NORTH CAROLINA LAW REVIEW

Volume 51 | Number 3 Article 17

2-1-1973

# Federal Jurisdiction -- Citizenship of the Beneficiary Controls in Wrongful Death Actions Requiring a Resident Administrator

L. James Blackwood

ing *Escobedo* and *Miranda* was not afforded even a cursory examination by the plurality. Yet, *Wade* specifically relied upon those decisions in establishing the controlling constitutional principle[63] for the applicability of the sixth amendment guarantee of the right to counsel at pretrial confrontations.[64] Apparently that guiding principle has now been rejected. In its place, *Kirby* has established an illogical, inflexible formula based on a preindictment-postindictment dichotomy, a formula severely limiting counsel's role in pretrial proceedings in the future.

MICHAEL E. KELLY

**Federal Jurisdiction—Citizenship of the Beneficiary Controls in Wrongful Death Actions Requiring a Resident Administrator**

Administrators have traditionally been viewed as the real party in interest whose citizenship is determinative in diversity jurisdiction. In a recent wrongful death action, *Miller v. Perry*,[1] the Court of Appeals for the Fourth Circuit sustained the validity of state statutes requiring such actions to be brought by a resident administrator, but held that the citizenship of the beneficiaries controls diversity.

In *Miller*, a minor citizen of Florida had died in North Carolina, allegedly through the negligence of the Perrys, North Carolina citizens. Since the minor died intestate, his father was appointed administrator of his estate in Florida. Mr. Miller subsequently brought an action in his representative capacity against the Perrys in a federal district court in North Carolina under the state's wrongful death act.[2] This action was dismissed because North Carolina law requires in-state assets to be administered by a resident administrator.[3] The state supreme court had previously held that a wrongful death action was an asset of the deceased in the county where the death occurred.[4] The decedent's grandfather, a resident of North Carolina, was then appointed ancillary administrator, and a second action was brought by him in the district court

[63] *See* text accompanying note 16 *supra*.

[64] 92 S. Ct. at 1884 n.2 (Brennan, J., dissenting).

[1] 456 F.2d 63 (4th Cir. 1972).

[2] N.C. GEN. STAT. § 28-173 (1966). For the provision itself, *see* note 34 *infra*.

[3] N.C. GEN. STAT. § 28-8 (1966) provides in pertinent part: "The clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify—. . . (2) Is a nonresident of this State; but a nonresident may qualify as executor."

[4] Vance v. Southern Ry., 138 N.C. 460, 50 S.E. 860 (1905).

with the father joining as principal administrator. This action was also dismissed, on the ground that the resident administrator was the real party in interest and thus, no diversity of citizenship was present. The Fourth Circuit reversed the decision, holding that the citizenship of the beneficiaries should be controlling.[5]

If the Supreme Court decision in *Mecom v. Fitzsimmons Drilling Co.*[6] were no longer viable, then the Fourth Circuit reasoned that it was free to determine for itself who was the real party in interest. In *Mecom*, an Oklahoma administratrix, suing for the wrongful death of her husband against a Louisiana defendant, was unable to prevent removal to the federal court but was allowed a voluntary dismissal. She then secured the appointment of a Louisiana citizen as administrator, who promptly appointed her his Oklahoma delegate. She refiled the action in his name in the Oklahoma state court. Defendant was again successful in having the action removed; a motion to remand was denied, and after a trial on the merits, defendant received a judgment in his favor.[7] The Supreme Court, however, held that the motion to remand had been erroneously denied, since the citizenship of the administrator, the real party in interest, was the same as that of defendant, and thus no diversity was present.[8]

*Mecom* rested on the assumption that the duties and responsibilities of an administrator are such as to always make him the real party in interest:

> [w]here an administrator is required to bring the suit under a statute giving a right to recover for death by wrongful act, and is, as here, charged with the responsibility for the conduct or settlement of such suit and the distribution of its proceeds to the persons entitled under the statute, and is liable upon his official bond for failure to act with diligence and fidelity, he is the real party in interest and his citizenship, rather than that of the beneficiaries, is determinative of federal jurisdiction.[9]

Furthermore, as a corollary to this rule, the Court implied that an inquiry behind the appointment for the purpose of determining whether in fact the duties and responsibilities of the administrator are such as

[5] 456 F.2d at 68.
[6] 284 U.S. 183 (1931).
[7] *Id.* at 184-85.
[8] *Id.* at 190.
[9] *Id.* at 186.

to make him the real party in interest would amount to a collateral attack denigrating the state decree.[10]

*Mecom* dealt with the use of collusion in appointing an administrator to defeat diversity while *Miller* involved the reluctant appointment of a resident administrator for the sole purpose of complying with state law.[11] The distinction is not controlling, however. The main thrust of the *Mecom* decision is that where an administrator is validly appointed by a state court and the state law clothes him with actual duties so that his appointment is not just nominal, then for purposes of federal jurisdiction he is the real party, and there can be no inquiry into whether he is actually exercising these duties.

