11, Ex. D (May 12, 2014).

NOW THEREFORE IT IS HEREBY ORDERED that Plaintiffs' May 12, 2014 motion for reconsideration of this Court's order imposing sanctions is hereby DENIED.

Plaintiffs shall have 10 days from the service of this Order upon them to respond to FSMDB's statement of costs and fees filed on May 6, 2014, and FSMDB's supplemental statement of fees filed on May 22, 2014.

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FSM SUPREME COURT APPELLATE DIVISION

FSM DEVELOPMENT BANK, Appellant, IN THE MATTER OF THE ESTATE OF MAKATO EDMOND, Deceased. RANDY EDMOND, Appellee.	)	APPEAL CASE NO. K6-2013 Civil Action No. 2012-2004

OPINION

Argued: February 14, 2014
Decided: June 30, 2014

BEFORE:

Hon. Martin G. Yinug, Chief Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court
Hon. Benjamin F. Rodriguez, Specially Assigned Justice, FSM Supreme Court*

*Chief Justice, Pohnpei Supreme Court

APPEARANCE:

For the Appellant: Nora E. Sigrah, Esq.
P.O. Box M
Kolonia, Pohnpei 96942

* * * *

HEADNOTES

Appellate Review – Standard – Civil Cases – De Novo

When the question presented is one of law, it is reviewed on a de novo basis. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 429 (App. 2014).

Domestic Relations – Probate; Jurisdiction

The probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes the national courts from disposing of property that is in a state probate court's custody. But it does not bar the national courts from adjudicating matters outside of those confines and otherwise within national court jurisdiction. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 430 (App. 2014).

Domestic Relations – Probate; Jurisdiction

Interference with the property of the estate, and the probate exception should be read narrowly so as not to bar national court jurisdiction over preliminary matters, or ancillary matters, such as in personam actions and equitable intervention for fraud, maladministration, or non-administration of the estate. In those matters, the national court may appoint an administrator or an administrator pendente lite on behalf of third party interests before, or while, the action is pending in state court. These actions are outside of the scope of the probate exception, but they should not be confused with direct challenges to the validity of the will itself, in interpreting the language of the will, or equitable charges of fraud, undue influence, or tortious interference with the testator's intent which are core matters within the probate exception. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 430 (App. 2014).

Domestic Relations – Probate; Jurisdiction

An open probate proceeding at the state level is not a bar to national court subject matter jurisdiction as long as the national court does not interfere with the estate's res. Under the longstanding "creditor exception," the national courts have subject matter jurisdiction to appoint an administrator or an administrator pendente lite and to initiate proceedings on behalf of interested third parties. This appointment has no impact on the res of the decedent's estate, does not interfere with administrative decisions regarding the decedent's estate, nor does it affect the distribution of those assets within the state's control. It is a preliminary matter outside of the scope of the probate exception. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 430-31 (App. 2014).

Domestic Relations – Probate; Jurisdiction – Diversity

When jurisdiction exists by virtue of diversity of the parties, the FSM Supreme Court may resolve the dispute despite the fact that matters squarely within the legislative powers of states (e.g., probate, inheritance and land issues) may be involved. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 431 (App. 2014).

Domestic Relations – Probate; Jurisdiction – Diversity

A long line of precedents supports diversity jurisdiction as a proper independent basis for national jurisdiction of probate matters. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 431 (App. 2014).

Jurisdiction – Diversity

The Constitution only requires minimal diversity. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 431 n.2 (App. 2014).

Domestic Relations – Probate; Jurisdiction – Exclusive FSM Supreme Court

Since the FSM Supreme Court trial division has original and exclusive jurisdiction in cases in

which the national government is a party except when an interest in land is at issue and since the Federated States of Micronesia Development Bank is an instrumentality of the national government and part of the national government for the purposes of the Constitution's Article XI, § 6(a), the FSM Supreme Court's trial division therefore has original and exclusive jurisdiction in any case in which the bank is a party so long as no interest in land is at issue. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 432 (App. 2014).

Civil Procedure – Pleadings

The term "at issue" is defined as whenever the parties come to a point in the pleadings which is affirmed on one side and denied on the other, they are said to be at an issue. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 432 (App. 2014).

Property – Mortgages

A mortgage foreclosure generally does not involve a dispute over who owns the land, but rather the mortgagor's undisputed ownership being transferred, often involuntarily, to a buyer or to the mortgagee to satisfy the mortgagor's debt. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 432 (App. 2014).

