

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

7  
8 In re: JAY T. JANECEK,  
co-trustee/beneficiary, and JILL J.  
9 (JANECEK) COBB,  
co-trustee/beneficiary and the  
10 JANECEK TRUST, a Washington  
express trust and the JANECEK  
11 CHILDREN'S TRUST, a  
Washington express trust,

12 Petitioners,

13 v.

14 JON J. JANECEK,  
15 co-trustee/beneficiary

16 Respondent.

NO. CV-13-287-LRS

**ORDER DENYING  
MOTION TO REMAND,  
INTER ALIA**

17  
18 **BEFORE THE COURT** is the Petitioners' Motion To Remand (ECF  
19 No. 46). On its own motion, the court hears the Motion To Remand on an  
20 expedited basis without oral argument.

21 **SUBJECT MATTER JURISDICTION**

22 The jurisdictional argument presented in the Motion To Remand has  
23 already been presented by Petitioners in their response to Respondent's Motion  
24 For Appointment of Third-Party Corporate Trustee (ECF No. 19), and  
25 Respondent has filed a reply which addresses Petitioners' argument that this  
26 court lacks subject matter jurisdiction. Moreover, the court has an independent  
27

28 **ORDER DENYING MOTION  
TO REMAND, INTER ALIA- 1**

1 obligation to examine whether subject matter jurisdiction exists before deciding  
2 any issue on the merits, *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116 (9<sup>th</sup>  
3 Cir. 2004), and the absence of federal subject matter jurisdiction may be raised  
4 at anytime. *Rains v. Criterion Systems, Inc.*, 80 F.3d 339, 342 (9<sup>th</sup> Cir. 1996).

5 This TEDRA (Trust and Estates Dispute Resolution Act) petition, RCW  
6 Chapter 11.96A, was removed by Respondent from Spokane County Superior  
7 Court on August 21, 2013. It was removed on the basis of federal diversity  
8 jurisdiction. The “Notice of Removal” (ECF No. 1 at p. 3) asserts the amount  
9 in controversy exceeds \$75,000 and there is complete diversity of citizenship  
10 because Petitioners Jay T. Janecek and Jill L. (Janecek) Cobb are residents and  
11 citizens of Washington and Idaho, respectively, and Respondent Jon J. Janecek  
12 is a resident and citizen of California. The “Notice of Removal” further  
13 asserts:

14 T]he trust-related tort claims (breach of fiduciary duty), trust-  
15 related accounting demands, and property issues (California real  
16 property issues and requests for disgorgement of trust funds),  
17 alleged herein do not fall under the “probate exception” to this  
Court’s exercise of jurisdiction because they do not relate to the  
probate of a will, administration of an estate, or property that is in  
the custody of a probate court.

18 Petitioners contend the “probate exception” applies. This exception  
19 provides that a federal court may not probate a will, administer an estate or  
20 entertain an action that would interfere with pending probate proceedings in  
21 state court or with the control of property in custody of the state court.  
22 *Markham v. Allen*, 326 U.S. 490, 494, 66 S.Ct. 296 (1946). In *Marshall v.*  
23 *Marshall*, 547 U.S. 293, 126 S.Ct. 1735, 1748-49 (2006), the Supreme Court  
24 articulated a simple test of whether a case fits within the probate exception:  
25 whether a plaintiff seeks an *in personam* judgment against a defendant, as  
26 opposed to the probate or annulment of a will or other relief seeking to reach a  
27 res in the custody of a state court, and whether sound policy considerations,  
28

**ORDER DENYING MOTION  
TO REMAND, *INTER ALIA*- 2**

1 specifically, the special proficiency of state courts with respect to the issues  
2 presented by a case, militate in favor of extending the probate exception to that  
3 case. In *Marshall*, the Court specifically held that a claim based on a “widely  
4 recognized tort” such as tortious interference with an expectancy of an  
5 inheritance or gift is outside the exception. *Id.* at 1748.