The Supreme Court has not had the opportunity since its decision in *Mecom* forty years ago to resolve the question of whether an administrator with such duties as those possessed in *Miller* is still to be considered the real party in interest. That it would still uphold that decision seems highly doubtful in light of the trend of decisions since *Kramer v. Caribbean Mills, Inc.*[12] In *Kramer*, the Supreme Court had to decide whether the validity under state law of an assignment made in an attempt to invoke diversity jurisdiction was determinative as to whether federal jurisdiction was present. The Court held that the validity of the assignment made no difference since "the existence of federal jurisdiction is a matter of federal, not state, law."[13] Whether a federal court could look behind a state order of appointment was not decided by *Kramer*; rather, it left the matter open for a later decision.[14] *Kramer* did, however, note some possible distinctions between the use of assignments and appointments that might make an inquiry into the appointment impermissible as amounting to a collateral attack on the state decree:

> Cases involving representatives vary in several respects from those in which jurisdiction is based on assignments: . . . under state law, different kinds of guardians and administrators may possess discrete sorts of powers; and . . . all such representatives owe their appointment to

[10] *Id.* at 189. In Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 524 (1928), the Supreme Court, in holding that the dissolution and reincorporation of a company in another state in order to obtain diversity jurisdiction was valid, stated that "[t]he succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction."

[11] 456 F.2d at 66.

[12] 394 U.S. 823 (1969).

[13] *Id.* at 829.

[14] *Id.* at 828 n.9.

the decree of a state court rather than solely to an action of the parties.[15]

Decisions reached by the lower courts have since shown that the distinctions enumerated in *Kramer* were inconsequential. In *McSparran v. Weist*,[16] the Third Circuit held collusive the appointment of a nonresident guardian to prosecute a personal injury action for a resident minor. In doing so, the court stated that it was not collaterally attacking an order of the state probate court by refusing recognition to the guardian's citizenship. "Guardian he remains, but since he is acting in the capacity of a straw party we refuse to recognize his citizenship for purposes of determining diversity jurisdiction."[17]

In *Lester v. McFaddon*,[18] the Fourth Circuit held collusive the appointment of a nonresident administrator in a wrongful death action where both the defendant and the statutory beneficiaries were residents of the same state. In considering whether an inquiry behind the administrator's appointment would be a collateral attack on the state decree, the court pointed out that the decree itself was not under attack since there is no interference with the capacity of the administrator to maintain the action in the proper court.[19] Other courts have reached the same result.[20]

Paralleling the decisions in *Kramer, McSparran,* and *Lester* has been the increased criticism of the basic foundation of *Mecom* that the administrator possesses such responsibilities that the federal court must consider him the real party in interest. The historical view has been that although nominal or formal parties can be disregarded,[21] the party having the legal right to sue and to represent those having beneficial interests is the real party in interest whose citizenship is determinative for purposes of diversity.[22] Thus, it was early determined that diversity was

---

[15] *Id.*

[16] 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

[17] *Id.* at 874.

[18] 415 F.2d 1101 (4th Cir. 1969).

[19] *Id.* at 1105.

[20] *E.g.*, Green v. Hale, 433 F.2d 324 (5th Cir. 1970); O'Brien v. Avco Corp., 425 F.2d 1030 (2d Cir. 1969).

[21] *See, e.g.*, Maryland v. Baldwin, 112 U.S. 490, 491-92 (1884); Atchison, T. & S.F. Ry. v. Phillips, 176 F. 663, 666-69 (9th Cir. 1910).