Domestic Relations – Probate; Jurisdiction

Ultimately, the bulk of probate matters are to remain with the states, but an express constitutional exception is carved out when the national government is a party to the suit. Furthermore, the Constitution's framers created a constitutional limitation on the national government's jurisdiction under the land clause exception of article XI, § 6(a). FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 433 (App. 2014).

Banks and Banking; Jurisdiction – Exclusive FSM Supreme Court

The FSM Development Bank is an instrumentality of the national government, and should be treated as if the national government itself is the actor. It, therefore, has an independent basis for jurisdiction under the Constitution article XI, § 6(a) and the national forum is available to it. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 433 (App. 2014).

Banks and Banking; Jurisdiction – Exclusive FSM Supreme Court

The FSM Development Bank may fully adjudicate many matters in the national court until land is at issue. At that time, unless, a separate and additional source of jurisdiction can be found, the case must be dismissed and returned to the state court, or alternately, held in abeyance until the land issue is certified. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 433 (App. 2014).

Civil Procedure – Parties

The purpose of the rule permitting an executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute to sue in that person's own name without joining the party for whose benefit the action is brought, is to relax the strict common law rules requiring an action at law be brought by, or in the name of, the person holding legal title, and at the same time to assure the defendant of the judgment's finality and protection from further harassment or vexation at the hands of other claimants to the same demand. The rule's failure to refer to the benefitted party in its list of persons qualified as real parties of interest does not have the effect of preventing that party from suing. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 435 (App. 2014).

Civil Procedure – Parties

The real party of interest in a civil action is the party who possesses the substantive right to be enforced. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 435 (App. 2014).

Civil Procedure – Parties

The real party in interest rule neither enlarges nor restricts a party's substantive right to recover in a particular action; thus, the substantive right to make the alleged claim must be found to exist before issue of appropriateness of the parties comes to the fore. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 435 (App. 2014).

Choice of Law

When national law merely provides the forum, the national courts must strive to apply the law in the same way the highest state court would. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 435 (App. 2014).

Civil Procedure – Parties

When the FSM Development Bank has an unpaid judgment entered by the FSM Supreme Court trial division and the debt was secured by a mortgage, the bank is the beneficiary and has a right to collect judgments and foreclose on property pursuant to state law. This substantive right creates the status of real party in interest for the bank in the national courts. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 435 (App. 2014).

Civil Procedure – Parties; Jurisdiction – Exclusive FSM Supreme Court

As an instrumentality of the government, the FSM Development Bank is, under Civil Rule 17's third party beneficiary clause, a real party in interest for the purposes collecting judgments from a party, limited by the land clause exception in article XI, § 6(a), and whenever "land is at issue" the national forum is no longer available so that if and when title to the land is disputed by the parties, the proceedings on that issue must be dismissed, or alternatively, the issue may be certified to the state court. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 435-36 (App. 2014).

Domestic Relations – Probate; Jurisdiction

Preference toward state courts adjudicating the bulk of probate matters should be read narrowly, to permit creditors and other third parties to protect financial interests by initiating probate proceedings and resolving many auxiliary matters. The national courts are not barred from exercising subject matter jurisdiction over probate matters, and when an independent basis for jurisdiction is established, the national courts may proceed with the probate matter in its entirety. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 436 (App. 2014).

Domestic Relations – Probate; Federalism – Abstention and Certification; Jurisdiction

Another court's assumption of jurisdiction should be made with restraint, cognizant of the limitation that if a court has already assumed jurisdiction over the matter, a second court will not interfere and assume in rem jurisdiction over the same res. In those cases, abstention may be the appropriate course of action. A probate matter filed only in national court, however, causes no such conflict. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 436 (App. 2014).

Jurisdiction – Exclusive FSM Supreme Court; Jurisdiction – Removal

If an independent basis creates exclusive jurisdiction in the national courts, the action must be removed from the state court, and adjudicated in the national forum. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 436 (App. 2014).

Civil Procedure – Parties; Domestic Relations – Probate

Under Civil Rule 17's third party beneficiary clause, judgment creditors are real parties in interest when pursuing many preliminary and auxiliary matters relating to the probate of estates. FSM Dev. Bank v. Estate of Edmond, 19 FSM R. 425, 436 (App. 2014).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

On February 14, 2014, we heard oral arguments in this appeal. Attorney Nora Sigrah represented the Appellant, FSM Development Bank (FSMDB). Randy Edmond (Edmond), the Appellee, was not present.

