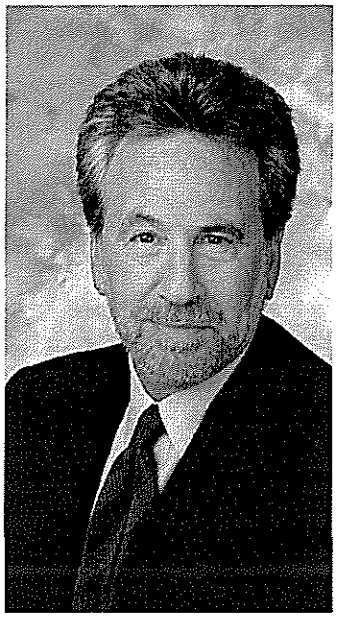
REPRESENTING ANNA NICOLE

by Fellow Kent L. Richland

"Sometimes a person has to go a very long distance out of his way to come back a short distance correctly."

Edward Albee, *The Zoo Story*



It is the dream of every appellate lawyer to argue before the United States Supreme Court. The dream also usually features the post-argument advocate pocketing his hands in a long overcoat as he walks down the front steps of the Court, his frosty breath preceding him as he approaches a bank of microphones to address the clamoring media.

I lived that dream. But as perfect as its realization was, getting there involved some of the most difficult–and some of the most enlightening – moments of my professional life.

The *Marshall* Case

Our firm was brought into *Marshall v. Marshall* just after the Bankruptcy Court in Los Angeles had awarded our client – debtor in possession Vickie Lynn Marshall, better known by her professional name Anna Nicole Smith – a judgment for $479 million in compensatory and punitive damages. The outlines of the story are known even to non-tabloid-TV fans. Vickie is the surviving widow of billionaire Texas oilman J. Howard Marshall II. When he died, J. Howard's will and trust left nothing to her and his entire estate to his son Pierce. While the estate was being probated in Texas, Vickie filed for bankruptcy in Los Angeles.

In the bankruptcy action, Pierce filed a defamation claim against Vickie, alleging she had falsely accused him in the press of forgery, fraud and overreaching to gain control of his father's assets. Vickie asserted truth as a defense, as well as a counterclaim for tortious interference with an intended *inter vivos* gift. The counterclaim alleged Pierce had prevented J. Howard from giving her a gift while he was alive by, among other things, imprisoning J. Howard, making misrepresentations to him, and transferring property against his wishes.

After summarily adjudicating the defamation claim in Vickie's favor, the Bankruptcy Court proceeded to try the tortious interference claim. It concluded that Pierce had tortiously interfered with J. Howard's attempt to set up a trust for Vickie consisting of what J. Howard called "new community"– half the increase in the value of his assets during the time of their marriage, which the court valued at $449 million. The court also awarded $25 million in punitive damages because of Pierce's "outrageous" conduct.

The Bankruptcy Court judgment was appealed to the District Court. But under the bankruptcy rules, the Bankruptcy Court can enter a final judgment only if the matter is "core." Otherwise, the Bankruptcy Court's findings are reviewed *de novo* by the district court. Here, the District Court determined the matter was "non-core" and therefore did a *de novo*

review that included presentation by both parties of additional live testimony and other evidence. Key items of evidence before the District Court were a memo by J. Howard's lawyer memorializing J. Howard's instructions to prepare the trust for Vickie's benefit, and the lawyer's billing records showing that the trust was actually drafted. (The trust never saw the light of day after Pierce got lawyers with allegiance to him to take over his father's affairs.) The evidence also showed that Pierce had hired a private detective to follow J. Howard after his marriage to Vickie to ensure that he could not make other arrangements to give her the intended gift.

After hearing all the evidence, the District Court adopted and supplemented the Bankruptcy Court findings. The District Court valued the intended trust at "only" $44.3 million. However, finding that Pierce's multiple forgeries and frauds were "even worse" than the Bankruptcy Court had found, and in light of the "overwhelming" evidence of Pierce's "willfulness, maliciousness, and fraud," the District Court awarded an equal amount in punitive damages, for a judgment of about $88.6 million.

