

Speaker 3 ([04:58](#)):

Next case on the calendar is Kennedy vs. Trustees.

Paul Dalnoky ([05:11](#)):

Good afternoon. Your honor, may it please the court, my name is Paul Dalnoky. I represent the opponent, John Kennedy.

Paul Dalnoky ([05:21](#)):

Illegitimate, fearless, [inaudible 00:05:24] bastard. Ironically, the police would have the court roll back the clock to that time in which a non marital child had no rights to the estate of the father. The district court relied on misuse of the fiduciary trust. In that case, there was ... they created a presumption that the non marital child had no rights in the estate of the father. However, a presumption may be rebutted. It is not an insuperable bar, which is what is required for a motion under 12(b)(6).

Paul Dalnoky ([06:10](#)):

Moving onto the second branch of the court's decision, in which it applied the probate exception to the diverse jurisdiction of the court. The martial decision-

Guido Calabresi ([06:24](#)):

But didn't Massachusetts change its law prospectively only?

Paul Dalnoky ([06:28](#)):

I'm sorry, didn't it change-

Guido Calabresi ([06:31](#)):

Didn't Massachusetts change its law prospectively only? Only for wills that were written-

Paul Dalnoky ([06:40](#)):

I-indeed, your honor. And Powers V. Wilkinson. It reversed that presumption prospectively only and now there is a presumption that a non marital child has an interest in the estate of the father.

Guido Calabresi ([06:55](#)):

[crosstalk 00:06:55] that they left the presumption as it was with respect to previous.

Paul Dalnoky ([07:00](#)):

Exactly, right.

Guido Calabresi ([07:01](#)):

It remains the same, doesn't it? Or are you arguing that in doing that they also weakened the prior presumption?

Paul Dalnoky ([07:10](#)):

Well, my argument ... First of all, my argument is two-fold. The misuse case was never a very strong precedent. The misuse case and the misuse case is a mere presumption. And a mere presumption may be rebutted. It is not an insuperable bar to relief.

Guido Calabresi ([07:29](#)):

Old law?

Paul Dalnoky ([07:30](#)):

The old law.

Guido Calabresi ([07:31](#)):

Which, uh, many of us would think was silly, was very strongly against children out of wedlock. And the presumption was very strongly against that. That came to be very unpopular and thought to be wrong and so it was turned around. But the question then is does the fact that it was turned around change anything as to what the law was before or should we now go back and say, "Gee, they didn't really like it so we should weaken that and the illegitimacy recognition presumption?" And I don't see any action really in either Massachusetts or other states that have had similar experiences in that direction.

Paul Dalnoky ([08:26](#)):

Again, your honor. The-the misuse case as I-I respectfully disagree.

Guido Calabresi ([08:33](#)):

Excuse me.

Paul Dalnoky ([08:34](#)):

I respectfully disagree that the misuse case creates a strong presumption. It ... the misuse case does create a presumption and again, a presumption does not create an insuperable bar. It does not create bar. It creates a presumption. A presumption may be rebutted. I believe that we have shown a great deal of evidence in the will itself that even though you don't consider the facts in 12(b)(6) motion, if you look at the will, the will constantly refers to children. Child. "Each child of mine." And the testament had no children at that time in fact. But again, my main point ... my two main points is that the misuse ... misuse is not as strong ... is not as strong ... does not create a strong presumption against. It creates a presumption. A presumption may be over turned. Maybe rebutted. Maybe overcome. And a presumption does not create an insuperable bar to relief that is-

Speaker 3 ([09:43](#)):

And to make sure I understand your argument, it's ... you're asserting that the presumption is overcome in this case because the will itself refers to children?

Paul Dalnoky ([09:51](#)):

Well, your honor ... my main, my main argument is, again, for the 12(b)(6) motion you need an insuperable bar. An insuperable bar, not a presumption. A bar, an absolute bar to the relief sought. Misuse doesn't create that. Misuse creates a presumption. And yes, your honor, by looking at the terms of the will each time it's refer ... uh, it refers to children. "Each child of mine." I believe, about 30 times or so, when it's a direct descendant. When it's the next line of inheritance, it refers to issue of children.

So I believe the test data was very clear along with all the evidence and the historical record that the test data made sure that other non marital children would be considered children of their father, when they came to the veterans of Vietnam. Certainly, if it was good for the rest of them, I believe it was good ... good enough for he. That he intended that his children take-

Guido Calabresi ([10:59](#)):

[inaudible 00:10:59] Massachusetts case, in which someone who wrote a will referring to children than he or she did not yet have, would by that fact be treated as including out of wedlock children? Are there any ... can you cite us anything in Massachusetts that suggests that Massachusetts court read the use of the word children before children where born? Is that rather than foreseeing the birth of the kid?