This case comes on appeal from the FSM Supreme Court Trial Division, Kosrae State. On April 27, 2012, FSMDB filed a Verified Petition for Appointment of Administrator (Verified Petition) in the estate of decedent Makoto Edmond. On March 31, 2013, the lower court denied jurisdiction in that case, dismissed the motion, and referred the FSMDB to the Kosrae State Court as the appropriate forum for probate matters. FSMDB seeks a review of that decision which appears to be inconsistent with other FSM Trial Division decisions.

Upon Consideration, we reverse and remand the lower court decision for the reasons set forth below:

I. Issues

The primary issue raised on appeal is the nature and scope of the probate exception: specifically, whether the FSM Supreme Court Trial Division has subject matter jurisdiction over probate matters, whether FSM Const. art. XI, § 6(a) provides an independent basis for national court jurisdiction, and whether the FSMDB has standing as a real party in interest.

II. Standard of Review

"When the question presented is one of law, it is reviewed on a de novo basis." Department of Treasury v. FSM Telecomm. Corp., 9 FSM Intrm. 575, 579 (App. 2000). FSMDB challenges the legal conclusion regarding the jurisdiction of the trial court, thus the proper standard of review in this case is de novo.

III. Background

On May 27, 1994, Makoto Edmond executed a deed of trust using land parcel no. 005-U-07 as security for an FSMDB loan. On December 3, 2010, the FSM Trial Division, sitting in Kosrae State, entered a judgment against Makoto Edmond in the amount of $19,543.22 for non-payment of this loan. On February 26, 2010, Makoto Edmond died. His wife, Irene Makoto Edmond, and nine children, are the surviving heirs to his estate. Nearly two years later, no petition to probate the property of the deceased had been opened. On April 27, 2012, FSMDB filed the Verified Petition to open the proceedings in the FSM Supreme Court Trial Division, sitting in Kosrae State, requesting that decedent's wife, Irene Edmond, be appointed as the estate administrator. On June 20, 2012, the court held a hearing in which Randy Edmond, decedent's son, agreed to be appointed as the administrator of the estate with the consent of the other heirs. Subsequently, FSMDB filed a motion to amend the Verified Petition in his name with the intent to proceed in a foreclosure on the mortgage that was used as a security on the loan. Ultimately, the lower court denied that request.

IV. PROBATE EXCEPTION

"Among longstanding limitations on federal jurisdiction otherwise properly exercised are the so-called 'domestic relations' and 'probate' exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history." Marshall v. Marshall, 547 U.S. 293, 299, 126 S. Ct. 1735, 1741, 164 L. Ed. 2d 480, 489-90 (2006). Searching for the historical roots of the probate exception has been described as "an exercise in mythography." *Id.* at 299, 126 S. Ct. at 1741, 164 L. Ed. 2d at 490 (citing Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 PROBATE L.J. 77, 125-26 (1997)).[1] Our own court has explored these matters at length and concluded that these historical underpinnings are no longer relevant to the FSM jurisprudence, but nevertheless abstained from making a probate decision in acquiescence to the rule. In re Nahnsen, 1 FSM Intrm. 97 (Pon. 1982). "[H]owever shoddy the historical underpinnings of the probate exception, it is too well established a feature of our federal system to be lightly discarded" and acquiescence to the rule has made it a settled part of the national court's subject matter jurisdiction. Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982).

There are many articulations of the probate exception, but upon review, we now formally adopt the standard as articulated in the leading U.S. case: "The probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from disposing of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside of those confines and otherwise within the federal jurisdiction." Marshall, 547 U.S. at 311-12, 126 S. Ct. at 1748, 164 L. Ed. 2d at 498. Notably, this decision stressed the "distinctly limited scope" of the probate exception. *Id.* at 310, 126 S. Ct. at 1747, 164 L. Ed. 2d at 497. The court further observed that "'it has been established by a long series of decisions . . . that the federal courts of equity have jurisdiction to entertain suits in favor of creditors, legates, heirs, and other claimants against a decedent's estate . . . so long as the federal court does not interfere with the probate proceedings.'" *Id.* at 310-11, 126 S. Ct. at 1747-48, 164 L. Ed. 2d at 497 (quoting Markham v. Allen, 326 U.S. 490, 494, 66 S. Ct. 296, 298, 90 L. Ed. 256, 259 (1946)).

