STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 480-7-10 Wncv
STATE OF VERMONT AGENCY OF NATURAL RESOURCES, Plaintiff, v. PARKWAY CLEANERS et al., Defendants.	

RULING ON THE STATE'S MOTION TO SUBSTITUTE
AND MS. LYFORD'S MOTION TO DISMISS

This is an environmental enforcement action relating to contamination at the Parkway Cleaners site in the Town of Hartford. Following unusually lengthy litigation, the court entered final judgment on April 10, 2018 against Defendant Richard S. Daniels as a "current owner," including a mandatory injunction requiring him to come into compliance with his statutory obligations. The court retained jurisdiction "over the subject matter of this action and the parties: (a) to enforce the terms and conditions of this Order; (b) to resolve any disputes between the parties concerning the application of this Order; and (c) to provide further relief as may be appropriate." Mr. Daniels appealed, and the Vermont Supreme Court affirmed. *State of Vermont Agency of Nat. Resources v. Parkway Cleaners*, 2019 VT 21, 209 Vt. 620. Though the parties have not presented any disputes to the court about the implementation of the injunction since the entry of final judgment, the State currently is in some sort of dispute with one of the contractors hired by Mr. Daniels, and the mandatory injunction remains unsatisfied. Meanwhile, Mr. Daniels died earlier this year.

Following notice of Mr. Daniels' death, the State filed a suggestion of death on the record and a Rule 25 motion to substitute as the proper party in his place his daughter, Julie Lyford, who is both the executor of his probate estate and the trustee of the Richard S. Daniels Revocable Trust. The State seeks to substitute Ms. Lyford in this case in both capacities. Ms. Lyford opposes substitution, arguing that the court has no personal jurisdiction over her, and this case therefore must be dismissed. But for personal jurisdiction, Ms. Lyford has not argued that there is any other defect with the State's request for substitution.

Substitution of Ms. Lyford in her capacity as executor

Mr. Daniels' probate estate was opened in New Hampshire, where he was a resident

at the time of death. His will names Ms. Lyford executor of the estate and she has assented to serve in that role and was so appointed. "[I]t is basic that the capacity to be sued exists only in persons in being." *Richie By and Through Richie v. Laususe*, 892 S.W.2d 746, 748 (Mo. Ct. App. 1994). Thus, when a party to a lawsuit dies, if the litigation is to continue, one with legal capacity must be substituted for the dead person. See V.R.C.P. 25(a). Typically, "the 'proper' party for substitution would be either the executor or administrator of the estate of the deceased." *Ashley v. Illinois Cent. Gulf R. Co.*, 98 F.R.D. 722, 724 (S.D. Miss. 1983). Ms. Lyford does not argue that she is not a proper party for substitution in this sense. Instead, she argues that because she is a *foreign* executor (appointed by the New Hampshire probate court and not a Vermont resident herself) in relation to the Vermont litigation, she is not subject to this court's personal jurisdiction, and the State has not come forward with proof that her contacts with the State of Vermont in her executor capacity should subject her to the court's jurisdiction. She seeks outright dismissal of the case on this basis—she does not suggest who might be a proper substitute if not her. In other words, she argues that this case died with Mr. Daniels.

There is no personal jurisdiction defect regarding Ms. Lyford in her capacity as executor of Mr. Daniels' estate. Ms. Lyford's appearance in this case will be in that *representational* capacity only. There has never been any claim against her in her personal capacity in this case, and the State is not proposing one now. See *Abrams v. Massell*, 586 S.E.2d 435, 439 (Ga. Ct. App. 2003) ("Substituting an executor keeps the action against the deceased alive; it does not, in and of itself, make the executor a party to the action in his or her individual capacity."). Contemporary specific personal jurisdiction looks to the *claim-specific* contacts that gave rise to the case. See *Dall v. Kaylor*, 163 Vt. 274, 276 (1995) ("The critical consideration in determining if defendants' activities satisfy the minimum contacts requirement is whether 'the defendant's conduct and connection with the forum State are such that [the defendant] should reasonably anticipate being haled into court there.' This reasonableness requirement is met when the defendant purposefully directs activity toward residents of a forum state *and the litigation arises out of, or relates to, that activity*." (emphasis added; citations omitted)); V.R.C.P. 12(h)(1). The substitution of Ms. Lyford in her representational capacity as executor has no impact whatsoever on the contacts that gave this court personal jurisdiction at the inception of this case and, as she readily concedes, there has never been any doubt as to the court's jurisdiction over Mr. Daniels.