Paul Dalnoky ([11:39](#)):

Well, your honor, there is not case on point. However, the odd case is that we cite in our previous that shows that if you can show something, some evidence then you can ... you can look further into the issue.

Guido Calabresi ([11:54](#)):

[inaudible 00:11:54] I know the cases you cited [inaudible 00:11:56].

Paul Dalnoky ([11:57](#)):

We don't have the [inaudible 00:11:58] case directly on point, yeah. On that point. I believe my time is up. Uh, I'll turn it over the [inaudible 00:12:16].

Guido Calabresi ([12:15](#)):

Way up. Way up.

Harlan Levy ([12:15](#)):

Way up. How far does it go, your honor?

Paul Crotty ([12:18](#)):

You may be at the limit right now.

Harlan Levy ([12:20](#)):

The limit? Thank, thank, thank you.

Harlan Levy ([12:23](#)):

Good afternoon. May, may it please the court, my name is Harlan Levy of the firm of Boies, Schiller, and Flexner counsel for the trustees for the last will and testament of President Kennedy.

Harlan Levy ([12:37](#)):

Uh, there are two issues on this appeal. Uh, the first issue is whether the probate exception to diversity jurisdiction applies to plaintiff's inheritance claim. The district court held that it does apply. There's no-

Guido Calabresi ([12:52](#)):

If we were to decide for you on the second issue, the first issue wouldn't matter, would it? That is, if we were to decide that this will did not provide ... for the reasons the district court held the second part, then the question of whether the probate court except ... the probate court exception as we define by the supreme court is way or not is [inaudible 00:13:19].

Harlan Levy ([13:21](#)):

Your honor, there, there ... I can't really answer that right now. I haven't thought about that, but I-I can tell that it's one of the number of will-

Guido Calabresi ([13:30](#)):

The will does not provide for this.

Harlan Levy ([13:33](#)):

The, the will does ... yeah. The, the will does not provide, therefore, there's no fiduciary duty. Uh, therefore, uh, there's no, uh, there's ... it is not a child as defined by ... he's not a child defined by the will. Uh, and he's not ... he's not covered. That's right. There's also to some extent-

Paul Crotty ([13:57](#)):

Before there, before you get to answer that question don't you have to have jurisdiction? I mean if there's no ... if there is a probate exception to jurisdiction, we shouldn't be answering the second question.

Harlan Levy ([14:06](#)):

The, the, um, the way that Judge Polly sliced this, and I think it's the correct way to, to slice it, uh, Judge Polly focused on diversity jurisdiction with respect to the inheritance claim. And he said there was diversity jurisdiction, uh, as to the inheritance claim, but that there was no right inheritance under ... excuse me, that there was no diversity jurisdiction on the inheritance claim. But he then did separately address the claim for breach of fiduciary duty.

Harlan Levy ([14:42](#)):

That was, that was his, his division in, uh, in analyzing, uh, this. And, uh, his, his view and it's the view that, that we are for here, uh, your honor, is that the probate exception applies because under Massachusetts law, uh, testamentary trusts are always under the jurisdiction of the Massachusetts probate court and under the New York law, if it's New York that applies lifetime testamentary trust also fall within the jurisdiction of the probate court. And therefore, uh, there is no jurisdiction as to the inheritance claim. The complaint was not structured in terms of laying out the course of action of inheritance on one hand. Or in the other hand laying out a cause of action for breaching fiduciary duty, but those two concepts were, were intermingled in the pleading. And Judge Polly essentially analyzed each other separately, uh, in, in assessing this.

Harlan Levy ([15:41](#)):

So he, he definitely did start with a premise that the lack of diversity jurisdiction, uh, applied, uh, simply to the inheritance claim, but he did adjudicate the, uh, the, the, uh, question whether there was a fiduciary duty. And the case is properly here for that, for that purpose.

Harlan Levy ([16:01](#)):

Uh, with, with regard to, uh, fiduciary duty, the district court held that the trustees had no fiduciary duty, uh, to this plaintiff, and dismissed, uh, the plaintiff's claim. The will establishes a testamentary trust for the benefit of President Kennedy's children, and any breach of fiduciary duty would be predicated on plaintiff being child of President Kennedy, uh, under his will, uh, and person out of wedlock was not a child, uh, as defined by both the relevant New York and the relevant Massachusetts law.

