Tortious Interference With Expectancy of Inheritance

new tort, new traps

by James A. Fassold

It could be the perfect crime.[1]

Uncle has a will that leaves everything equally to his only surviving relations, Niece and Nephew. Niece lives in a different state, leaving Nephew to look after Uncle's needs. Resentful of this burden, Nephew decides to take matters into his own hands. He isolates Uncle from outside contact, tells him lies about Niece's character and behavior, defrauds him into immediately signing over his house, and threatens to cut off cable service and worse unless the kindly old gentleman rewrites his will. After months of this treatment and enfeebled by mental deterioration, Uncle finally breaks down and executes a new will which leaves everything to Nephew and nominates him to be personal representative of the estate.

Why the perfect crime? Because Nephew has virtually nothing to lose. If Niece gets wind of the scheme, she can contest the will on the basis of capacity, fraud and undue influence. But if she wins, the previous will is reinstated (or Uncle is deemed to have died intestate) and Nephew is out only the half of the estate he had snatched from his sister. In other words, he is right back where he started, with no penalty paid for his conduct. Indeed, unless Niece can successfully challenge the inter vivos transfer as well, Nephew keeps the house because it is no longer part of Uncle's estate. Chances are that Niece, confronting expensive litigation in a distant state and the daunting burden all will contestants face, will settle for less than her half. Nephew wins again. And regardless of the outcome, Uncle's estate pays for Nephew's lawyers.

All is not lost for Niece, however. If Nephew lives in one of an increasing number of states, he can be found liable for tortious interference with expectancy of inheritance.[2] Based on the traditional tort of intentional interference with contractual relations, this emerging theory provides disappointed heirs with their day in court even if a traditional probate action would afford little or no relief. Moreover, it permits the recovery of punitive damages and attorney's fees, which a will contest normally does not.

Elements

If an Arizona court were to entertain a cause of action for tortious interference with expectancy, it is likely that the court would look to the Restatement to supply the required elements. Section 774B of the Restatement (Second) of Torts, "Intentional Interference with Inheritance or Gift," provides as follows:

"One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."[3]

Courts generally have held that a plaintiff must plead and prove the following five elements:

(1) The existence of an expectancy;

(2) The defendant's intentional interference with that expectancy;

(3) Interference that constitutes conduct tortious in itself;

(4) Reasonable certainty that the devise would have been received by the potential devisee but for the defendant's interference; and

(5) Damages.[4]

Existence of an Expectancy

The most frequently contested element of the tort is whether a plaintiff had a legitimate expectancy. The clearest proof of an expectancy is an earlier will.[5] The plaintiff in such a case need merely establish that the revocation of the earlier will was the product of tortious conduct. A draft or a testator's written intention may be sufficient to establish an expectancy.

But an expectancy may exist even without proof of the decedent's intent. Under the Restatement, "inheritance" includes "any property that would have passed to the plaintiff by intestate succession."[6] Under Arizona's intestacy statutes, a long-estranged son or daughter could establish expectancy based solely on the parent-child relationship.[7]

Perhaps inadvertently, a Florida court has implied that the mere allegation that a decedent intended to make a bequest creates an issue of fact as to the decedent's state of mind, an issue to be decided at trial:

"It is our opinion that when there is an allegation that the testator had a fixed intention to make a bequest in favor of the plaintiff and there existed a strong possibility that this intention would have been carried out but for the wrongful acts of the defendant there exists a cause of action. While it is true that such a cause of action is difficult to prove, that does not affect the existence of a ground of tort liability."[8]

It is doubtful the court intended such a broad interpretation: under this reasoning, virtually any complaint, no matter how specious, which included the bare allegation that the decedent intended a bequest, could survive summary judgment. Other jurisdictions have required written evidence of the testator's intent.[9]

Because revocable inter vivos trusts often function as will substitutes, several courts have held that a beneficiary's expectancy under such a trust can form the basis of a tort action.[10]

Intentional Conduct

This is an intentional tort. Mere negligence or even recklessness in breaching a duty to use reasonable care does not rise to the level of intentional conduct.[11] Nevertheless, some commentators have suggested that negligent interference may be actionable where a special relationship exists between testator and defendant.[12]

Under Arizona's intestacy statutes, a long-estranged son or daughter could establish expectancy based solely on the parent-child relationship.