The court further explained the word "interference" was to be understood as "a reiteration of the general principle that, when one court is exercising in rem jurisdiction over a res a second court will not assume in rem jurisdiction over the same res." Marshall, 547 U.S. at 311, 126 S. Ct. at 1748, 164 L. Ed. 2d at 498. The touchstone, therefore, is interference with the property of the estate, and the probate exception should be read narrowly, so as not to bar preliminary matters, or ancillary matters, such as in personam actions and equitable intervention for fraud, maladministration, or non-administration of the estate. In those matters the national court may appoint an administrator, or an administrator pendente lite, on behalf of third party interests before, or while, the action is pending in state court. These actions are outside of the scope of the probate exception, but they should not be confused with direct challenges to the validity of the will itself, in interpreting the language of the will, or equitable charges of "fraud, undue influence[, or] tortious interference with the testator's intent" which are core matters within the probate exception. *Id.* at 304, 126 S. Ct. at 1744, 164 L. Ed. 2d at 493.

In this appeal, FSMDB seeks a review of the FSM Supreme Court Trial Division, Kosrae State, denying the request for the appointment of an administrator to the estate of Makoto Edmond.

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[1] "The probate exception is one of the most mysterious and esoteric branches of the law of federal jurisdiction." *See* Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982).

Proceedings have not been opened in the Kosrae State Court. Even if they were, an open probate proceeding at the state level is not a bar to national subject matter jurisdiction, as long as the national court does not interfere with the res of the estate. Under the longstanding "creditor exception" the national courts have subject matter jurisdiction to appoint an administrator, or an administrator pendente lite, and to initiate proceedings on behalf of interested third parties. This appointment has no impact on the res of the decedent's estate, does not interfere with administrative decisions regarding the decedent's estate, nor does it affect the distribution of those assets within the state's control. In short, it is a preliminary matter outside of the scope of the probate exception.

IV. Independent Basis

The second issue raised on appeal is whether the FSMDB has an independent basis for jurisdiction under the FSM Constitution article XI, § 6(a). The FSM Supreme Court has previously held, "This court is empowered to exercise authority in probate matters where . . . there is an independent basis for jurisdiction." In re Nahnsen, 1 FSM Intrm. at 104. In that decision the court held that diversity of citizenship was an independent basis for jurisdiction in probate matters, but also made it clear that the preferred court was to be the state, "We conclude that the court does have jurisdiction. Nevertheless, we suggest that state courts, rather than national courts, should normally resolve probate and inheritance issues." *Id.* at 97. Accordingly, the court abstained from initiating national proceedings for 45 days, allowing the parties adequate time to begin actions at the state level, but simultaneously demonstrated a willingness to resolve the matter if no action was taken.

Subsequently, the FSM Supreme Court removed a probate proceeding from state court based on diversity of the parties stating, "The national courts, including the trial division of the Supreme Court, have concurrent original jurisdiction in . . . disputes between . . . a state or a citizen thereof, and a foreign . . . citizen." In re Estate of Hartman, 4 FSM Intrm. 386, 387 (Chk. 1989); *see* FSM Const. art. XI, § 6(b). More importantly, that court held that diversity jurisdiction does not "preclude state courts from acting under state law, unless or until a party to the litigation invokes the national court jurisdiction." *Id.*; *see also* Hawk v. Pohnpei, 4 FSM Intrm. 85, 86 (App. 1989). Additionally, this court has held that "Where jurisdiction exists by virtue of diversity of the parties, the FSM Supreme Court may resolve the dispute despite the fact that matters squarely within the legislative powers of states (e.g., probate, inheritance and land issues) may be involved." Ponape Chamber of Commerce v. Nett Mun. Gov't, 1 FSM Intrm. 389, 392 (Pon. 1984). "Issues concerning land usually fall into state court jurisdiction, but if there are diverse parties having bona fide interests in the case or dispute, the Constitution places jurisdiction in the national courts even if interests in land are at issue." Etscheit v. Adams, 5 FSM Intrm. 243, 246 (Pon. 1991). Furthermore, minimal diversity has been found sufficient to support jurisdiction, and the national trial court is not "precluded from exercising jurisdiction" under the complete diversity rule. In re Nahnsen, 1 FSM Intrm. at 105.[2]

