Tortious Interference with Expectation of Inheritance

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Although the tortious interference with expectation of inheritance cause of action is not new, it was recently highlighted when the U.S. Supreme Court discussed it in the high-profile case, Marshall v. Marshall, 547 U.S. 293, 126 S.Ct. 1735 (2006). In Marshall, the widow, Vickie Lynn Marshall, brought an adversary action counterclaim in her Chapter 11 bankruptcy case seeking recovery for her stepson's alleged tortious interference with an inter vivos gift from her deceased husband. The case drew national attention, not because of the intriguing legal basis of the claims asserted, but because the grieving widow was better known in pop culture as former Playboy Playmate and reality television star Anna Nicole Smith. In the course of the case's journey through the federal courts, Smith was awarded approximately $44.3 million dollars in compensatory damages and an equal amount in punitive damages, withstood a probate exception challenge to the federal court's jurisdiction through the U.S. Supreme Court decision, and, ultimately, lost all due to preclusion by a Texas probate court judgment. Marshall v. Marshall, 600 F.3d 1037 (9th Cir. 2010).

While the Supreme Court described Smith's tortious interference cause of action as being "widely recognized," a survey of case law demonstrates that it is far from universally recognized. Marshall, 547 U.S. at 312, 126 S.Ct. at 1748. Some jurisdictions have expressly adopted the tort. See, e.g., Wackman v. Rubsamen, 602 F.3d 391, 410 (5th Cir. 2010) (the Fifth Circuit acknowledges that the Texas Supreme Court has not ruled on the issue, but Texas intermediate appellate courts have recognized the cause of action); DesMarais v. Desjardins, 664 A.2d 840 (Me. 1995). Courts of various jurisdictions have acknowledged the claim, which has not yet been addressed by their highest courts. See, e.g., Lindberg v. U.S., 164 F.3d 1312, 1319 (10th Cir. 1999); Harris v. Kritzik, 480 N.W.2d 514 (Wis. Ct. App. 1992). Still, in other jurisdictions, the highest court or appellate courts have been asked to adopt the tort, but they have not been presented with sufficient cause to adopt or formally reject the cause of action. See, e.g., Kibbee v. First Interstate Bank, 242 P.3d 973, 992 (Wyo. 2010); Geduldig v. Posner, 743 A.2d 247 (Md. Ct. App. 1999). Arkansas, Connecticut, and South Carolina are among those definitely refusing to recognize the claim. See Jackson v. Kelly, 44 S.W.3d 328 (Ark. 2001); Dimaria v. Silvester, 89 F. Supp. 2d 195 (D. Conn. 1999); Douglass v. Boyce, 542 S.E.2d 715 (S.C. 2001). Even in those jurisdictions in which the claim is recognized, several hurdles exist that may prevent recovery under such a claim.

Basic Elements of the Cause of Action

The Restatement (Second) of Torts, § 774B (1977), specifies that “[o]ne 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.” Inheritance includes “any devise or bequest that would otherwise have been made under a testamentary instrument or any property that would have passed to the plaintiff by intestate succession,” and a gift is broadly defined to include “any donation, gratuity or benefaction that the other would have received from the third person.” Id., cmt. b.

Although jurisdictions recognizing the tort have characterized the tort slightly differently, the basic elements of an intentional interference with an expected inheritance claim are the existence of an expectancy; intentional interference with the expectancy through tortious conduct such as duress, fraud, or undue influence; causation; and damages. See, e.g., Cyr v. Cote, 396 A. 2d 1013 (Me. 1979). In some jurisdictions, the second element is described as intentional interference through “improper means or for an improper purpose.” Taylor v. Cooksey, 2007 WL 2323367, at *2 (D. Or. Aug 7, 2007). The alleged “improper means” must be “independently wrongful by reason of statutory or common law, beyond the mere fact of the injury complained of . . . [and it would] include ‘violence, threats, intimidation, deceit, misrepresentation, bribery, unfounded litigation, defamation and disparaging falsehood.’” Id. (quoting Church v. Woods, 77 P.3d 1150, 1154 (Or. Ct. App. 2003)).

