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TORTIOUS INTERFERENCE WITH EXPECTANCY OF INHERITANCE OR GIFT – SUGGESTIONS FOR RESORT TO THE TORT

Irene D. Johnson[*]

I. Introduction[**]

The cause of action for tortious interference with expectancy of inheritance or gift, while not a new development, has received recent attention,[1] especially in light of the substantial awards of compensatory and punitive damages in a California Bankruptcy Court[2] and, on appeal, in the United States District Court for the Central District of

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[**] For convenience, throughout this article, the term "testator" will be used to signify the decedent whose estate is at issue, even if it eventuates that the decedent dies intestate, and the term "testamentary benefit" will be used to signify benefits received from the testator's probate estate, whether the benefits are provided in a probated will or by intestate succession.

[1] *See, e.g.*, F. Ladson Boyle, *Tortious Interference with an Inheritance*, 2 PROB. PRAC. R. 1 (March 1990); James A. Fassold, *Tortious Interference With Expectancy of Inheritance: New Tort, New Traps*, 36 ARIZ. ATT'Y, Jan. 2000, at 26; Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357 (2004); Diane J. Klein, *A Disappointed Yankee in Connecticut (or Nearby) Probate Court: Tortious Interference with Expectation of Inheritance - A Survey with Analysis of State Approaches in the First, Second, and Third Circuits*, 66 U. PITT. L. REV. 235 (2004)(Klein III); Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance – A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79 (2003)(Klein II); Diane J. Klein, *Revenge of the Disappointed Heir: Tortious Interference with Expectation of Inheritance – A Survey with Analysis of State Approaches in the Fourth Circuit*, 104 W. VA. L. REV. 259 (2002)(Klein I); Steven K. Mignogna, *On the Brink of Tortious Interference with Inheritance*, 16 PROB. & PROP. 45 (2002); M. Read Moore, *At the Frontier of Probate Litigation: Intentional Interference With the Right to Inherit*, 7 PROB. & PROP. 6 (1993); Dennis D. Reaves, *Tortious Interference with an Expected Gift of Inheritance*, 47 J. MO. B. 563 (1991); Curtis E. Shirley, *Tortious Interference with an Expectancy*, 41 RES GESTAE 16 (Oct. 1997); Marianna R. Chaffin, *Stealing the Family Farm: Tortious Interference with Inheritance*, 14 S.J. AGRIC. L. REV. 73 (2004); Paul F. Driscoll, *Tortious Interference with the Expectancy of a Legacy:* Harmon v. Harmon, 32 ME. L. REV. 529 (1980); Nita Ledford, *Note—Intentional Interference with Inheritance*, 30 REAL PRO. PROB. & TR. J. 325 (1995-1996); Marilyn Marmai, *Tortious Interference with Inheritance: Primary Remedy or Last Recourse*, 5 CONN. PROB. L.J. 295 (1991). Other recent articles dealing, in part, with tortious interference with expectancy of inheritance or gift include Aloysius A. Leopold and Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990); Mark. R. Siegel, *Unduly Influenced Trust Revocations*, 40 DUQ. L. REV. 241 (2002). Earlier articles on the tort include Alvin E. Evans, *Torts to Expectancies in Decedents' Estates*, 93 U. PA. L. REV. 197 (1944-1945); Leo H. Whinery, *Tort Liability for Interference with Testamentary Expectancies in Decedent's Estates*, 19 U. KAN. CITY L. REV. 78 (1950-1951).

[2] Marshall v. Marshall (In re Marshall), 253 B.R. 550, 562-63 (Bankr. C.D. Cal. 2000)(award to Vicki Lynn Marshall of damages of $ 449,754,134, to be reduced by a possible probate recovery and "punitive damages in an amount that remains to be determined after her actual damages are calculated").

California,[3] in *Marshall v. Marshall (In re Marshall)*, to Vickie Lynn Marshall (better known to most as Anna Nicole Smith)[4] in her action against her stepson, E. Pierce Marshall, on the ground of tortious interference with her expectancy of an *inter vivos* gift from her recently-deceased husband, J. Howard Marshall, II.[5] While *Marshall* is, without doubt, the highest-profile case to involve a cause of action for tortious interference with an expectancy, the tort has surfaced in many cases in many jurisdictions over the past century.[6]

The tort of tortious interference with expectancy of inheritance or gift provides the means by which a plaintiff, who claims to have been deprived of an expected inheritance, benefit under a will, at-death benefit, or *inter vivos* gift, by the tortious act of the defendant, can recover for the loss of this expectancy. For example, **A**, who is not an intestate heir of the testator, expects to receive a benefit under the testator's will, which has been drafted by the testator's attorney, provides that the testator's entire probate estate is to go to **A**, but has not yet been executed. **B**, an intestate heir of the testator, tortiously induces the testator to not execute the will favoring **A** (by fraud, duress, or undue influence, for example, or, more dramatically, by physically preventing the testator from executing the will). As a result, the testator dies intestate (at which point, of course, he would not be a testator), **B** receives an intestate share, and **A** receives nothing. **A** is understandably miffed by these events. He feels that he has been damaged by **B**'s behavior; that but for **B**'s tortious acts, the will would have been executed and **A** would have received the entire probate estate, the thing that he expected. No remedy would be available to **A** in the probate court because **A** cannot prove up a will that has not been properly executed. In many jurisdictions, however, **A** is not out of luck because he can bring a civil action against **B** for **B**'s tortious interference with **A**'s expectancy.

Some would argue that providing **A** with a recovery against **B** for loss of an expectancy is not warranted because **A**'s interest is "too shadowy and evanescent;"[7] there was never a guarantee, even if the testator had executed the will favoring **A**, that the testator would have left that will in place and not changed his mind before his death. Most courts and commentators agree, however, that **A** is recovering not for the loss of the benefit under the will *per se*, but for his loss of the opportunity of receiving that benefit; **A** is recovering for his right not to have his opportunity interfered with by **B**'s tortious conduct.[8] **A** is like a pass-receiver in a football game. The quarterback (the testator) throws the pass toward **A**, the intended receiver. Through pass-interference, **B** prevents **A** from being in a position to receive the pass. There is no guarantee that **A** would have caught the football, but **B** is penalized for depriving **A** of that opportunity.

In the above wills hypothetical, it is clear that the emphasis in a tort recovery is the relationship between the plaintiff and the defendant; that the purpose of the tort relief is to vindicate **A**'s rights not to have his opportunity interfered with. The focus of the

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[3] Marshall v. Marshall (In re Marshall), 275 B.R. 5, 58 (C.D. Cal. 2002)(award to Vicki Lynn Marshall of "compensatory damages…of $ 44,292,767.33, plus costs of suit, plus punitive damages…of $ 44,292,767.33").

[4] 275 B.R. at 8.

[5] For a discussion of *Marshall*, see *infra* notes 46 to 75 and accompanying text.

[6] For a listing of cases decided before 1950, *see* Whinery, *supra* note 1, 79 n.7; for a listing including recent cases, *see* Klein III, *supra* note 1, 240 n.10.

[7] Hutchins v. Hutchins, 7 Hill 104, 110 (N.Y. Sup. Ct 1845).