6 Petitioners cite to certain deposition testimony of Respondent Jon J.  
7 Janecek as indicating the dispute regarding the trusts is inextricably intertwined  
8 with the probate of the estate of Lionell Janecek and therefore, this court’s  
9 entertaining of that dispute would interfere with the pending probate  
10 proceedings in Spokane County Superior Court, or with the control of property  
11 in the custody of that court. The following colloquy occurred during the  
12 deposition of Jon J. Janecek:

13 Q: Would you agree that marshaling the trust asserts, dividing  
14 by three equal ways is the resolution to this action?

15 A: Actually, sir, they’re combined. It’s a . . . pour over will. So  
16 frankly, even the stuff that goes into the probate by virtue of  
17 the will is automatically going to the trust. So it’s all  
18 combined, sir. It’s a unified trust and estate issue, wills and  
19 trust issue. So they’re all combined.

20 Frankly, the probate is supposed to send to the trust because  
21 the trust is the sole beneficiary under the will. So it’s all  
22 combined.

23 (ECF No. 39-11 at pp. 46-47).

24 This court does not believe the mere existence of a pour over will  
25 deprives it of subject matter jurisdiction to adjudicate the parties’ dispute  
26 regarding the trusts. It does not appear this court’s adjudication of the dispute  
27 would interfere with the probate proceedings in Spokane County Superior  
28 Court or with control of property in the custody of that court. None of the  
relief sought by Petitioners appears to have anything to do with estate assets.  
Rather, Petitioners seek relief only with regard to trust assets: 1) order

**ORDER DENYING MOTION  
TO REMAND, *INTER ALIA*- 3**

1 compelling Respondent to provide complete and full accounting of the  
2 Children's Trust; 2) order compelling Respondent to provide complete and full  
3 accounting of the Janecek (Family) Trust; 3) order compelling Respondent to  
4 disgorge all assets under his control that belong to the Children's Trust; 4)  
5 order compelling Respondent to disgorge all assets under his control that  
6 belong to the Janecek (Family) Trust; 5) order finding that Petitioners are not  
7 required to respond to a Payoff Demand Statement under California law, and  
8 prohibiting Respondent from enforcing such a demand; and 6) order  
9 compelling Respondent to provide a full and complete accounting of all  
10 payments claimed to have been made in full or partial satisfaction of the  
11 Promissory Note regarding the Seal Beach house, including canceled checks  
12 showing all payment. (Ex. A to ECF No. 1 at p. 12).

13           Petitioners do not seek a judgment out of estate property. Rather,  
14 Petitioners seek an *in personam* judgment against Respondent. Petitioners are  
15 akin to tort claimants seeking a declaration that Respondent has breached his  
16 fiduciary duties with regard to the trusts and that Petitioners should be granted  
17 the injunctive and declaratory relief they seek in order to remedy that breach.  
18 Breach of fiduciary duty imposes liability in tort. *Miller v. U.S. Bank of*  
19 *Washington, N.A.*, 72 Wn.App. 416, 426, 865 P.2d 536 (1994). Many courts  
20 have held that a claim for breach of fiduciary duty is outside the probate  
21 exception. *Curtis v. Brunsting*, 704 F.3d 406, 409-10 (5<sup>th</sup> Cir. 2013); *Campi v.*  
22 *Chirco Trust UDT*, 223 Fed. Appx. 584, 585 (9<sup>th</sup> Cir. 2007); *Lefkowitz v. Bank*  
23 *of New York City*, 528 F.3d 102, 107-08 (2<sup>nd</sup> Cir. 2007); *Jones v. Brennan*, 465  
24 F.3d 304, 307-08 (7<sup>th</sup> Cir. 2006); and *Hamilton v. Nielsen*, 678 F.2d 709, 710  
25 (7<sup>th</sup> Cir. 1982). In *Lefkowitz*, for example, the probate exception barred federal  
26 jurisdiction over a beneficiary's claims against the executor of her parents'  
27 estate to obtain assets that remained under the control of the state probate court,  
28

**ORDER DENYING MOTION  
TO REMAND, *INTER ALIA*- 4**

1 but it did not bar her tort claims against the executor for fraud and breach of  
2 fiduciary duty which did not directly implicate the assets of the probate estate  
3 and were not entirely intertwined with issues of estate administration.