In contrast to a will contest based on undue influence, where the contestant must establish that the free will of the testator was overborne, a tortious interference claim does not require such a proof. Rather, the focus is on the *defendant's* intention: whether the defendant intended to interfere with an inheritance and acted on that intention.[13] But as with most intentional torts, proving a defendant's state of mind can be difficult.

Independently Tortious Conduct

It is not enough for a plaintiff to show that the defendant intended to interfere with an inheritance. A plaintiff also must prove that the defendant's conduct was independently actionable. "The usual case is that in which the third person has been induced to make or not to make a bequest or a gift by fraud, duress, defamation or tortious abuse of a fiduciary duty, or has forged, altered or suppressed a will or a document making a gift."[14] As in an undue influence contest, legitimate means of persuasion are not actionable.[15]

Causation/Reasonable Certainty

A plaintiff who makes it this far faces another hurdle: establishing "but for" causation. "[T]here must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator..."[16] Complete certainty is not required.[17]

The causation requirement raises an interesting question: may a plaintiff bring a tortious interference claim before the testator dies? Conventional wisdom would reject such a claim, as causation could not be established—no one, not even the testator, could predict what the testator would want at death. Some jurisdictions, however,

have permitted such an action to proceed under certain circumstances. In *Carlton v. Carlton,* for example, the testator remained alive but the alleged tortfeasor had died. If the plaintiffs were forced to wait until the testator's death, the statute of limitations on creditor's claims could have barred their claims against the tortfeasor's estate.[18] In general, however, courts have refused to extend pre-death suits beyond the extraordinary circumstances of *Carlton*.[19]

Damages

Damages typically consist of the value of the property plaintiffs would have received in the absence of the tortious conduct. Because the defendant has interfered with an expectancy, not a certainty, and because the testator can change his or her mind prior to death, the nature and amount of damages are necessarily speculative and uncertain. If the tortfeasor received any property, a court may place a constructive trust or equitable lien on the property or execute a monetary judgment.[20]

Consequential damages, such as damages for emotional distress, are also available, as are punitive damages.[21] Indeed, a successful will contestant may be well advised to bring a subsequent action for tortious interference, seeking punitive damages in the amount of the attorney's fees incurred in the will contest.[22]

Finally, a payment made in settlement of an interference claim is not deductible as a claim against the estate because the damages are not a personal obligation of the decedent or the estate.[23]

Prerequisites

Most states that have considered the issue have held that a claim for tortious interference with expectancy of inheritance may only be brought where conventional probate relief would be inadequate.[24] A deprived legatee must either make an attempt to probate the offending will or show that such a probate is impossible.[25] If a will contest is available to

the plaintiffs, and a successful contest would provide complete relief, no tort action is warranted.[26] Likewise, the action may not be brought where the offending will has been probated, and plaintiffs had adequate notice of the probate proceedings and an opportunity to contest.[27] If an earlier will exists on which plaintiffs base their claim, they should attempt to probate that will and contest the later will by conventional means.[28]

If, however, plaintiffs allege that a will's proponents also induced the decedent to make inter vivos transfers to them, thereby reducing the size of decedent's estate, plaintiffs may bring a tortious interference claim in conjunction with a will contest: in such a case, a successful will contest by itself would reinstate the earlier will but would not provide the plaintiffs with full relief.[29] A plaintiff who is fraudulently induced to forgo a will contest during the limitations period may bring a subsequent action for tortious interference.[30]

Some courts permit plaintiffs to bring a will contest and a tort action simultaneously, even in cases where the probate action, if successful, would provide complete relief. A successful will contest would necessitate the dismissal of the tort action. However, if the contest were to fail, the plaintiffs' probate remedy would be inadequate and the tort action could proceed.[31]

Punitive damages are generally not available in a will contest. This unavailability does not itself constitute inadequate relief, such that a contestant would be permitted automatically to bring a tort action in which such damages are sought.[32]

As with any collateral action, res judicata and issue preclusion could bar a subsequent tort suit. The grounds for a will contest—fraud, duress, undue influence, etc.—can also form the basis for an interference claim. If the particular issue is fully litigated in the will contest, a plaintiff may not bring a tort action on the same theory.[33]