[8] *See, e.g.*, Klein I, *supra* note 1, at 264-65.

probate process is quite different. The purpose of probate is to identify the testator's intent in respect of his probate estate and insure, to the extent possible, that the testator's intent is being accomplished.[9] When a defendant tortiously interferes with an expectancy, he is necessarily acting to interfere with the testator's testamentary intent as well as the plaintiff's expectancy. In the tort, as demonstrated by the description of the tort below, the focus is on what the defendant did (committed an intentional tort), how it affected the plaintiff (prevented the plaintiff from receiving his expectancy), and what damages the plaintiff suffered.

II. The Tort (and a Comparison to Probate)

In 1979, the Restatement Second provided the following statement of the tort of intentional interference with expectancy: "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."[10] A common statement of the elements that must be proved by the plaintiff in order to recover is: "the existence of the expectancy; that the defendant intentionally interfered with the expectancy; that the interference involved tortious conduct such as fraud, duress, or undue influence; that there was a reasonable certainty that the plaintiff would have received the expectancy but for the defendant's interference; and damages."[11] If any of these elements is not established, the cause of action for tortious interference with expectancy will not lie.

Again, the emphasis in probate proceedings is the effectuation of the testator's intent with respect to the disposition of the testator's probate estate (something difficult to establish with definiteness because the testator, at the point of probate, is necessarily dead), while the thrust of the tort is to restore to the plaintiff the benefit of which he was arguably deprived by the defendant's tortious conduct. The result of a successful tort action is a judgment against the defendant for money damages, not a determination of the validity of a particular will or other testamentary result.

Although some of the considerations in a tort action will be the same as considerations in a probate proceeding with respect to the same set of circumstances, there are major differences between tort and probate in addition to the differing focus of the proceedings, the testator's intent as opposed to the plaintiff's injury. A tort action would be an *in personam* action by the plaintiff, the person allegedly deprived of his expectancy by the tortious conduct of the defendant, against the alleged tortfeasor.[12] In probate, even if there is a wills contest involving proponents and opponents of a particular testamentary plan, the proceeding is *in rem*, to determine where the testator's probate property should go.[13] A tort action can result in a judgment against the defendant, the alleged tortfeasor, to be paid from his personal assets.[14] A probate

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[9] *Id.* at 263-64.
[10] RESTATEMENT (SECOND) OF TORTS § 774B (1979).
[11] Sonja Soehnel, Annotation, *Liability in Damages for Interference with Expected Inheritance or Gift*, 22 A.L.R. 4TH 1229 (1983).
[12] Klein I, *supra* note 1, at 265.
[13] *Id.* at 260.
[14] Moore, *supra* note 1, at 6.

proceeding will result in a determination as to what will happen to the assets in the testator's probate estate.[15]

In tort, the parties pay their own costs and expenses, with the plaintiff often recovering from the defendant for costs and expenses of litigation if the plaintiff is successful in establishing tort liability.[16] Remedies in tort can include prejudgment interest, attorney's fees and punitive damages.[17] In probate, the cost of litigation to defend the estate (comparable to the defendant's costs in tort litigation) is borne by the estate rather than by the proponents of the will.[18] When a determination is made in probate, whether in favor of the proponent's position or in favor of the opponent's position, the decision provides what is to happen to the estate's property, and, even if the opponent succeeds, there is no opportunity to obtain prejudgment interest, attorney's fees or punitive damages. In other words, in probate, in the many cases in which a will was allegedly tainted in some way by tortious conduct and the proponent of the will would be the alleged tortfeasor in a civil tort action, an unsuccessful defense of the will costs the proponent nothing out of his own pocket and often results in his receipt, under another prior will or by intestacy, of a substantial benefit.

An often-noted distinction between probate proceedings and tort actions is the standard of proof.[19] Because of the nature of probate, determining the intention of a person who, because of his death, is not in a position to testify, the standard of proof is high.[20] In most jurisdictions, a will must be established by the testimony of two credible disinterested witnesses.[21] On the other hand, in a tort action, the standard of proof is simply a preponderance of the evidence.[22] It is possible that a will which could not be proved up in probate because of some inadequacy of evidence could be established, for purposes of tort, because of the lesser standard of proof. Technically, since the purpose of the tort action might be to establish that the defendant tortiously interfered with the plaintiff's expectancy of inheritance by preventing, in some way, the will favoring the plaintiff from being effective in probate, the purpose of "proving" the will in tort would be simply to establish the interference, not to establish the will.[23] Some courts and commentators, however, have expressed concern about these different standards of

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[15] WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES § 12.1 (3d ed. 2004). *See also* Moore, *supra* note 1, at 6.

[16] *See* Fried, *supra* note 1, n.11.

[17] *Id.* at 359-60. In one case, a tort action was brought, subsequent to a successful outcome in probate, to recover for compensatory and punitive damages not available in the probate proceeding. Huffey v. Lea, 491 N.W.2d 518 (Iowa 19920.

[18] Shirley, *supra* note 1, at 16. According to this commentator, "Normally, the estate pays both defense attorney fees and those of a plaintiff making a good faith attempt to probate a prior will." *Id. See also* MCGOVERN & KURTZ, *supra* note 15, § 12.1, at 498.

[19] *See, e.g.*, Fried, *supra* note 1, at 381-81; Klein I, *supra* note 1, at 270.

[20] Klein I, *supra* note 1, at 260. Professor Klein notes, "[The probate] process is attended with special formalities and high standards of proof, intended primarily to protect the testator, who of course cannot testify personally (on account of being dead)." *Id.*

[21] MCGOVERN & KURTZ, *supra* note 15, § 4.3, at 189-92.

[22] *See* Klein I, *supra* note 1, at 270.

[23] *See* Moore, *supra* note 1, at 8.

proof.[24] At least one writer has suggested that potential conflicts could be avoided by requiring the same standard of proof in tort actions as in probate proceedings.[25]

Sometimes, a probate court proceeding is not even available to a person who seeks to vindicate a right of expectancy of which he claims to have been tortiously deprived. He might lack standing[26] to participate in a probate proceeding.[27] If, for example, **A** claims to be a person who would have benefited under **Will 1**, a will that the testator was tortiously prevented from executing, the testator instead having been tortiously induced by **B** to execute **Will 2**, a will under which **A** does not benefit, and **A** is not an intestate heir of the testator, in many jurisdictions **A** will not have standing to participate in the probate proceeding because, even if **Will 1** is defeated, the testator's property will pass by intestacy and **A** cannot claim a share by intestacy. Thus, **A** would be barred from the probate proceeding because he lacked standing. In a tort action against **B** to establish that **B** tortiously interfered with **A**'s expectancy under potential **Will 1**, **A**, as plaintiff, would necessarily have standing.

The statute of limitations on tort actions is usually different from the statute in probate proceedings.[28] Moreover, the statute often starts to run in tort not at the time of the testator's death but rather at the time the tortious conduct occurred or at the time when the tortious conduct should have been discovered.[29] Other differences include the availability of a jury in tort[30] and the possibility that the tort action could be brought in a federal court.[31]

Finally, some would argue that one of the purposes of tort law, and particularly of the availability of a tort action for tortious interference with expectancy of inheritance or gift, is to penalize and deter tortious conduct. Commentators have noted that the probate system has virtually no deterrent effect[32] while the possibility of being assessed not only compensatory damages but also attorneys' fees and, in appropriate cases, punitive damages, in tort might deter potential tortfeasors.[33]

IIIA. Availability of the Tort in General

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[24] Klein I, *supra* note 1, at 267.