Thus, a long line of precedents supports diversity jurisdiction as an exception to the probate exception and as a proper independent basis for national jurisdiction of probate matters. This court, however, has never extended that precedent to FSM Const. art. XI, § 6(a), but does so now. The FSM

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[2] The minimum diversity doctrine was later upheld upon review in Luzama v. Pohnpei Enterprises Co.,"Thus the only possible conclusion that can be reached from the text of the Constitution and that text's "legislative history" as found in the Constitutional Convention journals is that it offers no support that the framers intended to adopt the statutory rule of complete diversity as a constitutional requirement. The constitutional language itself, following FSM precedents on constitutional interpretation, only requires minimal diversity and the constitutional journals do not reveal any intent to depart from the plain meaning of the constitutional language." 7 FSM Intrm. 40, 49 (App. 1995).

Supreme court trial division "has original and exclusive jurisdiction in cases affecting officials of foreign governments, disputes between states, admiralty or maritime cases, and in cases in which the national government is a party except where an interest in land is at issue. FSM Const. art. XI, § 6(a). After a lengthy analysis, our trial division has held that "the Federated States of Micronesia Development Bank is an instrumentality of the national government and part of the national government for the purposes of FSM Const. art. XI, § 6(a). This Court's trial division therefore has original and exclusive jurisdiction in any case in which the bank is a party, so long as no interest in land is at issue." FSM Dev. Bank v. Estate of Nanpei, 2 FSM Intrm. 217, 221 (Pon. 1986). Notably, in that case, the dispute was limited to the sale of the hotel building itself and the underlying title to the property was not at issue. As a result, the court supported the forced foreclosure sale of the hotel building for $832,990.00 which was used to satisfy the FSMDB as a judgment creditor.

Based on that decision, the national court later found that the FSMDB had jurisdiction in the FSM Supreme Court Trial Division "because the national government is a party. FSM Dev. Bank v. Mori, 2 FSM Intrm. 242, 244 (Truk 1986) (citing FSM Dev. Bank v. Estate of Nanpei, 2 FSM Intrm. at 221). That court affirmed that the bank was "an instrumentality of the national government." *Id.* at 243. Again, the court held that land was not at issue, this time because the answers to the pleadings had not been filed and, consequently, there was no material dispute between the parties at that point. Citing Black's Law Dictionary, the court defined the term "at issue" as "whenever the parties come to a point in the pleadings which is affirmed on one side and denied on the other, they are said to be at an issue." *Id.* at 244. Notably, in a differently situated case, where land was held to be at issue,[3] our trial division, sitting in Chuuk state, indicated "a mortgage foreclosure generally does not involve a dispute over who owns the land, but rather the mortgagor's undisputed ownership being transferred, often involuntarily, to a buyer or to the mortgagee to satisfy the mortgagor's debt." FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 1, 4 (Chk. 2001).

Following that entire line of cases, our trial division, sitting in Pohnpei, appointed an administrator in the estate of Manny Setik, based on the FSMDB's status as an instrumentality of the national government under FSM Constitution article. XI, § 6(a). The order was granted without comment on jurisdiction, but significantly the petition neither raised or discussed diversity jurisdiction. *See* In re Estate of Setik, Order at 1 (Pon. Civ. No. 2012-016 Feb. 1, 2103).

This appeal emerges shortly thereafter from a conflicting decision in the trial division, sitting in Kosrae, which held that, for jurisdictional purposes under FSM Constitution article XI, § 6(a), the FSMDB as a creditor, and not an heir, was not a party to that probate case, notwithstanding its status as an instrumentality of the national government. *See* In re Estate of Edmond, 19 FSM R. 59, 62 (Kos. 2013). Denying jurisdiction, in that case, ultimately created a split of authority in need of resolution. Notably, neither decision disputes that the FSMDB is an instrumentality of the national government for the purposes of FSM Constitution article XI, § 6(a). The dispute emerges when the court extends jurisdiction under that section because the grant is exclusive rather than concurrent. The issue, when this occurs, is whether this removes probate matter jurisdiction from the state courts contrary to the intent of the framers of the national constitution who strove to demarcate between state and national powers.[4] The Committee on Governmental Functions of the first Micronesian Constitutional Convention

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[3] "In the usual mortgage foreclosure, the mortgagors' ownership of the mortgaged property is unquestioned." Ifraim, 10 FSM Intrm. at 4.