On the other hand, exceptions

may arise in those jurisdictions that require differing standards of proof. In *Peffer v. Bennett*, for example, a plaintiff succeeded in invalidating a will on a theory of undue influence.[34] The probate court's finding of constructive fraud was based on the parties' relationship rather than on any proof of actual intent to deceive.[35] Therefore, the doctrine of collateral estoppel did not bar the defendant from defending against a subsequent fraud action.[36]

Properly enforced, the prerequisite of inadequate probate relief would reduce the risk of frivolous or abusive filings. In our example, Niece could bring her claim because the inter vivos transfer of the house reduced the amount available to her under the previous will. Niece would not obtain complete relief in a successful will contest.

Dangers

The advantages of the theory are clear. The disadvantages, although less obvious, are no less important. First, the tort can play havoc with traditional probate law. In Arizona, as in most states, a presumption of testacy attaches to a will admitted to probate: testators may do what they wish with their estates, absent a statutory prohibition, and the courts do not substitute their judgment for the testators'.[37] A contestant must prove, by *clear and convincing evidence*, that a will was the product of undue influence.[38] Contestants whose evidence would not survive summary judgment may be tempted to throw in a tortious interference claim, lessen the burden of proof, and thereby do an end-run around settled probate law.

Second, the litigation could deteriorate into sheer speculation as both sides argue what the decedent would have done, had certain events not occurred. The evidentiary morass could exasperate even an experienced judge and thoroughly befuddle a jury as it attempted to separate fact from argument.

Third, a contestant who loses a will contest may bring a subsequent

tort action, receive one more crack at the prize and delay the administration of the estate. The will's proponents may find it more economical to settle a frivolous claim than to subject the family to two lengthy court proceedings.

Fourth, "to allow what amount to collateral attacks on the determinations of courts sitting in probate" could result in fraud, inconsistent judgments and a general assault on the concept of issue preclusion.[39]

Fifth, the existence of the tort changes the rules for estate planning. Unless named as a beneficiary of the estate plan, a drafting attorney is rarely subject to liability if a will contest is successful. But in an action for tortious interference, the drafting attorney could be named as a defendant and drawn into expensive—and reputation-damaging—litigation.

Perhaps the greatest danger posed by the tort, at least at this point, is the unsettled state of the law. An unscrupulous attorney or a sympathetic judge faced with circumstances in which conventional relief is unavailable could expand the tort into an exception that would swallow the conventional rule.

Let us change the facts of our illustration. Suppose Niece is the in-state caregiver and performs her duties without complaint. Uncle, in full command of his faculties, decides to change his will to reward Niece at the expense of the distant ne'er-do-well Nephew. Conventional probate law stacks the deck against Nephew. To set aside the will, he must either prove that Uncle was incapacitated at the moment he put pen to paper, or prove, by clear and convincing evidence, that Niece unduly influenced or defrauded their uncle. But a tortious interference theory provides Nephew with another arrow for his quiver. As one of Uncle's heirs, and with the earlier will in hand, he satisfies the expectancy element. If he can survive the prerequisite of inadequate probate relief—or convince the court that no such prerequisite applies in the state—he can avoid probate's traditional burdens of proof and the presumption of Uncle's capacity and intent. Niece's chances of disposing of the case through a pre-trial motion are slim. She is faced with the unpalatable choice of either footing the bill for extensive litigation and a trial or paying Nephew to settle his meritless claim. Until the law of the tort develops more fully, courts may be unable or unwilling to weed out the frivolous actions at an early stage.

Conclusion

Arizona has not yet recognized a claim for tortious interference with expectancy of inheritance. But the tort has appeared in an increasing number of jurisdictions and in the Restatement of Torts, to which Arizona looks to fill the interstices in its law. Therefore, the question of Arizona's recognition is probably not if, but when. Probate lawyers and judges should familiarize themselves with the elements of the tort and consider when such a claim might be appropriate to pursue, what defenses may be raised to counter it, and how best to harmonize this theory with Arizona's existing probate law.