[25] Fried, *supra* note 1, at 382.

[26] "In order to discourage 'strike' suits by persons seeking to extract money by threatening costly litigation, courts allow wills to be contested only by persons with a financial interest in the contest." MCGOVERN & KURTZ, *supra* note 15, § 12.1, at 497.

[27] Klein I, *supra* note 1, at 266-67.

[28] Klein I, *supra* note 1, at 270.

[29] Moore, *supra* note 1, at 8.

[30] Shirley, *supra* note 1, at 20.

[31] Klein I, *supra* note 1, at 265-66.

[32] Klein I, *supra* note 1, at 266.

[33] *Id*. at 267-68. For example, **B** who is not an intestate heir of the testator, fraudulently induces the testator to execute a will which provides a substantial benefit for **B** and nothing for **A**, the testator's intestate heir and the person who would have taken had the tortious conduct not occurred. **A** opposes probate of the fraudulently induced will and is successful. **A** takes by intestacy and **B** takes nothing. **B** has lost nothing by his unsuccessfully engaging in tortious conduct. The estate paid to defend the will. No damages were assessed against **B**, and **B** stood the chance of being successful in probate. Nothing that has happened to **B** would deter him from trying again at another time. Moreover, the case would serve as a message to others that they have nothing to lose by engaging in tortious behavior.

While not all jurisdictions recognize a cause of action for tortious interference with expectancy of inheritance or gift, about half of all jurisdictions do permit actions based on the tort.[34] Some jurisdictions have not ruled on the availability of the tort,[35] while other states appear to have rejected its use.[36] Of the jurisdictions recognizing the tort, most take the position that a tort action will not lie unless it can be established that probate is inadequate in some way—that probate would not provide a sufficient remedy or that probate would not be available at all to the person claiming tortious deprivation of his expectancy.[37] Some refer to this as an "exhaustion" requirement, that probate remedies must be exhausted before recourse can be made to tort. For example, probate would not provide any remedy for a person who lacked standing to get into probate court. Nor would probate provide any remedy in a case like *Marshall* where the tortious conduct of her stepson allegedly deprived Vickie Lynn Marshall of an expectancy in the form of an *inter vivos* gift of non-probate assets.[38] Moreover, in the case where the plaintiff claims to be a person who would have benefited had the testator not been tortiously prevented from executing a will, probate will not provide the plaintiff with a remedy because there is no will to probate. Just from these few examples, it is clear that the tort fills a need for a remedy outside of probate.

In terms of the availability of the tort, the cases seem to fall into three categories. First, there are those cases in which probate provides an adequate remedy and there would be no need for the tort.[39] So any action would proceed in the probate court. Second, there are those cases in which probate would provide an inadequate remedy or no remedy,[40] so that the case should proceed in tort without resort to probate. Third, however, are those cases in which a probate proceeding is held, the result does not provide complete relief (or any relief) to the person alleging deprivation of an expectancy by tortious interference, and a tort action is then sought.[41] It is this third category of cases

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[34] For a state-by-state enumeration and analysis of the acceptance of the tort action as a cause of action available in civil courts of general jurisdiction, see Klein III, *supra* note 1, n.10.

[35] *Id.*

[36] *Id.* One commentator has claimed, "No case can be found in which a court has categorically denied a plaintiff the right to proceed on a tort theory. Generally, the courts rely on other reasons to prevent relief in tort, such as the ability to obtain the same result by contesting a will offered for probate." Fried, *supra* note 1, n.64.

[37] One court has defined adequacy of probate remedy in the following manner: "Adequacy is predicated on what the probate court can give as compared to what the plaintiff reasonably expected from the testator prior to interference." DeWitt v. Duce, 408 So.2d 216, n.11 (Fla. 1981), *ans. conformed to* 675 F.2d 670 (5th Cir. 1982).

[38] For a discussion of *Marshall*, see *infra* notes 46 to 75 and accompanying text.

[39] *See, e.g.,* DeWitt v. Duce, 408 So. 2d 216 (Fla. 1981), *ans. conformed to* 675 F.2d 670 (5th Cir. 1982)(tort action would not lie where the plaintiffs had failed to attack the will in an earlier wills contest, which attack would have afforded them complete relief); Estate of Hoover, 513 N.E.2d 991 (Ill. App.), *app. den.* 517 N.E.2d 1086 (1987)(tort action would not lie where success in the plaintiffs wills contest would result in complete relief); Smith v. Chatfield, 797 S.W.2d 508 (Mo. App. 1990)(action for tortious interference would not lie where earlier wills contest provided complete remedy).

[40] *See, e.g.,* Neumann v. Wordock, 873 So. 2d 502 (Fla. App. 2004)(the plaintiffs, who would have had an inadequate remedy in probate, could bring tort claim even though, because of lack of assets in the probate estate, no probate action had been brought).

[41] *See, e.g.,* Estate of Jeziorski, 515 N.E.2d 422 (Ill. App. 1987), *app. den.* 522 N.E.2d 1245 (1988)(the plaintiffs, who had pleaded two counts of tortious interference in their wills contest in the probate division, were permitted, after the probate court dismissed their tort action and during the pendency of the probate action, to proceed separately in tort in a civil proceeding because even if they were successful in the wills

(along with cases in which a tort action is sought without resort to probate and with no showing that probate would not provide adequate relief)[42] that often raises the issue of whether a tort action would be a barred as a collateral attack on the probate court determination (or whether the action should be barred, by the collateral attack doctrine, because appropriate resort to probate was not sought).[43]

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contest they would not get the relief they sought); Huffey v. Lea, 491 N.W.2d 518 (Iowa 1992)(the plaintiffs, upon successful completion of wills contest, were permitted to proceed in tort for compensatory and punitive damages not available in the probate contest).

[42] *See, e.g.*, McGregor v. McGregor, 101 F. Supp. 848 (D. Colo. 1951), *aff'd* 201 F.2d 528 (10th Cir. 1953)(the plaintiffs, legatees under a later will than the one that was probated by the decedent's widow, were precluded from proceeding with a tort claim because they had not attempted to probate the will under which they claimed a benefit); Hall v. Hall, 100 A. 441 (Conn. 1917)(the plaintiff-heir, who had not asked the trial court as a court of equity to treat probate decree of validity of will attacked in tort action as inoperative, could not proceed with tort action); Holt v. Holt, 61 S.E.2d 448 (N.C. 1950)(the plaintiffs-heirs, who had not had a paper writing that was probated as decedent's will declared invalid as a testamentary writing, could not maintain their actions in tort).

[43] An early commentator on the tort noted:

> An initial proposition is that only probate courts have jurisdiction to probate wills and that a probate decree, like other judgments and decrees, is not subject to collateral attack. There is a disposition also on the part of courts to hold that if a claimant has an adequate remedy in probate court, he should not first resort to a court of general jurisdiction."