The Restatement of Conflict of Laws puts it plainly: "The judicial jurisdiction of the state is not affected by the death of the decedent. Having had the requisite judicial jurisdiction to enter a personal judgment in its courts against the decedent during his lifetime, the state has similar power . . . to enter a judgment against an executor or administrator, whether local or foreign, after the decedent's death." Restatement (Second) of Conflict of Laws § 358 cmt. d. That is not a controversial proposition.

However, prior to the development of contemporary personal jurisdiction doctrines, an old common law rule immunized a foreign executor from suit in any state other than the one in which the estate had been opened. The rule and its proposed bases have long been harshly criticized. See, e.g., Note, The Amenability to Suit of Foreign Executors and Administrators, 56 Colum. L. Rev. 915, 926 (1956) ("In general, the policies behind the immunity from suit of foreign representatives are no longer applicable today."); David Currie, The Multiple Personality of the Dead: Executors, Administrators, and the Conflict

of Laws, 33 U. Chi. L. Rev. 429 (1966), available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6171&context=journal_articles. Ms. Lyford has woven this anachronistic idea of the immunity of the foreign executor into her personal jurisdiction argument without untangling the history that reveals it as a relic of the common law that simply has not survived the development of contemporary personal jurisdiction principles.

The Restatement, while making clear that the issue is not one of the court's jurisdiction, describes the contemporary rule applicable in these circumstances as follows:

> An action may be maintained against a foreign executor or administrator upon a claim against the decedent when the local law of the forum authorizes suit in the state against the executor or administrator and
> (a) suit could have been maintained within the state against the decedent during his lifetime because of the existence of a basis of jurisdiction other than mere physical presence (see §§ 29–39), or
> (b) the executor or administrator has done an act in the state in his official capacity.

Restatement (Second) of Conflict of Laws § 358. Because the issue is not jurisdictional, the only apparent need for such a "local law" is to clarify that the old common law rule no longer obtains. Vermont's long-arm statute is just such a "local law," if one were necessary at all.

At the hearing on the motions, Ms. Lyford suggested that this court would be the first in the country to assert jurisdiction over a foreign executor in these circumstances. In reality, other courts already have carefully deconstructed the history and death of the ancient common law rule in the context of contemporary personal jurisdiction law, and this court would be a lonely outlier were it to breathe new life into the much-maligned old common law rule as Ms. Lyford at least implicitly encourages.

One court has untangled this subject in detail, as follows:

> The parties agree that under Minnesota's survival statute V.H.'s lawsuit survives Birnbaum's death and may be brought against Birnbaum's personal representative, Cleo Aufderhaar. They dispute whether Minnesota can assert personal jurisdiction over Aufderhaar, a nonresident, who is being sued in her capacity as Birnbaum's personal representative. The determination of whether personal jurisdiction exists is a question of law, subject to de novo review on appeal.
>
> I.
>
> The district court determined that it was appropriate to look at Aufderhaar's [foreign executor's] Minnesota contacts in determining whether jurisdiction exists. We disagree. We believe the proper focus is on Birnbaum's [decedent's] conduct. Minnesota's long-arm statute reads:
>
> > As to a cause of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction over the subject matter may exercise personal jurisdiction over * * * any nonresident

individual, or the individual's personal representative, in the same manner as if * * * the individual were a resident of this state. This section applies if * * * [the] nonresident individual:

* * * * * *

(c) Commits any act in Minnesota causing injury or property damage.

Under the plain language of the statute, the nonresident's actions determine whether jurisdiction exists.

