Tortious Interference With Inheritance

by Herb E. Tucker and Gregory B. Washington

Where traditional will contest remedies would fail to provide complete relief to litigants, an increasing number of state courts throughout the United States have recognized claims for tortious interference with inheritance. Although Colorado state courts, at least at the appellate level, have yet to do so, this article identifies case law from the Tenth Circuit and local federal district courts that suggests that Colorado courts, if faced with the issue, would recognize claims of this nature.

> "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."
> —*Restatement (Second) of Torts* § 774B (1979)

Colorado state courts have long recognized the tort of tortious interference with contractual rights.[1] At least at the appellate level, however, they have yet to embrace claims for tortious interference with inheritance rights, despite the fact that the courts of many other jurisdictions have done so. In 1999, the Tenth Circuit Court of Appeals assumed for purposes of its decision that Colorado state courts would recognize this common law tort.[2] The U.S. District Court for the District of Colorado also has recognized the tort in a diversity case, without citation to any Colorado case law.[3]

This article explores the modern trend toward recognition of claims for tortious interference with the right to inherit. It also explores related issues, such as the conflict between applicable tort statutes of limitations and the Colorado Probate Code non-claim statute when considering such claims, as well as potential damages.

Exhaustion of Probate Remedy

In *McGregor v. McGregor*,[4] the U.S. District Court for the District of Colorado imposed, as a prerequisite to a claim based on alleged tortious interference with inheritance, a requirement that the plaintiff first attempt to challenge any will or trust that is alleged to have given rise to the claim or, in the alternative, demonstrate that a traditional probate remedy is unavailable or inadequate under the circumstances of a particular case.[5] The majority of states that have addressed claims for tortious interference with inheritance or other expectancy generally have followed this same approach.

The rationale behind this limitation is reflected in the following excerpt from *McMullin v. Borgers*:

> Since a successful will contest would have replaced the October will with the July will, plaintiff would have received his full expectancy and suffered no actual damages. . . . Allowing an action for tortious interference in a situation such as this would merely encourage plaintiffs to forego the proper remedy of a will contest based on undue influence for the more lucrative damage options available in a tort action. Such a result would offend the goals of the undue influence action which seeks to implement the true intentions of the testator. . . . Where, as in this case, a

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> will contest provides essentially the same remedy and prevents any additional damages, we hold that an action for tortious interference will not lie.[6]

This same approach was followed in *In re Estate of Hoover*.[7] There, the Illinois appellate court upheld the trial court's dismissal with prejudice of the first three counts of plaintiffs' complaint alleging intentional interference with their expectancies under the decedent's will. In *Milton v. Sackett*,[8] this same court affirmed the trial court's grant of summary judgment with regard to similar tort claims that had been alleged, along with traditional claims of undue influence and lack of testamentary capacity.

Under this common approach, if a will contest is available to the plaintiff, and a successful contest would provide complete relief, no tort action is available. Similarly, an action for tortious interference may not be brought where the offending will already has been formally probated and the plaintiffs had adequate notice of the probate proceeding and a fair opportunity to contest the will but failed to do so.[9]

However, a will contest clearly would not provide an adequate remedy in a situation where the plaintiff asserts that the defendant either prevented the decedent from making a will or induced the decedent to revoke an existing will, thus causing the estate to pass by intestate succession. No will contest would be available under these circumstances because no will would exist.

The *Beckwith v. Dahl* Opinion

With the 2012 decision in *Beckwith v. Dahl*,[10] California joined the ranks of the states that recognize what the court labeled the tort of intentional interference with expected inheritance (IIEI) as a valid cause of action.[11] In *Beckwith v. Dahl*, Beckwith and his partner MacGinnis were in a long-term, committed relationship for almost ten years. MacGinnis had no children and his parents were deceased. His sister Susan Dahl, with whom he had an estranged relationship, was his only legal heir. MacGinnis became ill and was hospitalized awaiting surgery. During this time, MacGinnis showed Beckwith his unexecuted will, which provided for his estate to be divided 50% to Beckwith and 50% to Dahl. Beckwith e-mailed Dahl a copy of her brother's intended will and advised Dahl that MacGinnis was going to execute it before his surgery. Dahl responded, "I really think we should look into a trust to avoid probate." Dahl offered to contact an attorney to prepare a trust and told Beckwith to hold off on the execution of the will. MacGinnis's surgery led to complications and he died several weeks later, leaving an estate worth $1 million.