[22] *See, e.g.*, Wormley v. Wormley, 21 U.S. (8 Wheat.) 421 (1823); Chappedelaine v. Dechenaux, 8 U.S. (4 Cranch) 306 (1808). This definition has led to some confusion and produced some results which base their determination on capacity to sue. *Eg.*, Fallat v. Gouran, 220 F.2d 325 (3d Cir. 1955); Meehan v. Central R.R., 181 F. Supp. 594 (S.D.N.Y. 1960). *See generally* 3A J. MOORE, FEDERAL PRACTICE ¶ 17.04, at 119-120 (2d ed. 1970).

present in suits by or against administrators if they were citizens of different states, although diversity would not have been present for their intestate decedents.[23] Federal Rule of Civil Procedure 17(a), incorporating these holdings, expressly states that the action must be prosecuted in the name of the real party in interest and lists administrators and executors as examples[24] of those who may sue in their own name without joining the beneficiaries in the action.

The impetus for the current criticism of the real party rule came from the holding in *Kramer* that federal diversity jurisdiction is a question of federal law. As one court pointed out, "[w]hile a state may of course define and encourage certain fiduciary relationships, the characterization and effect of those relationships for the purposes of federal diversity jurisdiction is a federal question."[25] The Third Circuit in *McSparran*, in dealing with the real party rule set down in Rule 17, stated that "[t]he focus of the rule is on capacity to sue, and it does not purport to establish standards for the determination of diversity of citizenship. Indeed, as Rule 82 expressly states, the rules do not affect the jurisdiction of district courts."[26] On this same issue, the Fourth Circuit in *Lester* stated:

> Under Rule 17 . . . the administrator is expressly authorized to bring suit in his own name without joining the beneficiaries. Procedurally he is the real party in interest. The rule is but a restatement of a well established doctrine, for it was held very early that an administrator was the real party in interest in the sense of entitlement to proceed in his own name . . . . It was in that sense that *Mecom* held that the administrator was the real party . . . .[27]

Similarly, it has been stated that Rule 17(a) concerns only "the proper entitlement of an action."[28] Indeed, some commentators have suggested that it would be better to discard the rule since the rules dealing with capacity to sue and joinder cover the situation just as well and less confusingly.[29]

---

[23]Childress v. Emory, 21 U.S. (8 Wheat.) 642 (1823).

[24]*See* FED. R. CIV. P. 17(a), Advisory Committee Notes on the 1966 Amendment.

[25]O'Brien v. Avco Corp., 425 F.2d 1030, 1034 (2d Cir. 1969).

[26]402 F.2d at 870. FED. R. CIV. P. 82 provides in pertinent part: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."

[27]415 F.2d at 1105.

[28]Allen v. Baker, 327 F. Supp. 706, 710 (N.D. Miss. 1968).

[29]*See* Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 MINN. L. REV. 675, 724 (1967). *See also* Atkinson, *The Real Party in Interest Rule: A Plea for Its Abolition*, 32 N.Y.U.L. REV. 926 (1957).

In *Davis v. Carabo*,[30] a South Carolina district court went even farther in its criticism of the historical rule. In this wrongful death action, the decedent, the beneficiaries, and defendants were all citizens of South Carolina, but plaintiff, the administrator for the decedent appointed in South Carolina, was a resident of North Carolina.[31] The court held that where the administrator had no direct financial interest personal to him, his citizenship is not controlling; instead, the court stated that it would look to the citizenship of the beneficiaries.[32] The court pointed out, however, that if the administrator had been one of the beneficiaries, then, as such, his citizenship would have been controlling.[33] Thus, that court rejected the old rule that the duties and responsibilities of the administrator are enough in themselves to make him a real party. To be a real party for purposes of diversity, he must have a personal interest.

The cases since *Mecom* have demonstrated that the administrator is not *per se* the real party in interest; instead, the courts have examined his duties and responsibilities before making any determination as to whose citizenship should determine diversity. In *Miller*, the minor had died intestate; consequently, any property he had in Florida would have been distributed in that state under the supervision of his father as principal administrator. If there had been no recovery in the wrongful death action, the resident administrator would never have anything to do. If there had been a recovery, his only duty would have been to receive the funds, pay from them only those claims of creditors for funeral or medical expenses which occurred as a result of the fatal injury, and disburse the rest according to the intestate succession statutes.[34] He, of course, would have had a fiduciary duty to press the

[30]50 F.R.D. 468 (D.S.C. 1970).

[31]*Id.*

[32]*Id.*

[33]*Id.* at 468-69. *Compare* Farrell v. Ducharme, 310 F. Supp. 254 (D. Vt. 1970) (appointment of nonresident uncle as guardian not collusive), *with* Butler v. Colfelt, 313 F. Supp. 527 (E.D. Pa. 1970) (appointment of nonresident aunt as guardian collusive).