* * *

The fact that V.H.'s action requires application of Minnesota's survival statute should not affect the considerations underlying the long-arm statute. The Minnesota Supreme Court has emphasized that the legislature intended the long-arm statute to extend jurisdiction to the limits imposed by the federal constitution. It thus is appropriate to read the statute as including within its reach the personal representative of a deceased individual.

We conclude that the long-arm statute allows for jurisdiction over a deceased nonresident's personal representative if the nonresident would have been subject to jurisdiction if he or she were alive. Courts in other jurisdictions have reached the same conclusion under similar long-arm statutes. . . . [Another court] found its ruling was consistent with the Restatement (Second) of Conflict of Laws § 358, which permits actions against a foreign executor or administrator if: (1) authorized by local law; and (2) the decedent would have been subject to jurisdiction based on more than simply physical presence in the state.

Respondent argues that a foreign personal representative cannot be sued in the capacity of representative in jurisdictions other than the state in which appointed. This argument has been rejected under modern long-arm statutes. . . .

Because V.H. alleges that Birnbaum caused her injury by sexually abusing her in Minnesota while they were Minnesota residents, Birnbaum's conduct falls within the provisions of the long-arm statute. If Birnbaum were alive, the statute would apply to him. Therefore, we conclude that Minnesota's long-arm statute authorizes jurisdiction over Birnbaum's personal representative. . . .

V.H. v. Est. of Birnbaum, 529 N.W.2d 462, 464–65 (Minn. App. 1995) (citation omitted), aff'd, 543 N.W.2d 649 (Minn. 1996).

Another court has explained:

This [personal] jurisdictional question is complicated, however, by the old Virginia common law rule that an executor or administrator is not subject to suit in a state other than that of his appointment, unless he brings into or collects from the state assets of the decedent's estate. . . . The issue, then, is

whether the common law prohibition against such a suit as this has been removed by the enactment of the Virginia long-arm statute in 1964.

Sylvania explained the Virginia rule thus:

> "The reason that a foreign executor is not ordinarily subject to suit is that a grant of administration has no legal operation outside the state from whose jurisdiction it is derived. . . . The exception recognized by the Virginia decisions is based upon the right of the state to protect local creditors with respect to the property of the decedent found or brought within the state. As to such property, the power of the state can be asserted without regard to the powers granted the executor by the foreign state."

Likewise, the comments to Restatement (Second) of Conflict of Laws § 358 (1971) indicate[s] that the judicial reluctance to entertain suits against foreign executors is not necessarily due to a want of jurisdiction, but because "the courts have deemed themselves incompetent to entertain the suit in the absence of statute," since a foreign executor holds the assets of the estate subject to the direction of the appointing court. The rule permitting suit against a foreign executor where assets lie within the forum state is predicated on the state's in rem jurisdiction over property within its own territory.

Sylvania was decided two years before the revolution in personal jurisdiction wrought by the Supreme Court's enunciation of the "minimum contacts" due process doctrine in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). . . . There can be no doubt that personal jurisdiction could have been obtained over Via during his lifetime, as he had operated a business in Virginia and entered into a contract with plaintiff concerning that business in Virginia. As the Virginia Supreme Court and this Circuit have repeatedly held, the long-arm statute represents a deliberate and conscious effort by the Virginia legislature to assert jurisdiction over nonresident defendants to the extent permitted by due process. The Virginia Supreme Court has not yet addressed the issue before us, but we are convinced that it would recognize, as we do now, that the enactment of the Virginia long-arm statute in 1964, over two decades after *Sylvania*, considerably broadened the scope of personal jurisdiction in Virginia and superseded the [rule regarding foreign executors]. *That common law doctrine, with its focus on the location of property, was more suited to the narrow concept of personal jurisdiction embodied in Pennoyer v. Neff, 95 U.S. 714 (1877).* . . . A finding of personal jurisdiction here is in accord with the rule expressed in Restatement (Second) of Conflict of Laws § 358. . . .