[4] "It is true that the framers of the Constitution strove to demarcate between national powers, principally set out in Art. IX of the Constitution, and state and local powers. It is also plain that the issues in this litigation fall within the areas subject to state powers. Article IX, Sections 2 and 3 of the Constitution

contemplated that the bulk of land and inheritance law would be "exclusively reserved to the state," but also conceded that some of those powers would be "concurrently" shared. II J. of Micro. Con. Con. 814; SCREP No. 33 (Oct. 10, 1975). Thus, concurrent jurisdiction appears to have been anticipated by the framers, and creates no real conflict between the state and national government, but exclusive jurisdiction by the national government was not.[5]

The framers of the constitution, however, simultaneously created a special forum in the national courts for governments under FSM Constitution article XI, § 6(a). Thus, whenever a foreign government, state government, or the national government itself, was a party to a lawsuit, regardless of the claim, those matters were to be heard exclusively in the national forum. It is our opinion that those two constitutional provisions can, and should, be read together harmoniously. Ultimately, the bulk of probate matters are to remain with the states, but an express constitutional exception is carved out when the national government is a party to the suit. Furthermore, the framers created a constitutional limitation on the national government's jurisdiction under the land clause exception of FSM Constitution article XI, § 6(a). When land is at issue the special forum in the national court is lost and jurisdiction can no longer be supported there. Notably, the contours of this constitutional limitation are more restrictive, but largely mirror the judicially created limitations found under the probate exception. Thus, when land is at issue the state in question has exclusive jurisdiction, and this limitation preserves the state's core interest behind inheritance and probate matters when the national government is a party to the suit.

The FSMDB is an instrumentality of the national government, and should be treated as if the national government itself is the actor. Therefore, the FSMDB has an independent basis for jurisdiction under the FSM Constitution article XI, § 6(a) and the national forum is available to it. Furthermore, using the definition from Mori, land is not at issue until a material dispute emerges between the parties and is pled in court. 2 FSM Intrm. at 244. Thus, the FSMDB may fully adjudicate many matters in the national court, until "land is at issue." *Id.*; FSM Const. art. XI, § 6(a). At that time, the case must be dismissed and returned to the state court, or alternately, held in abeyance until the land issue is certified,[6] unless, a separate and additional source of jurisdiction can be found.

This court declines to answer the question as to what would happen when multiple sources of jurisdiction can be used to support a case; that question is not before us. It is worth noting that the

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delegates various specific powers to Congress. There is no delegation to the national government of power to establish laws concerning probate of wills, or inheritance. A power 'not expressly delegated to the national government or prohibited to the states is a state power.' FSM Const. art. VIII §2. . . . Committee Proposal No. 21 of the Micronesian Constitutional Convention's Committee on Governmental Functions eventually led to adoption of Article VIII of the Constitution. The committee report plainly confirms that regulation of inheritance and land were to be state powers." *In re* Nahnsen, 1 FSM Intrm. at 107-08.

[5] "It is common for state courts to consider questions involving national constitutions, and national laws and treaties, although the laws or treaties under consideration could come into effect only through the exercise of national powers granted to the Congress or the national executive branch. Conversely, federal courts commonly exercise jurisdiction over disputes where state or local issues are involved. To a considerable extent the courts of our dual system, federal and state, are working partners. . . ." *In re* Nahnsen, 1 FSM Intrm. at 108-09.

[6] "If national court jurisdiction exists the national court should promptly grant the petition to remove. Thereafter the national court can entertain a motion to abstain or to certify specific issues to the state court. Proceedings in the national court do not have to stop while a certified issue is presented to a state court." Etscheit, 5 FSM Intrm. at 246.