Evans, *supra* note 1, at 188. A more recent commentator expanded on this position:

> A court faced with a lawsuit brought by a disappointed heir for damages…should determine initially whether the matter is one within the province of a probate court. If the claimed wrongdoing relates to the execution or revocation of a will, and the claimant has standing in the probate proceeding, the court should not entertain an independent action even if the jurisdiction recognizes the tort of interference with an inheritance. Thus, when a delay in pressing a claim in the probate court was avoidable, the claimant cannot relitigate issues cognizable in the probate court or collaterally attack the probate decree. A plaintiff who had an opportunity to contest the validity of a will and chose not to do so also should be precluded from maintaining an independent action once the probate proceeding is over. The bottom line is that an interference action in a court of general jurisdiction should be allowed only when a probate remedy is inadequate or unavailable.

Fried, *supra* note 1, at 371-72 (footnotes omitted). As to cases like *Huffey*, *supra* note 41, Professor Fried suggests:

> Some courts find that success in the probate court does not bar a separate action for tortious interference with an inheritance. These courts advance the theory that a party's claim of undue influence in the probate proceeding focuses on the testator's intent, while the independent action focuses on the tortious means intentionally used by the alleged wrongdoer in depriving the claimant of an inheritance or gift. Therefore, these courts say the later actions are neither claim- nor issue-precluded because they are not the same action and do not use the same evidence.

Fried, *supra* note 1, at 373. One recent commentator has gone even farther:

> The cause of action for tortious interference with inheritance does not constitute a collateral attack on the decree of the probate court….A judgment is not *res judicata* in a subsequent proceeding unless the matter adjudicated in that proceeding is identical to the matter at issue in the subsequent proceeding. In the tort action, the plaintiff is not attacking the validity of a will of record or attempting to probate a document that he alleges is a valid will. Nor is he seeking to recover from the estate. Rather, the plaintiff is bringing an action against the person or persons whose malevolence prevented him from receiving a legacy. Since the action may provide relief regardless of the probate decree, the plaintiff does not attempt to retry the issues adjudicated by the probate court or to attack the decree of that court. Therefore, an independent suit in tort undertaken as

IIIB. Availability of the Tort – An Analysis

Several commentators have written on the subject of this tort,[44] including one writer who has undertaken an ambitious jurisdiction by jurisdiction survey of the availability of the tort.[45] It is the purpose of this article to identify and categorize, in this fact-driven area, those several different circumstances in which the tort might be relevant and then to suggest, in respect of each circumstance, a rational approach to the availability of the tort. While some cases and circumstances will remain problematic after this analysis, this writer's purpose is to classify, clarify and rationalize, to the extent possible, those different situations in which the tort might be implicated.

1. Expectancy to Receive an *Inter Vivos* Gift Reduced or Defeated by Tortious Interference with the Gift

As noted above,[46] the Restatement Second includes, in the statement of the tort, the situation in which the plaintiff-claimant's expectancy to receive an *inter vivos* gift is interfered with in a tortious way. While cases abounded in which the plaintiff alleged deprivation of an expected at-death benefit such as insurance proceeds[47] or the remainder interest of a revocable *inter vivos* trust,[48] before the *Marshall*[49] case, few, if any, cases involved deprivation of a true *inter vivos* gift.[50] Probably, the fact that, with respect to most *inter vivos* gifts, the expectant-donor is still alive would mean that these situations could be resolved by actions on the donor's part. In *Marshall*,[51] the expectant-donor died shortly after promising the gift, so the tort issue was raised.[52]

> a primary cause of action to remedy interference with inheritance does not offend the principle of *res judicata.*

Marmai, *supra* note 1, at 313.

[44] *See supra* note 1.

[45] *See* Klein I, Klein II, and Klein III, *supra* note 1.

[46] *See supra*, text at note 10.

[47] *See infra* note 78 and accompanying text.

[48] *See infra* note 76 and accompanying text.

[49] *See infra* notes 53 to 75 and accompanying text.

[50] The writer of the most recent A.L.R. annotation on tortious interference, *see* Soehnel, *supra* note 11, at § 10, found only two cases prior to *Marshall* that involved gifts taking effect before death, Ross v. Wright, 190 N.E. 514 (Mass 1934), and Simar v. Canaday, 53 N.Y. 298 (1873). In each, the defendant prevailed.

[51] *See infra* notes 53 to 75 and accompanying text.

[52] 275 B.R. at 20-25.

Briefly, the relevant facts follow.[53] J. Howard Marshall, II, a wealthy Texan in his late eighties, married Vickie Lynn Marshall, a woman substantially younger than himself. As part of their more than two year courtship, J. Howard made lavish gifts to Vickie and frequently promised her that, if they married, he would give her, as an *inter vivos* gift, a substantial amount, referred to by the District Court for the Central District of California as half of their "new community."[54] He made this promise in front of others[55] and undertook to accomplish this goal by directing his attorneys to create a "catch-all" trust for Vickie with this property.[56] J. Howard's son from a prior marriage, E. Pierce Marshall (Pierce), in conjunction with one of J. Howard's attorneys, successfully blocked this gift. According to one court in this action, Pierce and the attorney committed many intentional acts to prevent the gift from being accomplished, all acts described by the court as "tortious conduct."[57]

Vickie's claim for intentional interference with the expectancy of a gift arose in the context of a bankruptcy proceeding brought by Vickie in California.[58] In that proceeding, Pierce filed a proof of claim against Vickie alleging that she had defamed him by certain statements that she made to the press and alleging that such claim would not be dischargeable in the bankruptcy.[59] Vickie counterclaimed against Pierce for tortious interference with her expectancy of a gift.[60] The Bankruptcy Court, finding that these claims and counterclaims were "core proceedings" over which it had the authority to enter a final judgment, found that Pierce had committed the tort and assessed compensatory damages of almost $450,000,000.[61] Upon review of the Bankruptcy Court's determination, the District Court found that Vickie's claim was not a "core issue," and, therefore, that the Bankruptcy Court's determination was a proposal rather than a final judgment.[62] The District Court, in a *de novo* review, agreed with the Bankruptcy Court's finding that Pierce had tortiously interfered with Vickie's expectancy

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[53] While for purposes of this article, the relevant opinions regarding the tort of tortious interference with the expectancy of inheritance or gift are those of the Bankruptcy Court for the Central District of California, Marshall v. Marshall (In re Marshall), 253 B.R. 550 (2000), and the United States District Court for the Central District of California, Marshall v. Marshall (In re Marshall), 275 B.R. 5 (2002), the case involved a subsequent reversal of the District Court by the Court of Appeals for the Ninth Circuit, Marshall v. Marshall (In re Marshall), 392 F.3d 1118 (2004), on the ground that the "probate exception" would bar federal jurisdiction in this case because the estate of J. Howard Marshall, II, was being probated in a Texas court, and a United States Supreme Court reversal and remand of the Ninth Circuit decision, Marshall v. Marshall, 547 U.S. 293 (2006), on the ground that the probate exception did not bar jurisdiction in this case, "that the District Court properly asserted jurisdiction over Vickie's counterclaim against Pierce [for totious interference]." 547 U.S. at 314. The Supreme Court remanded to the Ninth Circuit to address the question of "whether Vickie's tort claim was 'core,'" 547 U.S. at 297, for purposes of the jurisdiction of the District Court and other procedural issues. *Id.* Reference will be made to the Supreme Court opinion, not for the issue of the "probate exception" which is beyond the scope of this Article, but for clarifications of facts and issues regarding the tort claim.