The tortious interference with expectancy of an inheritance cause of action is designed to provide a remedy where a probate proceeding does not. See, e.g., Geduldig v. Posner, 743 A.2d 247, 258 (Md. Ct. App. 1999) (refusing to recognize a tort based on the facts of the case, explaining that it would do so if it were necessary to afford complete, but traditional, relief, and stating that it would decline to recognize the tort where the “sole reason” is an “expansion of traditional remedies, as opposed to a situation . . . where the traditional remedy
might be insufficient to correct the pecuniary loss”); DeWitt v. Duce, 408 So.2d 216, 219–20 (Fla. 1981) (holding that tortious interference action is allowable only when inadequacy of the probate remedy is established or apparent). In fact, courts in some jurisdictions require a plaintiff to exhaust any available probate remedies before pursuing an action for tortious interference with an expected gift (assuming the probate remedies adequately compensate for the damages incurred). See, e.g., Kryder v. Kryder, 2010 WL 425092, at *2 (N.D. Ohio Jan. 27, 2010) (final adjudication from a probate court is required before a plaintiff can assert a claim for intentional interference with expectancy of inheritance to prevent the plaintiff’s double recovery); Moore v. Graybeal, 843 F.2d 706, 710 (3d Cir. 1988) (the plaintiffs are precluded from maintaining cause of action in tort because they failed to pursue the exclusive statutory remedy of contesting probate of the will at issue); McGregor v. McGregor, 101 F. Supp. 848, 850 (D. Colo. 1951), aff’d, 201 F.2d 528 (10th Cir. 1953) (finding that a prerequisite to seeking relief after being deprived by another of a just bequest under a will in a court other than probate court is for that person to have tried to probate the will that forms the basis of his claim).

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The cause of action may be viable where the putative testator was prevented from forming a will. See Allen v. Hall, 974 P.2d 199 (Or. 1999). The tort may also be available if there is nothing left in the estate for probate due to the tortfeasor’s receipt of all the estate property. 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, 82 (2003).

As the Supreme Court observed in Marshall, probate litigation is an in rem proceeding addressing property distribution and the possible nullification of a will, whereas tortious interference with an expectancy of inheritance is an in personam action in which a plaintiff seeks damages against the alleged tortfeasor. Marshall, 547 U.S. at 312. This difference drives the type of recovery a plaintiff may receive. In a will contest, one seeks the nullification of a will to receive property belonging to the estate. In re Estate of Sharpley, 653 N.W.2d 124, 158 (Wis. Ct. App. 2002) (noting the difference between a will contest and a tort action for interference with an expected inheritance and the remedy for each). In a tortious interference case, however, a plaintiff seeks to recover damages from the tortfeasor rather than actual property from the estate. Id.

Included among the classes of plaintiffs advancing the cause of action have been a decedent’s companion who was disliked by the decedent’s family, Harris v. Kritzik, 480 N.W.2d 514 (Wis. Ct. App. 1992); children who were omitted from the testament and replaced by a decedent’s lover or new spouse, Schneider v. Cate, 405 F. Supp. 2d 1254 (D. Colo. 2005) (children of a deceased trust grantor, as trustees and beneficiaries, brought unsuccessful diversity action against the grantor’s husband); children or grandchildren who received less than others in the family, In re Loraine Bolley Ingersoll Trust, 950 A.2d 672 (D.C. 2008); and a child or stepchild who had a strained relationship with the decedent but still felt he or she would be entitled to a portion of the decedent’s estate, In re Estate of Hendrix, 2006 WL 2048240 (Wash. Ct. App. June 24, 2006). Heirs have also brought suit against a testator’s accounting firm and a testator’s attorney. See O’Keefe v. Merrill Lynch & Co., 84 P3d 613 (Kan. Ct. App. 2004); Chase v. Bowen, 771 So.2d 1181 (Fla. Ct. App. 2000).

Standard and Burden of Proof
The Restatement specifies that the interference at issue must be by a means that is independently tortious. Restatement (Second) of Torts § 774B, cmt.c. Some jurisdictions do not require this for a claim of interference with contract or a prospective contractual relation. See id. § 766B (relating to tortious interference with a contract). A claimant, however, is not required to prove that he is or was ever named as a beneficiary under a willnow or that he has been devised the disputed property, as doing so would defeat the purpose of a claim for tortious interference with expectancy. Plimpton v. Gerrard, 668 A.2d 882, 886 (Me. 1995).