Crosson v. Conlee, 745 F.2d 896, 899–900 (4th Cir. 1984) (citations and footnotes omitted; emphasis added).

Vermont's long-arm statute, 12 V.S.A. § 913, does not expressly say that it extends to personal representatives, such as executors and trustees. However, there is no

constitutional or other necessity for it to do so in these circumstances, and the Vermont Supreme Court clearly recognizes that Vermont's long-arm "confers jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause." *Dall v. Kaylor*, 163 Vt. 274, 275 (1995). It extends as broadly as any such statute can. It therefore necessarily extends to a foreign executor, and there is no constitutional or other limitation preventing it from doing so.

Birnbaum and *Crosson* are not the only cases in which courts have confronted these issues and resolved them in favor of jurisdiction over the foreign representative. See *Nezan v. Aries Technologies, Inc.*, 704 S.E.2d 631, 642 (W.Va. 2010) (noting that any construction of long-arm statute, otherwise silent on the matter, as not extending to the personal representative of a decedent "would make no sense"); *Hossler v. Barry*, 403 A.2d 762, 765–66 (Me. 1979) ("We are aware of the traditional rule that a foreign administrator or executor can neither sue nor be sued in the courts of another state. However, whatever authority is needed to abrogate this common-law principle is found in our long-arm statute and our non-resident motorist statute." (citations omitted)); *Saporita v. Litner*, 358 N.E.2d 809, 816 (Mass. 1976) ("Having determined that the court had personal jurisdiction over the defendant as executor under the testator's will, we fail to perceive any sound reason why the general rule granting immunity to foreign executors should shield the defendant from suit in Massachusetts."); *Mitsui Manufacturers Bank v. Tucker*, 152 Cal.App.3d 428, 432 (Cal. Ct. App. 1984) ("Taking jurisdiction of foreign representatives when their decedents had adequate minimum contacts with the forum has repeatedly been held constitutional."); *Gandolfo v. Alford*, 333 A.2d 65, 69 (Conn. Super. Ct. 1975) ("This court holds that the common law rule that an executor or administrator can sue and be sued only in a jurisdiction in which he has been appointed has been modified by Connecticut's long-arm statute.").

Ms. Lyford, as the executor of Mr. Daniels' estate, is the proper party for substitution in this case. There is no defect in the court's personal jurisdiction, and the court will not apply the ancient common law to immunize her in her representational capacity from suit in Vermont.

Substitution of Ms. Lyford in her capacity as trustee

The State also seeks to substitute Ms. Lyford in her capacity as trustee of the Richard S. Daniels Revocable Trust. Rule 25 requires the substitution of a "proper" party in the event of death. The State has not explained why it thinks that Ms. Lyford, as trustee, is a proper party for substitution (let alone why Mr. Daniels needs a second substitute when the first is sufficient) other than to suggest that his probate estate might not have adequate funds to satisfy the remaining liability, implying that additional funds may be available under the revocable trust but not forthcoming, a matter entirely collateral to Ms. Lyford's suitability in this capacity *for substitution*.

Mr. Daniels' estate plan consists, in part anyway, of a "pour over" will and revocable trust. Any assets in the probate estate available after satisfying claims and other expenses "pour over" to the revocable trust for further distribution. To the extent that the probate estate is insufficient, any assets in the revocable trust already remain available to the executor to satisfy claims against the decedent. N.H. Rev. Stat. § 564-B:5-505 provides:

(a) During the settlor's life, the property of a revocable trust is subject to claims of the settlor's creditors regardless of whether the trust contains a spendthrift provision.
(b) After the settlor's death and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable immediately before the settlor's death is subject to the following claims to the extent that the settlor's probate estate is inadequate to satisfy those claims:
(1) Claims of the settlor's creditors;
(2) Costs of administration of the settlor's estate; and
(3) Expenses of the settlor's funeral and disposal of remains.
(c) Subsection (b) shall apply to a trust regardless of whether the trust contains a spendthrift provision.
(d) Subsection (b) shall not apply to:
(1) The proceeds and any other benefits of a policy of life or endowment insurance effected by a settlor, a trustee, or any other person on the settlor's life or another individual's life as provided in RSA 408:2; or
(2) Any claim barred under RSA 564-B:5-508.
(e) During only the period that the power of withdrawal may be exercised, the holder of a power of withdrawal shall be treated in the same manner under this section as the settlor of a revocable trust to the extent of the property subject to the power of withdrawal.