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ENDNOTES:

1. This example is adapted from Curtis E. Shirley, "Tortious Interference with an Expectancy," 41 *Res Gestae* 16 (October 1997).
2. The following states have recognized, to varying degrees, the tort of interference with expectancy of inheritance: Alabama (*Holt v. First Nat'l Bank of Mobile*, 418 So.2d 77 (Ala. 1982)); Colorado (*McGregor v. McGregor*, 101 F. Supp. 848 (D. Colo. 1951) (apparently applying Colorado or Louisiana law), *aff'd*, 201 F.2d 528 (10th Cir. 1953)); Connecticut (*Benedict v. Smith*, 376 A.2d 774 (Conn. Super. Ct. 1977)); Florida (*DeWitt v. Duce*, 408 So.2d 216 (Fla. 1981)); Georgia (*Mitchell v. Langley*, 85 S.E. 1050 (Ga. 1915)); Illinois (*Robinson v. First State Bank of Monticello*, 454 N.E.2d 288 (Ill. 1983)); Indiana (*Minton v. Sackett*, 671 N.E.2d 160 (Ind. App. 1996)); Iowa (*Huffey v. Lea*, 491 N.W.2d 518 (Iowa 1992)); Kansas (*Axe v. Wilson*, 96 P.2d 880 (Kan. 1940)); Kentucky (*Allen v. Lovell's Administratrix*, 197 S.W.2d 424 (Ky. 1946)); Louisiana (*McGregor v. McGregor*, 101 F. Supp. 848 (D. Colo. 1951) (apparently applying Colorado or Louisiana law), *aff'd*, 201 F.2d 528 (10th Cir. 1953)); Maine (*Cyr v. Cote*, 396 A.2d 1013 (Me. 1979)); Massachusetts (*Monach v. Koslowski*, 78 N.E.2d 4 (Mass. 1948)); Michigan (*Creek v. Laski*, 227 N.W. 817 (Mich. 1929)); Missouri (*Hammons v. Eisert*, 745 S.W.2d 253 (Mo. App. 1988)); New Jersey (*Casternovia v. Casternovia*, 197 A.2d 406 (N.J. Super. 1964)); New Mexico (*Doughty v. Morris*, 871 P.2d 380 (N.M. App. 1994)); North Carolina (*Bohannon v. Wachovia Bank & Trust Co.*, 188 S.E. 390 (N.C. 1936)); Ohio (*Firestone v. Galbreath*, 616 N.E.2d 202 (Ohio 1993)); Oregon (*Allen v. Hall*, 974 P.2d 199 (Or. 1999)); Texas (*King v. Acker*, 725 S.W.2d 750 (Tex. App. 1987)); West Virginia (*Barone v. Barone*, 294 S.E.2d 260 (W. Va. 1982)); Wisconsin (*Harris v. Kritzik*, 480 N.W.2d 514 (Wis. App.), *review granted*, 485 N.W.2d 412 (Wis. 1992)). Montana and New York have refused to recognize the tort. *Hauck v. Seright*, 964 P.2d 749 (Mont. 1998); *Vogt v. Witmeyer*, 665 N.E.2d 189 (N.Y. 1996).
3. *Restatement (Second) of Torts* § 774B (1979) ("*Restatement*").
4. *Greene v. First Nat'l Bank of Chicago*, 516 N.E.2d 311, 316-17 (Ill. App. 1987); *Nemeth v. Banhalmi*, 425 N.E.2d 1187, 1191 (Ill. App. 1981).
5. *Nemeth*, 425 N.E.2d at 1191.
6. *Restatement* § 774B, cmt. b.
7. A.R.S. § 14-2101 *et seq.*
8. *Allen v. Leybourne*, 190 So.2d 825, 829 (Fla. App. 1966), *quoted in* Nita Ledford, "Note –Intentional Interference with Inheritance," 30 *Real Property, Probate and Trust Journal* 325, 329 (Summer 1995).
9. *Holt v. First Nat'l Bank of Mobile*, 418 So.2d 77, 80 (Ala. 1982).
10. *Hammons v. Eisert*, 745 S.W.2d 253, 258 (Mo. App. 1988); *Davison v. Feuerherd*, 391 So.2d 799, 802 (Fla. App. 1980); Ledford, *supra* note 8, at 333.
11. *Restatement* § 774B, cmt. a.
12. *See* Curtis E. Shirley, *supra* note 1, at 18.
13. *Id.*
14. *Restatement* § 774B, cmt. c.
15. *Id.*
16. *Id.* at cmt. d.
17. *Id.*
18. 575 So.2d 239, 242 (Fla. App. 1991).