A litigant in probate court is required to meet a rigorous standard of proof—sometimes described as clear and convincing—because the court is charged with determining the intent of a person who, because of death, is unavailable to testify. See In re Estate of Hendrix, 2006 WL 2048240, at *18. In most jurisdictions, a testator’s intent is considered proven upon the testimony of two credible, disinterested witnesses. See Restatement (Third) of Property, § 3.1, 1999. The standard of proof in a tortious interference with expectation of inheritance claim, however, is often, but not always, the lesser preponderance of evidence standard. See, e.g., Wackman v. Rubsamen, 602 F.3d 391, 410 (5th Cir. 2010) (applying Texas law); Peralta v. Peralta,
a plaintiff must prove "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 or that the gift would have been made inter vivos if there had been no such interference." Id. Complete certainty is not required because the testator is ordinarily deceased when the action is brought. Accordingly, in some jurisdictions, a plaintiff must prove "to a reasonable degree of certainty" that, but for the alleged conduct of the defendant, he would have received a share of the allegedly wrongfully diverted property. Firestone v. Gailbreath, 895 F. Supp. 917, 927-28 (S.D. Ohio 1995), aff'd 25 F.3d 323 (6th Cir. 1994). Presumably the "reasonable degree of certainty" standard is the same as the "preponderance of the evidence" standard, as cases describing both standards require less than the higher "clear and convincing" standard and adopt the Restatement as the foundation of the tort. See, e.g., Morrill v. Morrill, 712 A.2d 1039 (Me. 1998).

In Breen v. Lucas, 2005 WL 2736540 (Me. Super. Ct. July 4, 2005), a Maine court explained that when there is a fraud element in the tortious interference cause of action, the standard of proof is a preponderance of the evidence, as opposed to the clear and convincing standard required for an independent fraud claim. Id. at *7 (citing Petit v. Key Ban of Maine, 688 A.2d 427, 432-33 (Me. 1996)). Some courts, however, suggest that a tortious interference claim rooted in fraud and duress triggers the application of the clear and convincing standard of proof. For instance, in dicta in Minton v. Sackett, 671 N.E.2d 160, 163 (Ind. Ct. App. 1996), an Indiana court opined that the plaintiff's fraud and duress allegations necessitated the same standard of proof as if raised in a probate context.

In Wisconsin, one may demonstrate undue influence by proving the following two elements through "clear, satisfactory and convincing evidence": a "confidential relationship between the testator and the favored beneficiary" and "suspicious circumstances surrounding the making of the will." Wickert v. Burggraf, 570 N.W.2d 889, 890 (Wis. Ct. App. 1997) (quoting Sensenbrenner v. Sensenbrenner, 278 N.W.2d 887, 891 (Wis. 1979)). Other jurisdictions simply require that undue influence be proven by "clear and convincing evidence." See, e.g., Gay v. Ludwig, 2004 WL 911324, at *2 (Ohio Ct. App. Apr. 30, 2004).

Florida courts have held that, due to the difficulty in obtaining direct evidence of undue influence, a plaintiff may satisfy his burden by presenting facts "sufficient to raise a presumption thereof." See Metropolitan Life Ins. Co. v. Carter, 2005 WL 2810699, at *15 (M.D. Fla. Oct. 27, 2005) (citing In re Estate of Carpenter, 253 So.2d 697, 701 (Fla. 1971)). A presumption of undue influence arises when a devisee had a confidential relationship with the decedent at the time the undue influence is alleged to have occurred and "actively procured" the bequest. Id. (citing In re Estate of Stetzko, 714 So.2d 1087, 1090 (Fla. Ct. App. 1998)). Upon a plaintiff's showing of sufficient evidence to raise a presumption, "the burden shifts to the beneficiary to prove an absence of undue influence." Id. at n. 37.

Ohio courts have described the burden allocation somewhat differently. If a "confidential or fiduciary relationship exists between the donor and the donee," a presumption of undue influence arises, and the transfer is assumed to be unauthorized. Gay, 2004 WL 911324, at *2. The burden then shifts to the recipient of the gift or transfer to present evidence that the transfer was valid, although the plaintiff retains the "ultimate burden of proving undue influence through clear and convincing evidence." Id.

Conclusion
Although the U.S. Supreme Court has portrayed the cause of action of tortious interference with expectation of inheritance as being "widely accepted," the dimensions of this tort claim continue to evolve. The cause of action challenges the basic policy that a deceased's property should pass in accordance with the testator's written direction or through intestate succession. Recognition of the tort also may be perceived as conflicting with probate remedies. Thus, it is important for a plaintiff to ensure that the claim is appropriately advanced as a civil claim rather than as a probate claim and that the plaintiff understand the forum's proof requirements.