issue has been previously explored as dicta. *See* Ifraim, 10 FSM Intrm. at 5. In Ifraim, the court found that land was at issue in a mortgage foreclosure case against the FSMDB. *See id.* Additionally, the court found that the parties had jurisdiction under XI § 6(a), and pendent jurisdiction, or supplemental jurisdiction, over a second question of law that arose out of the same nucleus of operative facts, but declined to exercise that jurisdiction because the parties had contracted to try the matter in a Chuuk State court through a forum selection clause. In dicta, that court suggested that "the supreme court could have jurisdiction in an interest in land at issue case where the national government was a party *only if* some other jurisdictional basis such as diversity or 'arising under' or the case affects foreign government officials or is a dispute between states."[7] Ifraim, 10 FSM Intrm. at 5 (emphasis added). That court rejected the notion that jurisdiction would be divested in every case where the government was a party and land was at issue, because multiple sources of jurisdiction are at times possible in the same case. *See id.* That court further speculated that jurisdiction could even be considered concurrent in every case where land is at issue, and where the government is a party, because the text of the constitution could be read such that the word "except" refers to the word "exclusive" rather than "land." *See id.* at 5; FSM Const. art. XI, § 6(a). With respect, this court does not agree that the congressional record supports this reading,[8] but leaves the determination to the future when there is an actual case and controversy before it.

V. Real Party Rule

The third issue raised on appeal is whether the FSMDB has standing as a real party in interest. FSM Civil Rule 17(a) states in full:

> Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the Federated States of Micronesia so provides, an action for the use or benefit of another shall be brought in the name of the Federated States of Micronesia. No action shall be

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[7] US courts have found federal question jurisdiction in probate matters under a number of constitutional and statutory grants: under civil rights act, Tonti v. Petropoulous, 656 F.2d 212, 215 (6th Cir. 1981) (42 U.S.C. § 1983); bankruptcy, Marshall v. Marshall, 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006) (28 U.S.C. § 1291); Trading with the Enemy Act, Markham v. Allen, 326 U.S. 490, 66 S. Ct. 296, 90 L. Ed. 256 (1949) (50 U.S.C. § 17); and other matters, Jones v. Brennan, 465 F.3d 304, 307 (7th Cir. 2006) (28 U.S.C. § 1331). Thus the combinations of with other separate and independent sources of federal jurisdiction are near endless.

[8] The legislative history from the constitutional convention indicates that divesting the court of all jurisdiction in every case where land was at issue was debated, but ultimately rejected. "[T]he Constitutional Convention of 1990 proposed amending the jurisdiction provisions of article XI of the Constitution to grant the state courts concurrent jurisdiction in diversity cases and almost exclusive jurisdiction in land-related cases. The proposal read: The national courts, including the trial division of the Supreme Court, and the state courts have concurrent original jurisdiction in disputes between a state and a citizen of another state, between citizens of different states, and between a state or a citizen thereof, and a citizen or subject of a foreign state. Notwithstanding any provision in this Constitution, the national courts, including the trial division of the Supreme Court, shall not have such jurisdiction in cases where an interest in land is at issue or the relief sought affects an interest in land, and may only exercise such jurisdiction where the parties are states. II J. of FSM Con. Con. 680 (1990)." Luzama v. Pohnpei Enterprises Co., 7 FSM Intrm. 40, 52 n.7 (App. 1995). This debate nevertheless suggests that some of the founders intended to limit the jurisdiction of the national court.

> dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The purpose of this rule is to relax the "strict rules of the common law requiring an action at law be brought by, or in the name of, the person holding legal title," and at the same time to "assure the defendant finality of the judgment" and protection from" further harassment or vexation at the hands of other claimants to the same demand." 59 AM. JUR. 2D *Parties* § 35, at 426-27 (rev. ed. 1987). Rule 17, in pertinent part, states, "Every action shall be prosecuted in the name of the real party in interest." FSM Civ. R. 17(a). Immediately following this sentence, an enumerated list expressly identifies examples of real parties in interest, including the third party beneficiary clause: "a party with whom or in whose name a contract has been made for the benefit of another or authorized by statute." FSM Civ. R. 17(a). "The statute is permissive and not exclusive, in its operation." 59 AM. JUR. 2D *Parties* § 38, at 434 n.47 (rev. ed. 1987). Thus the "rule's failure to refer to the benefitted party in its list of persons qualified as real parties of interest does not have the effect of preventing that party from suing." 6A CHARLES A. WRIGHT, ET AL. FEDERAL RULES OF PRACTICE AND PROCEDURE § 1549, at 384 (2d ed. 1990).