Harlan Levy ([16:35](#)):

I briefly addressed the argument that somehow there's a meaningful difference between, uh, the word issue on one hand, uh, and the word children on the, on the other hand. I think there's distinction without that difference. Uh, I think it's very hard if we try to pass it to which one is, is, uh, broader and which one is, uh, narrower. Uh, and uh, the case law in Massachusetts in fact says that words of this type are treated interchangeably, and I think that's the only reasonable way to think about these words. That they're interchangeable words. In, in Massachusetts, under Massachusetts law prior to 1987, words such as children are issues meant only persons in the class who were born in wedlock, and is, your honor, point that out in 1987 that rule was overruled by Powers which specifically said that the rule only applies instruments that are executed prospectively.

Harlan Levy ([17:34](#)):

Uh, President Kennedy's will was executed in 1954, long before the 1987 decision, uh, empowers. Uh, and the case of Massachusetts stated that if there was going to be a manifestation of contrary intent that it had to be, uh, an obvious and unequivocal manifestation of contrary intent.

Guido Calabresi ([17:56](#)):

By any wild chance, um, the [inaudible 00:17:59] of James Landis's great article on the effect of wrongful death statutes in the 19th century, um, the meaning of children born out of wedlock at common law for inheritance and the change that those statutes made in the common law and the change in the common law what that did to some prior statutes? Um, it changed, according to Landis's 1936 article, it was [inaudible 00:18:35] about relation to common laws statutes about how presumptions way of looking at things which were fixed before were, nonetheless, changed by the fact of statutory changes introspectiveness only. The very interesting and controversial thing, which could add some flare ...

Harlan Levy ([19:02](#)):

I'm, I'm not familiar with the article, uh, your honor.

Guido Calabresi ([19:10](#)):

James Landis became dean at Harvard, joined the New Deal and came to a bad end.

Harlan Levy ([19:16](#)):

Um ... your honor, I did not know, uh, any of ... that, but I will educate myself. Thank, thank you. All right...

Speaker 3 ([19:24](#)):

But your argument might be that the change effected by Powers in '87, even assuming it had some effect cases decided in the '70s, might not be relevant to a will executed in the '50s?

Harlan Levy ([19:35](#)):

My, my argument is that under Massachusetts law that, uh, that, that Powers says specifically it's perspective. Powers says that, uh, on its face, and New York specifically says that it's the law that's in effect at the time of the testators' death that governs the interpretation of this intent. Uh, and that those who would be the precedence that we would, uh, rely, rely on. Uh, also, very briefly, uh, the two additional grounds that support affirmance, uh, the statute of limitations. This plaintiff changed his name to John Fitzgerald Kennedy in 1994. Uh, the claim was asserted, uh, in 2008. And under a Twombly and Iqbal, uh, the, uh, plaintiff relies solely on photos, which he claims how a sample ... a family resemblance. Thank you.

Paul Dalnoky ([20:38](#)):

Very briefly, your honor. Misuse did not create a rule, it created presumption. Presumptions can be overcome. A presumption is not bar. It is not an insuperable bar to relief, which is required in a 12(b)(6). In fact, it ... it ... the presumption applied to issue. It didn't apply to ... it defined the class of issue. We all know who the child is. We all know who the child is, your honors.

Paul Dalnoky ([21:09](#)):

Uh, finally ... finally, with the thought to these, uh, probate exceptions to the diversity jurisdiction of the district court, there is no testamentary trust exemption to the diversity of the district court. No court has ever ruled-

Guido Calabresi ([21:29](#)):

You keep saying a presumption can be overcome. What is it that you bring us, that you proffer which would cause this presumption to be?

Paul Dalnoky ([21:37](#)):

Well-

Guido Calabresi ([21:39](#)):

Of course presumptions can be overcome. They're not overcome just because they don't disappear [inaudible 00:21:44].

Paul Dalnoky ([21:44](#)):

But in fact, we go into the will in detail and we show how the first lineal descendants are referred to as children. "Each of my children, to a child of mine." The next line is referred to as issue. Uh, we refer to the, uh, executive order in which President Kennedy made all non marital children children of their fathers. I don't know what law we can give this court than-

Guido Calabresi ([22:14](#)):

The military in a completely different context as president for political reasons.

Speaker 3 ([22:22](#)):

And years after the will was executed.

Paul Dalnoky ([22:26](#)):

Right, when he was president, correct. Uh, correct. But that shows ... that shows his feeling towards children, non marital and marital. Uh-

Guido Calabresi ([22:37](#)):

So politically, this was an appropriate thing for him to do, but there many people who take political stance that they don't live in their private lives, lord knows. We've seen a few examples recently.

Paul Dalnoky ([22:50](#)):

That's true. That's true, thank you very much, your honor.

Speaker 3 ([22:57](#)):

Thank you both.