The Ninth Circuit

Pierce appealed to the Ninth Circuit. There his fortunes improved dramatically.

In his 160-page brief, Pierce challenged virtually every factual finding made by the District Court and raised a number of other arguments, including invoking an arcane doctrine known as the "probate exception" to federal jurisdiction. Under that doctrine, Pierce argued, the federal courts lacked jurisdiction over Vickie's claim because it was within the exclusive jurisdiction of the Texas probate court.

I felt we had the better side of that and Pierce's other arguments. However, I've been an appellate lawyer long enough to know that you can lose any appeal. Nevertheless, as oral argument approached, I was confident that in light of the devastating factual findings against Pierce, the Ninth Circuit was unlikely to reverse in the absence of unequivocal error. So when I showed up for oral argument, I was looking forward to an interesting and challenging discussion of the law and the facts.

Instead, I encountered the most difficult argument of my 30 years of appellate practice. The questions focused almost exclusively on the probate exception issue, and the court was openly skeptical of every argument I made. One judge commented that it was "tricky asking [me] questions."

Immediately after the argument, I felt certain we had lost. But as the weeks and months passed after the argument with no opinion issuing, a little hope crept into my heart. After a year, I thought, "Well, maybe they've read the briefs and the cases, and they are seeing their initial impressions were wrong." Nevertheless I can't say I was really surprised when, fourteen months after the oral argument, the panel issued an opinion fully adopting Pierce's position and holding the probate exception was a bar to federal jurisdiction.

Certiorari

We immediately began to explore certiorari, delving far deeper into the history and literature of the probate exception than the expedited briefing schedule had permitted. We found its roots in early Supreme Court cases, and we discovered that the Court's last opinion on the subject, in 1946, contained highly ambiguous language. Several law review articles described how the ensuing confusion in the circuits had resulted in multiple splits of authority – indeed, in the 1960s, the ALI had given up trying to formulate the probate exception discussion in the Restatement of Jurisdiction.

In other words, we had a classic cert issue. And while we were very proud of our cert petition – which both pointed out the circuit splits and suggested an approach to the probate exception that harmonized all the Supreme Court case law – we knew the length of the odds. And we were also concerned that the

sheer notoriety of the case and our client would work against us.

Needless to say, when *Marshall v. Marshall* was announced as one of the three cases on which cert had been granted after the Court's summer recess, we were elated. The fact that the vote was 8-0 (before the Roberts confirmation) made it all the sweeter.

Media Attention and Merits Briefing

Despite its fame, while we were in the Ninth Circuit our case got the same media treatment as just about every other appellate matter–it was ignored. But something about the juxtaposition of Anna Nicole Smith and the United States Supreme Court changed that. I was contacted for an interview by virtually all the major (and many minor) media outlets. Few had interest in the issue before the Court–the most pressing question seemed to be whether my client would attend oral argument. One of the most prominent Supreme Court reporters assured me that she normally wouldn't cover a case like this one, but the grant of cert gave her no choice. Most of the media portrayed the case as a will contest, having no appreciation for the fact that it was a tort action.

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We busily began to prepare our opening brief on the merits. About a week and a half before it was due, I received a call from an Assistant Solicitor General. She explained that Pierce's lawyers had asked the Government for its support, but it was the SG's policy to contact the other side before making that decision. I was convinced the Government's interests were much more consonant with our position; since I would be in Washington that weekend at an AAAL meeting, I made an appointment for the following Monday, hoping to dissuade her from supporting our opponent.