Our trial division has held that "[t]he real party of interest in a civil action is the party who possesses the substantive right to be enforced." Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 96 (Pon. 1995). Similarly, a U.S. court has held that "The real party in interest is the one who possesses the right sought to be enforced, and is not necessarily the person who ultimately benefits from recovery." O'Donnell v. Fletcher, 681 P.2d 1074, 1076 (1973). Notably, the "real party in interest rule neither enlarges nor restricts party's substantive right to recover in a particular action; thus, substantive right to make a claim alleged in the petition must be found to exist before issue of appropriateness of the parties comes to the fore." *Id.* at 1077. Based on the venerable Eire Doctrine,[9] when national law merely provides the forum, the national courts must strive to "apply the law in the same way the highest state court would." Island Dev. Co. v. Yap, 9 FSM Intrm. 18, 22 (Yap 1999).

Notably, the failure to establish a governing statute that either demonstrates a "federal question," or creates a "federal forum" is dispositive to the petitioner's interest.6A CHARLES A. WRIGHT ET AL., FEDERAL RULES OF PRACTICE AND PROCEDURE § 1544, at 344 (2d. ed. 1990). This forum for relief has frequently been created by the diversity clause, and the FSM Supreme Court has repeatedly held that the FSMDB is a real party in interest under governing state law when sitting in diversity. *See* In re Nahnsen, 1 FSM Intrm. 97 (Pon. 1982). *See* In re Estate of Hartman, 4 FSM Intrm. 386 (Chk 1989).

In this case, the FSMDB has an unpaid judgment entered by the FSM Supreme Court Trial Division, Kosrae State, on December 3, 2010, for $19,543.22. This debt was secured by a mortgage taken out on parcel no. 005-U-07 in Utwe municipality in Kosrae. The FSMDB is the beneficiary through a deed of trust. The FSMDB has a right to collect judgments and foreclose on property pursuant to Kosrae state law. This substantive right creates the status of real party in interest for the bank in the national courts, when an independent basis for jurisdiction can be established. In the past, the FSMDB has found this forum through diversity jurisdiction under FSM Const. art. XI, § 6(b); however, FSM Const. art. XI, § 6(a) also creates a special forum whenever the government is a party. Thus, as an instrumentality of the government, the FSMDB is a real party in interest for the purposes collecting judgments from a party, under third party beneficiary clause of FSM Civil Rule 17. Again,

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[9] "There is no federal general common law." This notion is ensconced in American case law via the venerable Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188, 1194 (1937).

this holding is limited by the land clause exception in FSM Constitution article XI, § 6(a), and whenever "land is at issue" the national forum is no longer available. If and when title to the land is disputed by the parties, the proceedings on that issue must be dismissed, or alternatively, the issue may be certified to the state court.

VI. Conclusion

The probate exception is a preference toward state courts adjudicating the bulk of probate matters.[10] The probate exception, however, should be read narrowly, to permit creditors and other third parties to protect financial interests by initiating probate proceedings and resolving many auxiliary matters. Additionally, the probate exception does not bar the national courts from exercising subject matter jurisdiction over probate matters, and when an independent basis for jurisdiction is established, the national courts may proceed with the probate matter in its entirety. Generally, the assumption of jurisdiction by another court should be made with restraint, cognizant of the limitation that if a court has already assumed jurisdiction over the matter, a second court will not interfere and assume in rem jurisdiction over the same res. In those cases, abstention may be the appropriate course of action. A probate matter filed only in national court, however, causes no such conflict. Furthermore, if the independent basis creates exclusive jurisdiction in the national courts, the action must be removed from the state court, and adjudicated in the national forum. Notably, the jurisdictional grant may come from a variety of legislative statutes, or constitutional sources, but when it is derived from FSM Constitution article XI, § 6(a), the grant is limited by the land clause. Whenever an interest in land is at issue, the national court can no longer maintain the action and must either dismiss the land issue, have it certified, or remanded to the state court. Finally, under the third party beneficiary clause of FSM Civil Rule 17, judgment creditors are real parties in interest when pursuing many preliminary and auxiliary matters relating to the probate of estates. This determination is made by the substantive governing law, and neither creates nor expands subject matter jurisdiction.

For the reasons so stated, the judgment of the FSM Trial Division, sitting in Kosrae State, is reversed and remanded for further proceedings consistent with this opinion.

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[10] While there are others, Judge Posner articulated three convincing purposes justifying the preservation of the probate exception: the promotion of legal certainty, judicial economy, and the creation of specialized courts of expertise. *See* Dragan, 679 F.2d at 714-15.