[34]N.C. GEN. STAT. § 28-173 (1966) provides in pertinent part:

> When the death of a person is caused by a wrongful act . . . such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent . . . . The amount recovered in such action is not liable to be applied as assets, in the payments of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars ($500.00) incident to the injury resulting in death . . .

litigation to a conclusion, but by the very nature of his appointment he could hardly have been expected to exercise any effective supervision over the conduct of the litigation by the principal administrator or his lawyers. Consequently, the *Miller* court concluded that when an administrator is required by state law, but his duties are limited, the citizenship of the beneficiaries controls diversity.[35] At the same time, however, the court upheld the North Carolina rule requiring a resident administrator to prosecute a wrongful death action, recognizing a valid state interest in such a statute.[36]

In light of the problem created by the use of artificial devices to create or defeat diversity, the American Law Institute has proposed a statutory change that would severely curtail such action.[37] Proposed section 1301(b)(4)[38] "is designed to prevent either the creation or the defeat of diversity jurisdiction by the appointment of a representative having a different citizenship from the decedent, infant, or incompetent he is appointed to represent."[39] This proposal would attribute to the representative the citizenship of the decedent. "Thus in an action where a decedent and potential adversary are of different citizenship, it will become impossible to defeat diversity jurisdiction by appointing an administrator of the same citizenship as the adversary."[40]

This proposal has received praise from the courts.[41] As *Miller* stated:

> It proposes a more satisfactory solution. . . . [The] proposal would avoid problems which may arise if the beneficiaries are of diverse citizenship or if their citizenship is different from that of their decedent . . . . Its rule is one which may be simply and economically administered to reach a rational conclusion.[42]

---

but [the amount recovered] shall be disposed of as provided in the Intestate Succession Act.

[35]456 F.2d at 67.

[36]*Id.* at 68. For a general treatment of the problem of allowing a foreign representative to sue in wrongful death actions see Kennedy, *Federal Civil Rule 17(b) and (c): Qualifying to Litigate in Federal Court*, 43 NOTRE DAME LAW. 273, 295-300 (1968).

[37]ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).

[38]*Id.* at 11.

[39]*Id.* at 117.

[40]*Id.* at 119.

[41]*E.g.*, Bass v. Texas Power & Light Co., 432 F.2d 763, 767 (5th Cir. 1970); O'Brien v. Avco Corp., 425 F.2d 1030, 1034-35 (2d Cir. 1969); Lester v. McFaddon, 415 F.2d 1101, 1106 (4th Cir. 1969). *But see* Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 S.C.L. REV. 677 (1965).

[42]456 F.2d at 68.

One commentator, however, has questioned whether proposed section 1301(b)(4) eliminates more diversity than it should. For example, in a situation where the beneficiaries are all nonresidents and are prosecuting the action, but the decedent was a resident, the proposed statute would deny the nonresidents federal jurisdiction.[43]

Diversity jurisdiction is meant to protect the out-of-state citizen from local bias.[44] However, this bias is still present when an action is prosecuted by a resident personal representative. The parties that will benefit from a recovery cannot be hidden from the court and jury. Furthermore, the representative's duties and responsibilities are only meant to insure that the administration of an estate is competently and diligently completed. Such duties by themselves do not give the administrator any real economic interest other than that which arises from his legal relationship with the estate. This legal relationship has led to the rule that only the personal representative has capacity to sue or be sued. This determination, however, should not be controlling as to the real party in interest.

Since the duties of the administrator do not make him a real party, only those persons who have a direct, personal interest in the outcome should be considered the parties with the real interest. As was held in *Miller*, the citizenship of the beneficiaries, rather than that of the administrator or of the decedent, should control diversity. Such a determination insures that federal jurisdiction will be invoked only when necessary to protect the party whose personal interest in the suit might be prejudiced by the presence of local bias.

L. JAMES BLACKWOOD

**Uniform Commercial Code—The Standard of Good Faith for Merchant Buyers Under Section 9-307(1)**

A new aspect to the continuing controversy over applying sections of article 2 (Sales) of the Uniform Commercial Code to article 9 (Secured Transactions) has recently been examined by the Delaware Supreme Court in the case of *Sherrock v. Commercial Credit Corp.*[1] The

[43]Kennedy, *supra* note 29, at 720.

[44]This has been the historical view for why diversity jurisdiction originated. *E.g.*, Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 67 (1809). *See generally* Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3 (1948). *But see* Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

[1]290 A.2d 648 (Del. 1972).