and Deans, as Trustees of the Item XII Trusts, have refused to accept the Estate as a partner, thereby allegedly denying the Estate from realizing the benefits from which such inclusion would result. Plaintiff alleges that the refusal of Defendants James Wachs and Paul Sittenfeld, and James Wachs and Robert Deans, as Trustees of the Charles Fleischmann Trust and the Dorette L. Fleischmann Viets Trust, respectively, have diminished the value of the Estate's 88% interest in the Partnerships by at least \$8,800,000.00. As a result, Plaintiff seeks a judgment against Defendants Wachs and Frost & Jacobs for legal malpractice in the amount of \$8,800,000.00, plus a return of all legal fees received from the marital trust, attorneys fees for this action and punitive damages.

Furthermore, Plaintiff alleges that by preventing the majority owner from exercising control over the partnership, Defendants have frustrated the intent of Julius Fleischmann by preventing the marital trust trustee from gaining control of the partnership. Because of that, Plaintiff alleges Defendants Wachs, Frost & Jacobs, Sittenfeld and Deans intentionally interfered with the

Decedent's appointment over the marital trust corpus. For this alleged tort, Plaintiff seeks the value of the Item XI Trust, including its controlling interest in the partnerships, costs and attorneys fees in this action and punitive damages.

On April 3, 1995, Defendants moved to dismiss the complaint for lack of jurisdiction over subject matter. Defendants' motion is granted for the following reasons:

CONCLUSIONS OF LAW

Subject matter jurisdiction in its broadest legal sense means the nature of the cause of action and the relief sought. Subject matter jurisdiction may not be granted upon the court by agreement of the parties, may not be waived, and is the basis for mandatory *sua sponte* dismissal. Fox v. Eaton Corp. (1976), 48 Ohio St. 2d 236, 238. Defendants' motion to dismiss for lack of jurisdiction raises the issue of whether a probate court has jurisdiction to render valid judgments for two distinct tort actions, namely, legal malpractice and interference with the exercise of a power of appointment. Probate court proceedings are restricted to those actions permitted by statute and by the Constitution, since probate courts are court of limited jurisdiction. Schucker v. Metcalf (1986), 22 Ohio St. 3d 33. Furthermore, probate courts may exercise only such jurisdiction as is expressly granted to them by the legislature. Seventh Urban, Inc. v. University Circle (1981), 67 Ohio St. 2d 19, 22. Conversely, courts of common pleas are courts of general jurisdiction, which can exercise all matters in law and equity except those not denied to it. While the distinction between the jurisdictional capabilities is subtle, it is a crucial one in order that a court may validly adjudicate a matter in comport with American judicial standards.

By statute, probate court has exclusive jurisdiction to those matters delineated by R.C. '2101.24(A)(1). As a listing of the twenty-six categories of jurisdictional matters granted exclusively to probate courts would serve no worthwhile purpose, it is sufficient to note that Plaintiff's claims are not within this court's exclusive jurisdiction. While this court may have

concurrent jurisdiction with the general division over the interference with appointment action, it has no jurisdiction over the legal malpractice claim. Ohio appellate courts have consistently held that probate courts are without jurisdiction to enter judgments on legal malpractice claims. See Trudeau v. Kuhnle (Mar. 2, 1990), Lucas App. No. L-89-150, unreported; Elden v. Sylvania Savings Bank Co. (Oct. 21, 1983), Lucas App. No. L-83-211, unreported; Bachman v. Swearingen (Feb. 8, 1983), Delaware App. No. 82-CA-24, unreported.

That Plaintiff has filed a parallel complaint in Common Pleas General Division (A95-001123) further compels this court to grant Defendants' motion to dismiss. On the same day as the complaint in this court was filed, Plaintiff filed a complaint in General Division alleging the same harm, requesting the same damages and naming the same defendants as in this case. Plainly, as *res judicata* would prevent duplicative suits between these same parties, so would judicial economy and efficiency require that only one suit be brought and heard. Since this court lacks subject matter jurisdiction to hear the legal malpractice claim and has concurrent jurisdiction for the second cause of action, logic dictates that this suit be dismissed for lack of subject matter jurisdiction.

Therefore, IT IS HEREBY ORDERED that Plaintiff's complaint be dismissed for lack of subject matter jurisdiction.

WAYNE F. WILKE, JUDGE

cc: Robert A. Pitcarin, Jr
James F. McCarthy, III
Cynthia L. Gibson
Michael R. Schmidt
Michael J. Boylan