[54] 275 B.R. at 52. According to the Court, "[t]his term was defined by J. Howard as one-half of the growth of his assets during the time of their marriage." *Id.*

[55] *Id.*

[56] *Id.* at 26.

[57] *Id.* at 53.

[58] 547 U.S. at 293. The Bankruptcy Court filing is In re Marshall (Chapter11)(Bankr. C.D. Cal 1996).

[59] *Id.*

[60] *Id.*

[61] 253 B.R at 562-563.

[62] 547 U.S. at 294.

of a gift from her husband, J. Howard, II.[63] Basing its damage assessment on a different valuation method from that used by the Bankruptcy Court, the District Court gave Vickie a little over $44,000,000 in compensatory damages and an equal amount in punitive damages.[64]

In its determination that Pierce had tortiously interfered with Vickie's expectancy of a gift, the District Court applied Texas law (the domicile of J. Howard Marshall, II), finding that Texas has adopted the Restatement Second position on this tort.[65] The court stated the elements of the cause of action – "[a] plaintiff must prove (1) the existence of an expectancy; (2) a reasonable certainty that the expectancy would have been realized but for the interference; (3) intentional interference with that expectancy; (4) tortious conduct involved with the interference; and (5) damages"[66] – and then applied these elements to the proof in the case. The court found the existence of an expectancy in the facts that J. Howard made "numerous promises to Vickie that she would receive half of what he owned,"[67] which promises were consistent with his past behavior in another relationship and were witnessed, in at least one case, by one of his attorneys, and that he sought, on several occasions and through various methods, to have his attorneys accomplish this goal.[68] In Vickie's evidence regarding the expected gift and in evidence of Pierce's tortious conduct in respect of the gift, the court also found reasonable certainty that the gift would have been realized had it not been for Pierce's conduct.[69] Ample proof demonstrated the intentionality of the tortious acts of Pierce and one of J. Howard's attorneys.[70] Moreover, many pages of the opinion are devoted to the evidence of Pierce's tortious conduct.[71] According to the court, "Evidence of Pierce's tortious conduct is legion. Acting in concert with [the attorney], they backdated documents, altered documents, destroyed documents, suborned falsified notary statements, presented documents to J. Howard under false pretenses, and committed perjury."[72] As the final element of the tort, the court considered and assessed damages,[73] as described above.

The tort analysis in this case is very straightforward. Moreover, the type of facts presented here, deprivation of expectancy of *inter vivos* gift, suggest only one forum for relief for Vickie – the civil court in a tort action.[74] J. Howard's probate estate, which was essentially without assets,[75] had nothing to do with the gift that Vickie had been promised, and thus, no probate proceeding could have provided Vickie with a remedy. It is clear that in a case involving tortious interference with the expectancy of an *inter vivos*

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[63] *Id.*
[64] 275 B.R. at 58.
[65] *Id.* at 51. *See supra* note 10 and accompanying text.
[66] *Id. citing* Doughty v. Morris, 871 P.2d 380 (N.M. Ct. App. 1994).
[67] *Id.* at 51-52.
[68] *Id.*
[69] *Id.* at 52-53.
[70] *Id.* at 53.
[71] *Id.* at 36-50.
[72] *Id.* at 53.
[73] *Id.* at 53-38.
[74] In this case, there is no forum which would focus on the intent of J. Howard Marshall, II in not having his intended *inter vivos* gift blocked by the behavior of others. If he were still alive and learned of this tortious frustration of his intent, he could take action himself to accomplish his goals.
[75] 275 B.R. at 13-19.

gift, the tort should be available in any jurisdiction as the only possible method for doing justice.

2. Expectancy to Receive an "At-Death" Benefit Reduced or Defeated by Tortiously Induced Alteration of the Benefit

Another "gift" category of cases in which the tort would provide the primary, if not sole, method for relief would be in situations involving "at-death" benefits that are not part of a decedent's probate estate. For example, **A** is a beneficiary under a revocable *inter vivos* trust which provides: "Income to the settlor for life. Remainder to **A**." Thus, **A** is to succeed to the corpus of the trust at the settlor's death. The trust corpus is not part of the settlor's probate estate. Before the settlor's death, **B**, through the intentional tort of undue influence, causes the settlor to change the remainder beneficiary of the trust from **A** to **B**. Arguably, **B**'s intentionally tortious conduct deprived **A** of the expected benefit of the remainder of the trust.[76] Other examples of non-probate, at-death benefits would include being a joint tenant with a right of survivorship on real property or personal property,[77] being a designated beneficiary on a life insurance policy,[78] or being the beneficiary of a payable-at-death certificate.[79] In any of those arrangements, the person expecting to receive the at-death benefit might be deprived of that expectancy by the tortious conduct of another who convinces the joint owner or insured or depositor or settler to remove the expectant person from the designation.

These cases would again be candidates for treatment in tort. Since the assets at issue are not probate property, the probate process would not be relevant unless, because of the interference, this property became probate property at the time of the testator's death.

3. Expectancy to Receive a Testamentary Benefit Reduced or Defeated by Tortiously Induced *Inter Vivos* Diminution of the Testator's Probate Estate

A third category of cases involve situations in which claimants are deprived of an inheritance because of the tortious inducement of an *inter vivos* transfer of assets that

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[76] Cases involving intentional interference with revocable trusts include Davison v. Feuerhard, 391 So. 2d 799 (Fla. Dist. Ct. App. 1980)(case involving the allegation that the appellees tortiously prevented the settlor of an *inter vivos* trust from signing an amendment that would have named the appellant as trust remainder beneficiary; the appellate court recognized a tortious interference action based on the appellant's expectation of being a beneficiary of a revocable *inter vivos* trust noting that "with regard to tortious interference claims, no real distinction exists between gifts of inheritance through will and gifts through a new trust", *id.* at 802); Hammons v. Eisert, 745 S.W.2d 253 (Mo. Ct. App. 1988)(case involving the allegation of undue influence in the revocation of an *inter vivos* trust to the detriment of the trust beneficiary; the court held that "the beneficiary of a revocable…trust has a cause of action…against a person who, by the exercise of undue influence induces a settler to revoke the trust and thereby diverts…the trust funds and prevents the beneficiary from receiving that which he otherwise would have received", *id.* at 254.).

[77] *See, e.g.,* Doughty v. Morris, 871 P.2d 380 (N.M. 1994)(the tortiously induced transfer of joint bank account and joint certificate of deposit from names of mother and daughter to names of mother and son).

[78] *See, e.g.,* Nemeth v. Banhalmi, 425 N.E.2d 1187 (Ill. App. 1981); Monroe v. Biggs, 139 P. 422 (Kan. 1914); Daugherty v. Daugherty, 154 S.W. 9 (Ky. 1913).