The meeting went better than I had expected. After our meeting, the ASG said her office would consider filing a brief supporting Vickie, although she could make no guarantees. But less than a week remained before our brief (and hence any supporting *amicus* brief) was due, and she explained that if the Government were to file a brief in our support, it would need at least another week to prepare the brief. I quickly arranged for a week's extension. In less than two weeks, the ASG mastered the complex issues and, to our delight, filed a remarkably comprehensive brief supporting Vickie's position.

The entire pre-argument process was an education in United States Supreme Court practice. Early on I learned of the enormous assistance offered by the Supreme Court Clerk's office, giving it a deserved reputation as the most helpful clerk's office in the nation. In particular, the Merits Clerk acts as the Court's interface with counsel on all cases the Court has accepted for review. She is familiar with the procedural posture of each case and can give counsel an idea when argument will be scheduled, grant extensions of time for merits briefing, ensure that the Court has the correct record, arrange for counsel to attend oral argument in other cases, and answer the myriad other questions that inevitably arise during the pre-oral argument process.

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I also learned about the importance of planning oral argument preparation. Former Assistant Solicitor General David Frederick's book *Supreme Court and Appellate Advocacy* (Thomson West 2003) was an invaluable resource, providing everything from a preparation timeline to a checklist of what to bring to oral argument, with countless examples from Supreme Court arguments of what the oral advocate should and shouldn't do. But unfortunately I learned too late about the Georgetown Law School's Supreme Court Institute Moot Court Program, reputed to be the best in the nation. When I contacted the school a few weeks after cert had been granted, I learned that the Program had already agreed to moot my opponent – and that the service, while free, is offered to only one side of each case on a first come, first serve basis. In the event, I participated in a moot court at my firm and two law school moot courts, including one at which **Past President Alan Morrison** generously contributed incisive questions and invaluable advice.

Oral Argument and Opinion

On February 28, 2006, I was awed to find myself sitting in the Supreme Court courtroom, in the tier of seats reserved for counsel arguing the morning's second case. After weeks of preparation and three moot courts, I almost felt prepared. While the first case was being argued, I reached for a pen to jot down a few notes; it leaked black ink all over my hands. Fortunately, the ASG, who was sitting next to me, was a mom and keeps a small bottle of Purell with her at all times. Talk about *amicus* support!

My argument got off to a rocky start. Since the issue was federal jurisdiction, I began with an analysis of the applicable jurisdictional statutes, an approach I thought would appeal to the Court's strict constructionists. Instead I found myself on the receiving end of a classic Scalia quip: "Do you want to stand on this position, Mr. Richland, or do you have a lesser position that might cause you to win?" I smiled and launched into my narrower argument that, whatever the scope of the probate exception, this case wasn't within it.

The rest of the argument went smoothly. And in my brief rebuttal I was able to answer, quickly and pointedly, three of the questions posed from the bench during my opponent's argument. I had done it; now for the overcoat and microphones.

On May 1, 2006, the Court unanimously reversed the Ninth Circuit. Eight justices, including Justice Ginsburg writing for the majority, concluded that "the Ninth Circuit had no warrant from Congress, or from the decisions of this Court, for its sweeping extension of the probate exception." *Marshall v. Marshall*, 126 S.Ct. 1735, 1741 (2006). In his concurring opinion, Justice Stevens agreed with our broader position that there was no probate-specific exception to federal jurisdiction and that the Court's so-called probate exception cases could all be explained as applications of conventional statutory jurisdiction principles.

As I write, the case has returned to the Ninth Circuit for consideration of the remaining issues on appeal. And as if the case does not have enough twists and turns, we recently learned that our opponent, E. Pierce Marshall, had died of a sudden illness. But whatever surprises this remarkable case has in store, I will always have the memories of my peak appellate advocacy experience. ❖

***Fellow Kent Richland** is a founding member of the 21-lawyer Los Angeles appellate boutique Greines, Martin, Stein & Richland. A former president of both the California Academy of Appellate Lawyers and the California Supreme Court Historical Society, Kent got the chance to make appellate history of his own in the 2005-2006 term of the United States Supreme Court.*