4 Assuming there is a pour over will, that means once the probate in  
5 Spokane County Superior Court is completed, the estate assets will be “poured  
6 over” into the trust(s) and then subject to any orders this federal court has made  
7 regarding management of trust assets. That does not, however, fall within the  
8 probate exception and deprive this court of subject matter jurisdiction. Once  
9 the assets are “poured over,” they will no longer be estate assets in custody of  
10 the state court. The probate court will settle how the estate assets are to be  
11 distributed per the terms of Lionell Janecek’s will. This court will have  
12 nothing to do with that. Its orders will only impact the assets after they have  
13 been “poured over” into the trusts.<sup>1</sup> To the extent, however, there is any impact  
14 upon assets currently in the custody of the probate court, this does not  
15 necessarily warrant application of the probate exception.

16 The probate exception incorporates the doctrine of custodia legis, “the  
17 general principle that, when one court is exercising *in rem* jurisdiction over a  
18 *res*, a second court will not assume *in rem* jurisdiction over the same *res*.”  
19 *Marshall*, 547 U.S. at 311-12. This principle is narrow, however, and “has no  
20 application to a case in federal court based upon diversity of citizenship,  
21 **wherein the plaintiff seeks merely an adjudication of his right or his**

---

22  
23 <sup>1</sup> Petitioners represent the estate has not been closed only because Lionell  
24 Janecek owned 25% of a real estate partnership that owned two vacant lots in  
25 Tacoma, and that the proposed closing date was February 7, 2014. (ECF No.  
26 36 at p. 5). It is possible then that there currently is no ongoing probate  
27 proceeding in Spokane County Superior Court.  
28

1 **interest as a basis of a claim against a fund in the possession of a state**  
2 **court . . . .”** *Princess Lida v. Thompson*, 305 U.S. 456, 466, 59 S.Ct. 275  
3 (1939)(emphasis added). This was reiterated by the Supreme Court in  
4 *Markham* and quoted by the Court again in *Marshall*:

5 [W]hile a federal court may not exercise its jurisdiction  
6 to disturb or affect the possession of property in the custody  
7 of a state court, . . . it may exercise its jurisdiction to adjudicate  
8 rights in such property where the final judgment does not  
9 undertake to interfere with the state court’s possession  
10 **save to the extent the state court is bound by the judgment**  
11 **to recognize the right adjudicated by the federal court.**

12 *Marshall*, 547 U.S. at 310 (quoting *Markham*, 326 U.S. at 494)(emphasis  
13 added). See also *F.T.C. v. J.K. Publ’ns, Inc.*, 2009 WL 997421 at \*3 (C.D. Cal.  
14 2009)(“[A] federal court properly adjudicates rights regarding property that is  
15 the subject of a probate proceeding so long as the federal court does not order  
16 the transfer of any property belonging to the probate estate”). Here, Petitioners  
17 do not ask this court to order the transfer of any property belonging to the  
18 probate estate; at most, they ask this court to adjudicate their rights and the  
19 rights of Respondent regarding property that is the subject of the Spokane  
20 County probate proceeding.

21 Petitioners also assert there is no diversity of citizenship because  
22 Respondent should be treated as a resident of Washington due to the fact he is a  
23 legal representative of Lionell Janecek’s estate, and Lionell Janecek was a  
24 resident of Washington.<sup>2</sup> 28 U.S.C. §1332(c)(2) provides that “the legal  
25 representative of the estate of a decedent shall be deemed to be a citizen only of  
26 the same State as the decedent . . . .” This argument is essentially  
27 indistinguishable from Petitioners’ argument that the probate exception to  
28

---

<sup>2</sup> All three of the siblings, Petitioners and Respondent, are co-personal  
representatives of the estate. They are also the sole beneficiaries of the estate.