[79] *See* Mitchell v. Langley, 85 S.E. 1050 (Ga. 1915).

otherwise would have passed to the claimant under a will or by intestate succession.[80] In other words, the interference is not with the probate dispositions *per se* but with the assets with which those dispositions could have been paid. For example, **A** is the sole beneficiary under the testator's valid and effective will which was properly executed in 1995. Subsequent to the execution of the will but prior to the testator's death, **B** tortiously induces the testator to make substantial *inter vivos* gifts to **B** (or to someone else who is not **A**),[81] which gifts have the effect of substantially or completely depleting the testator's probate estate. At the testator's death, the testamentary disposition to **A** remains in place, but there is little or no probate property available for the disposition because of **B**'s tortious diversion of these assets during the testator's lifetime.

In the above hypothetical, probating the will would establish **A**'s entitlement to take as the beneficiary of the will.[82] The probate process, however, will not restore to **A** that of which he claims to have been deprived by **B**'s tortious acts – the potential probate property transferred *inter vivos*, thereby depleting the amount that **A** will receive under the will. Probate would not provide **A** with a remedy for **A**'s loss caused by **B**'s tort, so this would be a case in which **A** should be allowed to bring a civil action against **B** for tortious interference with **A**'s expectancy of inheritance.[83] In this type of case, no one could argue that the civil action would be a collateral attack on any probate proceeding which established the will. The focus would be on **B**'s conduct in draining the probate estate through tortious behavior, with a successful action resulting in a judgment against **B** to be paid from **B**'s personal assets, the source of which need not be the former probate property, not on any determination made in the probate process. The will would be established and the civil action would not question the establishment of the will.

4. Expectancy to Receive a Testamentary Benefit Reduced or Defeated by Tortious Inducement to Execute, Not Execute, Revoke or Not Revoke a Will

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[80] *See, e.g.,* Cyr v. Cote, 396 A.2d 1013 (Me. 1979)(the plaintiffs, who alleged that the defendants had committed a tort by convincing the ailing testator to convey to them certain property that otherwise would have been part of the probate estate in which the plaintiffs would share, were found to have stated a cause of action in tort); Peralta v. Peralta, 131 P.3d 81 (N. M. App. 2005)(the plaintiff, whose brother and sister (the defendants) allegedly, through tortious conduct, arranged to have their mother convert otherwise probate property into non-probate dispositions for the benefit of the defendants (and through other tortious acts affected the plaintiff's expectation of inheritance), thereby depriving the plaintiff of an expected inheritance, were found to have stated a cause of action in tort).

[81] It does not appear necessary, for the tort of tortious interference with expectancy of inheritance or gift to be established, that the property that the plaintiff expected but did not get was diverted to the defendant by the defendant's tortious conduct. The only requirement in this regard is that the expected gift or inheritance be diverted from the plaintiff by the defendant's tortious actions.

[82] In this case, the establishment of the will would also establish **A**'s expectancy. Although there is always the argument that the testator, before his death, could have changed his mind and disposed of these assets in another manner, one which was not the product of tortious conduct on **B**'s part, the "but for" analysis is very strong here – the testator took all steps necessary for certain assets to go to **A**. But for **B**'s interference, those assets would still be part of the testator's probate estate and pass to **A** under the will.

[83] The argument can be made that a tort action would not be necessary in this type of case because the representative of the estate could take action to recover the diverted assets. *Cf.* Shirley, *supra* note 1, at 16. Even if this is a viable alternative to a tort action, it would not provide an adequate remedy in those cases (probably most cases) in which the defendant or other recipient of the *inter vivos* dispositions has consumed the property, making recovery of it by the representative impossible.

A category of cases which includes several sub-categories, dependent on the specific facts of the case, are those cases in which a testator is tortiously induced to execute or not to execute a particular will or is tortiously induced to revoke or not to revoke a particular will. The first-mentioned sub-category, tortious inducement to execute a will, might involve the following facts: the testator, who had not planned to execute a will and, therefore, would have died intestate, thereby benefiting his intestate heirs, including **A**, is tortiously induced by **B** to execute a will which benefits **B** but does not benefit **A**. If the will is admitted to probate, **B**'s tortious conduct will have deprived **A** of the opportunity to receive an intestate share of the testator's estate.[84] This example would clearly come within the parameters of the tort, but would come within the group of cases in which **A**, the potential tort plaintiff, could get relief in a probate proceeding.[85] As an intestate heir, **A** would have standing to oppose the admission to probate of the questioned will. And if **A** can establish, in the probate proceeding, that the will was the product of the tort of undue influence, for example, the will would be defeated and **A** would take his expected intestate share.[86] This would seem to be a case in which resort to probate, the court to which has been delegated the primary responsibility for determining the validity of wills, should be required before any resort to a tort remedy in civil court could be pursued. An unsuccessful result in probate – that the will is admitted because **A**'s claim of undue influence could not be proved – should also then be the end of **A**'s options. Allowing **A** to then try to establish the tort would allow a collateral attack on the probate court's determination of the validity of the will.[87]

An issue which remains open in respect of the above example in which **A** is successful at probate is the question whether a tort action would then lie in which **A** would claim as damages punitive damages (available in tort but not in probate), attorney's fees from the probate action (not available in probate), and other consequential

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[84] It is not necessary that **B** benefit from his tortious conduct in order for **A** to have a cause of action for tortious interference with expectancy of inheritance. So long as **B** has tortiously interfered and **A** has been deprived of his expectancy by the tortious conduct, **A** should be able to recover for the tort (assuming the jurisdiction recognizes the tort and any threshold requirement, such as exhaustion of probate remedies, has been satisfied), even if the tortiously induced Will does not benefit **B** at all. The relevant question is **B**'s actions *vis-à-vis* **A**'s expectancy and not to whom that expectancy is diverted.

[85] Whether such relief would be "complete" is a matter in dispute among courts recognizing the tort. At least one court has permitted a tort action subsequent to a successful wills contest, with the claims in the tort action being for attorney's fees, punitive damages, and economic losses caused by the plaintiff's inability to pursue his living (farming) during the pendancy of the probate proceeding. Huffey v. Lea, 491 N.W.2d 518 (Iowa 1992). *See also* King v. Acker, 725 S.W.2d 750 (Tex. App. 1987)(subsequent to a probate determination that the decedent had not signed a power of attorney pursuant to which the decedent's wife assigned the decedent's stock to herself, on review of a jury award of actual and exemplary damages in a tort action brought by the decedent's children , the court reduced the amount of actual damages and affirmed the rest of the jury award). Such recovery would not be available in the probate proceeding. Other courts have denied tort relief in similar circumstances, noting that punitive damages and the like are not part of a claimant's "expectations." *See, e.g.*, DeWitt v. Duce, 408 So. 2d 216 (Fla. 1981) *ans. conformed to* 675 F.2d 670 (5th Cir. 1982). In a footnote, the court stated, "For purposes of adequacy of relief we do not consider punitive damages as a valid expectation." *Id*, at 220 n.11. .

[86] MCGOVERN & KURTZ, *supra* note 15, § 7.3.