19. *See, e.g., Whalen v. Prosser*, 719 So.2d 2, 5 (Fla. App. 1998). *But see Harmon v. Harmon*, 404 A.2d 1020, 1025 (Me. 1979) (permitting case to proceed because testator would be available to testify).
20. *Restatement* § 774B, cmt. e.
21. *Id.* at cmt. e & § 774A; Ledford, *supra* note 8, at 339.
22. *King v. Acker*, 725 S.W.2d 750, 756-57 (Tex. App. 1987); Ledford, *supra* note 8, at 340.
23. *Lindberg v. United States*, 927 F. Supp. 1401, 1404-06 (D. Colo. 1996), *aff'd*, 164 F.3d 1312 (10th Cir. 1999).
24. *See, e.g., Moore v. Graybeal*, 843 F.2d 706, 711 (3d Cir. 1988) (applying Delaware law); *Firestone v. Galbreath*, 895 F. Supp. 917, 926 (S.D. Ohio 1995) (applying Ohio law); *McGregor*, 101 F. Supp. at 850; *Beren v. Ropfogel*, 1992 WL 373935 (D. Kan. 1992), *aff'd*, 24 F.3d 1226 (10th Cir. 1994); *Benedict*, 376 A.2d at 776; *DeWitt*, 408 So.2d at 218; *Robinson*, 454 N.E.2d at 294; *Minton*, 671 N.E.2d at 162; *Allen*, 197 S.W.2d at 426; *Brignati v. Medenwald*, 53 N.E.2d 673, 674 (Mass. 1944); *Scott v. Estate of Ehrmann*, 916 S.W.2d 872, 874 (Mo. App. 1996); *Griffin v. Baucom*, 328 S.E.2d 38, 42 (N.C. 1985). *See also* Marilyn Marmai, *Tortious Interference with Inheritance: Primary Remedy or Last Recourse*, 5 Conn. Prob. L.J. 295 (1991).
25. *McGregor v. McGregor*, 101 F. Supp. at 850.
26. *In re Estate of Hoover*, 513 N.E.2d 991, 992 (Ill. App. 1987).
27. *Dewitt v. Duce*, 408 So.2d 216, 220 (Fla. 1981).
28. *Id.*
29. *Estate of Jeziorski*, 516 N.E.2d 422, 426 (Ill. App. 1987).
30. *Ebeling v. Voltz*, 454 So.2d 783, 785 (Fla. App. 1984); *cf. Neill v. Yett*, 746 S.W.2d 32, 35-36 (Tex. App. 1988) (two-year limitations period for will contests applied to tort action for fraud, absent allegations of extrinsic fraud).
31. *In re Estate of Roeseler*, 679 N.E.2d 393, 406 (Ill. App. 1997); *In re Estate of Knowlson*, 562 N.E.2d 277, 280 (Ill. App. 1990).
32. *Roeseler*, 679 N.E.2d at 406.
33. *Gerhardt v. Miller*, 532 S.W.2d 852, 855 (Mo. App. 1975).
34. *Peffer v. Bennett*, 523 F.2d 1323, 1325 (10th Cir. 1975).
35. *Id.* at 1326.
36. *Id.* Such a case is less likely to occur in Arizona. While Arizona does recognize a presumption of undue influence if a person stands in a confidential relationship with the testator and is active in the procurement of a will which names that person as a beneficiary, that presumption dissolves as soon as the person denies it, even if the judge does not believe the denial, and undue influence must then be proved by other means. *In re Vermeersch's Estate*, 109 Ariz. 125, 128, 506 P.2d 256, 259 (1973); *In re O'Connor's Estate*, 74 Ariz. 248, 259-60, 246 P.2d 1063, 1071 (1952). Therefore, the resolution of a will contest based on undue influence, which relies on fraudulent representations as an indicium, probably would constitute res judicata for a subsequent tort action based on fraud.
37. *See generally* John D. Lewis, "Will Contests in Arizona," *Arizona Attorney* 18 (March 1990).
38. *Id.* at 21.
39. *Allen v. Hall*, 139 F.3d 716, 717 (9th Cir. 1998) (certifying the question of the tort's existence to the Oregon Supreme Court).