1 federal jurisdiction applies because of the existence of a pour over will.  
2 Because that exception does not apply, however, the only relevant  
3 consideration is Respondent's capacity as a trustee. In actions by or against a  
4 trustee, diversity is determined by the trustee's own domicile. Whereas a  
5 trustee is the legal owner of trust property, an executor is not the legal owner of  
6 estate property, but merely a representative of the estate. See *Andrews v.*  
7 *Modell*, 636 F.Supp.2d 213, 220-22 (S.D. N.Y. 2008). Respondent is a citizen  
8 of California for the purpose of this TEDRA lawsuit and therefore, there is  
9 complete diversity between him and the Petitioners.

10 The Supplemental Declaration of Jay T. Janecek (ECF No. 45) suggests  
11 \$75,000 may not be in controversy with regard to the trusts. This is the first  
12 time Petitioners have called the jurisdictional amount into question.  
13 Respondent, in his opening memorandum regarding his motion to appoint a  
14 third-party corporate trustee, indicates the Janecek (Family) Trust currently  
15 holds approximately \$1,500,000 in assets and that the probate action in  
16 Spokane County Superior Court involves approximately \$1,000,000 in assets.  
17 (ECF No. 19 at p. 3).<sup>3</sup> In their response memorandum, the Petitioners do not  
18 specifically take issue with the jurisdictional amount and indeed, state: "The  
19 total amount of combined assets exceeds \$2,000,000. The value of personal  
20 property is approximately \$3,600.00. The vast majority of trust assets are held  
21 in securities at Merrill Lynch and DA Davidson." (ECF No. 36 at p. 3). It is  
22 unclear if "combined assets" means combined trust assets or combined trust  
23 and probate assets.

---

24  
25 <sup>3</sup> According to Petitioners, the Janecek (Family) Trust is actually comprised  
26 of three trusts: (a) Credit Shelter Trust; (b) Marital Trust; and (c) Survivor's  
27 Trust. (ECF No. 36 at p. 2, n. 1).  
28

1           Based on the information currently before it, this court concludes the  
2 probate exception does not apply and that it has subject matter jurisdiction to  
3 adjudicate the parties' dispute regarding the trusts. Petitioners' Motion To  
4 Remand (ECF No. 46) is **DENIED**.

5  
6           **MEDIATION**

7           On August 16, 2013, Petitioners filed in this court a "Notice Of  
8 Mediation Under RCW 11.96A.300." (ECF No. 3). RCW 11.96A.300(1)  
9 provides that: "A party may cause the matter to be subject to mediation by  
10 service of written notice of mediation on all parties or the parties' virtual  
11 representatives as follows." The matter is to be resolved using mediation  
12 procedures unless a petition objecting to mediation is filed within twenty days.  
13 RCW 11.96.300(2)(b). The record does not indicate that Respondent ever filed  
14 a petition objecting to mediation. In fact, Petitioners' "Notice Of Mediation  
15 Under RCW 11.96A.300" represents that "[t]he parties previously mutually  
16 agreed through counsel that attorney Peter Witherspoon (WSB #7956) will be  
17 appointed as mediator."

18           **Within ten (10) days of the date of this order, the parties shall serve**  
19 **and file statements showing cause why the court should not compel them to**  
20 **engage in the mediation procedure set forth in RCW 11.96A.300.**

21           If the court does not compel mediation, it will promptly decide  
22 Respondent's Motion For Appointment Of Third-Party Corporate Trustee (ECF  
23 No. 19). If mediation is compelled, the court will await the outcome of the  
24 mediation before ruling on the motion.

25           //

26           //

27           //

28           **ORDER DENYING MOTION**  
**TO REMAND, *INTER ALIA*- 8**



1           **IT IS SO ORDERED.** The District Executive is directed to enter this  
2 order and forward copies to counsel.

3           **DATED** this   4th   of March, 2014.

4  
5   *s/Lonny R. Suko*

6   \_\_\_\_\_  
7   LONNY R. SUKO  
8   Senior United States District Judge