[87] For a discussion of the issue of collateral attack in the context of actions for tortious interference with inheritance, see *supra* note 43. To this writer, in this case, such a tort action would be giving **B** a second shot to establish the undue influence, and in a context in which the standard of proof would be reduced to a simple preponderance of the evidence. Thus, the tort action should not be permitted.

damages. Decisions in this area are split, with some courts permitting the subsequent action on the ground that probate did not provide **A** with "complete relief" because such damages are not available in probate,[88] while others view the probate success as the end of the process because **A** had no expectancy in these damages.[89]

Changing the above hypothetical example, what if **B** is an intestate heir of the testator and the testator intends to execute a will favoring **A**, who is not an intestate heir of the testator? Moreover, the testator has taken steps to accomplish this execution by consulting his attorney and having the proposed will drawn up. The only necessary act left undone (a big one) is the execution of the will by the testator. **B**, through tortious conduct, prevents the testator from executing the will. As it stands, the testator died intestate, which would benefit **B** but certainly not help **A**. And probate would not necessarily provide a complete remedy for **A**. First, **A** does not have standing to get into the probate court. He cannot offer for probate the unexecuted will and so he would have nothing to gain by opposing intestacy. Clearly, he cannot get relief in probate. This would be a situation in which a civil law action by **A** against **B** on the tort would be the action of first resort. **A** could recover as damages from **B**, personally, the amount that **A** expected to receive under the will, had **B** not tortiously interfered with its execution. Arguably, an action in equity seeking a constructive trust would also be a possibility,[90]

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[88] *See supra* note 85.

[89] *Id.* The situation in which **B** tortiously induces the testator to execute will can arise in other fact situations, discussed below, which involve a combination of tortiously induced execution with tortiously induced revocation of another will under which the claimant would have benefited.

[90] A constructive trust is an equitable remedy. MCGOVERN & KURTZ, *supra* note 15, § 6.1, at 269. When title to property is found in the hands of a person who, but for wrongdoing, would not have title, a constructive trust can be impressed which makes the wrongdoer/titleholder into a trustee for the benefit of those who would have taken had the wrongful conduct not occurred. In the words of Justice Cardozo:

> A constructive trust is a formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919). As stated by another commentator, "A constructive trust arises when the titleholder of property is subject to an equitable duty to convey it to someone else, on the ground that permitting the titleholder to retain the property would result in unjust enrichment." MARK L. ASCHER, SCOTT & ASCHER ON TRUSTS § 2.1.1 (5th ed. 2006). The RESTATEMENT OF RESTITUTION § 184 (1937) provides: "Where a disposition of property by will or an intestacy is procured by fraud, duress or undue influence, the person acquiring the property holds it upon a constructive trust, unless adequate relief can otherwise be given in a probate court." So, for example, where the decedent, on her deathbed, was prevented by some of her heirs-at-law from executing a will which would have benefited her friend (who was not an intestate heir), the heirs-at-law, who took from decedent's estate by intestacy, were found to be constructive trustees for the friend, who would have taken had the wrongful conduct not occurred. Pope v. Garrett, 211 S.W.2d 559 (Tex. 1948). The probate court could not provide adequate relief because the will desired by the decedent had not been executed. In another case, Latham v. Father Divine, 85 N.E.2d 168 (N.Y. 1949), the court found that a constructive trust would be available as a remedy where the plaintiffs alleged that defendant, a beneficiary under the decedent's will, prevented the decedent, by murder, from revoking that will and executing a new will in favor of the plaintiffs, individuals who were not intestate heirs of the decedent. Again, the probate court could not do justice by refusing to admit the tainted defendant-favoring will to probate because an intestacy (not what was desired by the decedent) would result. The Comments and Illustrations to the Restatement of Restitution § 184 provide many more examples of situations in which probate could not remedy a situation that had been caused by fraud, duress or undue influence.

but would not provide **A** with relief if, for example, during the pendency of the litigation, the estate assets were spent by **B**.[91]

A simple example of a fact situation involving tortious inducement of the testator to not revoke a will would be the following: the testator intends to revoke his will by physical act and die intestate. **B**, who benefits under the will, prevents the testator, by duress and fraud, from revoking the will. **A**, an intestate heir of the testator, who would have taken an intestate share of the testator's probate estate had **B** not engaged in the tortious behavior, is understandably disappointed. A probate remedy for **A** in this situation is less likely than in that provided above. When **B** offers the will for probate the will looks fine on its face and has been properly executed. There is no direct evidence from the will of any attempt at revocation. In fact, there was no actual attempt to revoke. **A** has standing to oppose the admission of the will to probate because if the will is defeated **A** will take by intestacy. But what argument would **A** make that the will should not be admitted to probate? **B**'s tortious conduct did not induce the testator to undertake some action such as execution of a will. Even though **A** can get into the probate court, at least in theory, the contest would be questionable since the will itself was not the product of duress and fraud. Perhaps a probate court would stretch the facts by finding that the will itself was procured by fraud and duress since but for the tortious conduct which prevented the will from being revoked the will could not have been offered for probate. If the will is admitted to probate, a fraud claim could serve as the basis for the impressing of a constructive trust. A civil action in tort, however, would give **A** the relief that he seeks. If **A** can prove that **B** tortiously frustrated the testator's attempt to revoke the will, thereby depriving **A** of the benefit of his intestate share, **A** could recover the amount of that share as damages from **B**. And this would be the result whether **B** benefited under the will or simply interfered with **A**'s expectancy because of some malicious desire to injure **A**. Arguably, this would not be a collateral attack on the will because the court would simply be finding that **B** caused **A** damages by **B**'s tortious conduct, a matter involving different issues and proof than the question of whether the will had been effectively revoked.

The last example to explore of those cases that involve a single tortious induction to execute, not execute, revoke, or not revoke – without another related act of execution or revocation – would be where the testator is tortiously induced to revoke a will and thereby die intestate. In this case **B** could be an intestate heir of the testator who tortiously induces the testator to revoke the will by physical act, which will was to benefit **A**, not **B**. **A**, as a beneficiary under a revoked will, would have standing to offer a copy

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The Restatement of Restitution provides a constructive trust as an equitable remedy in non-probate situations as well: "Where a person acquires property from another by fraud, duress or undue influence under such circumstances that a third person is entitled to restitution from the transferee, the transferee holds the property upon a constructive trust for the third person." RESTATEMENT OF RESTITUTION § 169 (1937).

[91] *See* Siegel, *supra* note 1, at 264. In the conclusion to his article, Professor Siegel states, "In situations where the constructive trust cannot restore the status quo, a tortious interference action may be warranted. For example, to the extent the trust property were consumed or otherwise dissipated or wasted, a tort action would be necessary to make the trust beneficiaries whole." In his article, entitled *Unduly Influenced Trust Revocations*, Professor Siegel was writing specifically about revocable *inter vivos* trusts, but his reasoning would extend to any situation in which a constructive trust would be used to recapture assets diverted from their intended recipient through wrongful conduct.

of the will for probate, just like in the case of a lost will.[92] **A** could argue that the will was not revoked because the testator did not have the requisite intent to revoke based on the tortious induction of the testator to revoke. If **A** can prove the tortious conduct, thereby rebutting the presumption of revocation by physical act, **A** could offer a copy of the will for probate. If, however, **A** could not prove the will because of difficulties of proof caused by physical destruction of the will, it would seem only fair to permit **A** to bring a tortious interference claim against **B**. Probate would not have given **A** complete relief, and, but for **B**'s tortious conduct the will could have been proved in probate.