Subsection (d)(2) notes that this does not apply to "[a]ny claim barred under RSA 564-B:5-508." Vermont's version of the uniform code lacks such a provision, though it is not clear that this would make any difference in this case.

The terms of Mr. Daniels' revocable trust expressly comply with these provisions. Revocable Trust Art. III § I(B)(1) provides:

> If the assets of the Grantor's probate estate (excluding the income therefrom and that portion thereof designated in the Grantor's will as not available for the payment of funeral expenses, claims against the estate, the expenses of administration of the estate and death taxes chargeable to the estate of the Grantor) are insufficient to pay such expenses, claims and taxes, and to satisfy all pre-residuary legacies or devises provided by the Grantor's Will, the Trustee shall pay to the executor such amounts or property as certified to be required to satisfy such deficiency. The Trustee may rely upon the certification of the executor as to any such amounts, including interest and penalties thereon, and shall have no duty to determine the propriety of the payment of any such sum or sums so certified to it, or to see to the application thereof by the executor. The Trustee's selection of assets to be sold and to pay such amounts, and the tax effects thereof, shall not be subject to question by any beneficiary of the Trust fund.

Any assets in the revocable thus presumably already are available to satisfy claims against the estate.

In seeking to have Ms. Lyford substituted in her capacity as trustee of the revocable trust, the State appears to be contemplating the possibility that it may have a future need to intervene in the administration of the revocable trust or otherwise take some action due to the disposition of Mr. Daniels' assets before, at, or after death.[1] It has not explained why, if doing so relates to the administration of the revocable trust, this court, which does not generally supervise the administration of New Hampshire trusts, would be a proper forum for doing so. See N.H. Rev. Stat. § 564-B:2-201(a) ("The [New Hampshire probate] court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.").

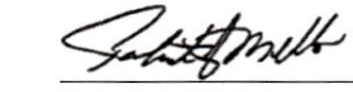
Moreover, the State has simply not explained why, when Ms. Lyford already is available as a substitute in her executor capacity, she ever would be a proper substitute in her trustee capacity. In her trustee capacity, she has not been authorized to represent Mr. Daniels' estate or to substitute for him or his estate otherwise. See *Casillas v. Cano*, 79 S.W.3d 587, 589–90 (Tex. Ct. App. 2002) ("None of the trust code provisions cited by Low would allow a trustee to represent the estate of the settlor of the trust unless that power is expressly given to the trustee. Further, the trust is not authorized to substitute as its settlor. Neither the trust itself nor the trustee of the trust has authority to proceed on behalf of Frederica Casillas in this appeal. We hold that, in her capacity as trustee of the inter vivos trust created by Casillas, Jeanette Low has no standing to prosecute this appeal on behalf of Casillas or Casillas' estate. The trust is likewise not a party to this appeal."). A claim against Ms. Lyford in her trustee capacity would appear to present a new claim, one that likely would not fall within the court's retained jurisdiction and that likely would be more appropriate in a New Hampshire court in any event.

With no showing that Ms. Lyford, as trustee, may be a proper substitute in this case, the court declines to further analyze personal jurisdiction over her in that capacity.

Order

For the foregoing reasons, the State's motion to substitute is granted as to Ms. Lyford in her capacity as executor of Mr. Daniels' estate, and otherwise it is denied. Mr. Daniels' motion to dismiss is denied.

SO ORDERED this 5th day of October, 2021



Robert A. Mello
Superior Judge

[1] Article III, Section III of the revocable trust describes certain irrevocable trusts as its sole distributees. The court expresses no opinion as to whether any assets in the irrevocable trusts may be available to satisfy the claims of creditors of the estate.