More complex scenarios involve tortious inducement, in the same case, to execute one will and revoke another, or to revoke one will which would revive another, or to choose to execute one will rather than another. For example, the testator has executed **Will 1**, which will benefits **A**. By undue influence, **B** tortiously induces the testator to execute **Will 2**, which will revokes **Will 1** (a tortiously induced revocation) and which will does not benefit **A** but benefits **B** instead. When **B** offers **Will 2** for probate, **A** has standing to oppose the admission to probate of Will 2 because **A** is a beneficiary under **Will 1**, and, if **Will 2** is defeated, **Will 1** would be reinstated. The probate process here would seem to provide **A** with a complete remedy (putting aside the question of attorney's fees, punitive damages, and the like). If **A** establishes that **Will 2** is the product of undue influence, **Will 2** will fail and **Will 1** will be reinstated, restoring to **A** the fruits of his expectancy, his inheritance under **Will 1**. **A** should be required to proceed in probate and oppose **Will 2** rather than simply bringing a tort action in civil court against **B**; **A** should be required to exhaust his probate remedies. And if **A** is unsuccessful in probate – **Will 2** is not defeated because the undue influence cannot be established – then **A** should not be able to have another opportunity to establish the undue influence in a civil action in tort where the standard of proof is lower than in probate.

Another such situation would involve the following: the testator has executed **Will 1**, which will does not benefit **A**. The testator intends to execute **Will 2**, which will would revoke **Will 1** and benefit **A**. **B** tortiously induces the testator to fail to execute **Will 2**, a tortious inducement of a failure to execute (**Will 2**) and a failure to revoke (**Will 1**). **A**, who is not an intestate heir, cannot get appropriate relief in probate. He does not have standing to oppose the admission to probate of **Will 1** because, if **Will 1** is defeated the testator's probate estate will pass by intestate succession and **A** would not benefit. Moreover, he cannot offer **Will 2** for probate since it was never properly executed. As in a couple of examples given above, a remedy might be available in equity

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[92] According to MCGOVERN & KURTZ, *supra* note 15, § 5.2, at 241, "Normally when a will cannot be found and the fact-finder…determines that it was not revoked, a copy of the will is probated or other proof is used to establish its contents." The New York statute on proof of lost or destroyed wills, N.Y. SURR. CT. PROC. ACT § 1407 (McKinney 1995), provides:

> A lost or destroyed will may be admitted to probate only if
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> 1. It is established that the will has not been revoked, and
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> 2. Execution of the will is proved in the manner required for the probate of an existing will, and
>
> 3. All of the provisions of the will are clearly and distinctly proved by each of at least two

credible witnesses or by a copy or draft of the will proved to be true and complete.

through a constructive trust,[93] and at least one commentator has suggested that both probate and equity should be exhausted before resort is made to the civil courts and the cause of action for tortious interference with expectancy of inheritance or gift.[94] As noted above, a problem with the equitable relief would arise if, subsequent to the setting up in probate of **Will 1** and prior to the equitable remedy of a constructive trust, the probate estate assets were spent.[95] Then no constructive trust would be available. Moreover, if **Will 1** did not benefit **B** (which is possible) but benefited **C** instead, the constructive trust would make **C** a constructive trustee for **A**'s benefit even though **C** did no wrong. A recovery in tort, however, would require that **B** pay damages to **A** from **B**'s resources as remediation for **B**'s tortious conduct. The tort relief would seem to be desirable because **B** would be made legally responsible for his act of depriving **A** of **A**'s expectancy under **Will 2** rather than making the estate assets answerable through the medium of **C**.

The same sort of analysis would apply in the following case: the testator intends to execute **Will 1**, which would benefit **A**. **B** tortiously induces Testator to execute instead **Will 2**, which would not benefit **A**. Again, unless **A** is an intestate heir, **A** would not have standing to oppose the admission to probate of **Will 2**. Moreover, **A** could not offer **Will 1** for probate because **Will 1** was never properly executed. Here the probate process would not offer **A** relief, but the tort would. This would be a clear case for the tort.

5. Expectancy to Receive a Testamentary Benefit Reduced or Defeated by Tortious Suppression or Spoliation of a Will

The final category of cases to be considered for use of the tort are those in which the tortious conduct is the suppression or spoliation of a will. The testator properly executes a will, which benefits **A**. **B**, an intestate heir of the testator, conceals or destroys the will. If **A** is aware of the original existence of the will, **A** could try to have the will admitted to probate. **A** would have to rebut the presumption that the testator revoked the will by physical act;[96] then **A** would have to prove due execution and the contents of the will.[97] Perhaps, however, due execution cannot be established because of the fact that the proof of execution was destroyed along with the will. In these cases, **A** should be able to seek a remedy in tort. The tortious act of **B** is what caused the failure of proof in probate. As stated by one commentator, "[I]t is possible that the proof which would be inadequate to probate such a will, might be sufficient to support a judgment in a tort action…."[98]

IV. Conclusion

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[93] *See supra* note 90.

[94] Siegel, *supra* note 1, at 255-63 (section entitled "Proposed Redress for the Wrongful Interference Scenario: Available Relief in Probate or Trust Proceedings in lieu of Tort Action").

[95] *See supra* note 90 and accompanying text.

[96] MCGOVERN & KURTZ, *supra* note 15, § 5.2, at 239-40. When a will that was last known to be in the testator's possession cannot be found at the testator's death, a presumption is raised that the testator destroyed the will by physical act with the intention of revoking the will. *Id.* at 239.

[97] *See supra* note 92.

[98] Whinery, *supra* note 1, at 84.

From the above discussion, it is clear that there are some circumstances in which the tort of tortious interference with expectancy of inheritance or gift would be the only method for remedying such wrongful interference. In the case of the deprivation of an *inter vivos* gift, as in *Marshall*, probate would have nothing to do with the issue. The same would be true for situations in which the interference is with nonprobate at-death benefits. If **A** expects a benefit under a revocable *inter vivos* trust and **B** tortiously induces the settlor to revoke the trust, **A**'s remedy would be in tort. Moreover, in cases involving *inter vivos* depletion, through a tortfeasor's conduct, of a testator's probate estate, which depletion deprives a beneficiary or heir of an expected inheritance, again the remedy would be in tort. The tortious conduct has not interfered with anything in which the probate court would have an interest (a will or intestacy), but only with the amount available in the probate estate.

In some cases involving a direct interference with a testator's testamentary intent, the person injured by the conduct could get relief in probate. For example, the intestate heir who can oppose a will that testator was tortiously induced to execute would have probate relief available. The claimant would have standing in probate and defeat of the will can give the claimant the benefit he expected (although he won't recover punitive damages and attorney's fees without a trip to civil court, if such is permitted in his jurisdiction). In these cases, probate should be exhausted before any resort to civil court.

In other cases involving a direct interference with a testator's testamentary intent, probate will not be a viable option, either because the claimant lacks standing to seek a remedy in the probate forum or because the probate court will not be able to give complete relief (if, for example, the will has been suppressed or destroyed by the tortfeasor and cannot be proved up in probate court). In those cases, the tort remedy should be available because of the importance of righting the wrong caused by the tort.