Following the death, Beckwith and Dahl met to discuss division of MacGinnis's personal property. After Beckwith suggested they find the will that MacGinnis prepared, Dahl told Beckwith, "We don't need a will." Dahl subsequently initiated a probate proceeding and mislead Beckwith into believing he eventually would receive a share of MacGinnis's estate, while generally keeping Beckwith in the dark as to what was going on in the proceeding. Beckwith later learned that the estate was being treated as intestate and was informed by the probate judge that he had no rights to MacGinnis's estate as a non-heir. He then filed a separate civil action against Dahl, asserting various claims, including one for intentional interference with expected inheritance. The trial judge in the civil action sustained a general demurrer to all of Beckwith's claims, stating that he was not "in a position to recognize" a new tort for IIEI because "that really is an appellate decision."

Before reaching its conclusion that California courts should recognize IIEI claims under certain circumstances, the California Court of Appeals discussed the inherent tension between a traditional system of probate laws and new tort claims such as this, which may impact existing laws regarding inheritance:

> The probate system was created to protect a decedent's testamentary intent by imposing very stringent requirements on a will contest. Recognition of the IIEI tort could enable Plaintiffs to usurp a testator's true intent by bypassing these stringent probate requirements. . . . If we were to permit, much less encourage, dual litigation tracks for disgruntled heirs, we would risk destabilizing the law of probate and creating uncertainty and inconsistency in its place. We would risk undermining the legislative intent inherent in creating the Probate Code as the preferable, if not exclusive, remedy for disputes over testamentary documents. These are very valid concerns that warrant this court's attention.[12]

The California court noted, however, that the majority of states that have adopted the tort of IIEI have achieved a balance by prohibiting the tort action where the remedy of a will contest is available and could provide the injured party adequate relief.

Basic Elements

Most states that recognize tortious or intentional interference with inheritance claims identify the following required elements for such claims: (1) the plaintiff had an expectancy with which the defendant interfered; (2) the interference was tortious; (3) reasonable certainty exists that, but for the defendant's tortious interfer-

ence, the expectancy would have been fulfilled; and (4) injury or damages. The most frequently contested element of the tort is whether the plaintiff had a legitimate expectancy interest.

The clearest proof of an expectancy is an earlier will or trust that benefitted the plaintiff. The plaintiff in such cases need merely establish that the revocation of the earlier will or trust was the product of the tortious conduct. A draft will or other written evidence of a decedent's intent may be sufficient to establish an expectancy.[13] However, an expectancy also may exist without written proof of the decedent's intent. Under the *Restatement (Second) of Torts*,[14] an intestate interest in an estate may be a sufficient expectancy.

A Florida court has held that the mere allegation that the decedent intended to make a bequest creates a genuine issue of fact to be determined at trial.[15] An Alabama court, however, in *Holt v. First Nat'l Bank of Mobile*,[16] rejected the Florida court's liberal approach, noting that virtually any complaint, no matter how specious, which included the bare allegation that the decedent intended a bequest, could survive summary judgment. The Alabama court tempered Florida's approach by requiring written evidence of the decedent's intent. Several courts have held that a beneficiary's expectancy under a trust also can form the basis of the tort action.[17]

It is not enough for the plaintiff to show that the defendant intended to interfere with an inheritance. The 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.[18]

A bankruptcy court in California has opined that tortious interference with an expectancy is an intentional tort, requiring the plaintiff to show "an intentional invasion or destruction of plaintiff's prospective interest or expectancy of which the defendant had actual knowledge."[19] There must be proof amounting to a reasonable degree of certainty that the bequest or devise or other expectancy otherwise would have been fulfilled but for the defendant's tortious conduct. If an earlier will exists on which the plaintiffs base their claim, they should attempt to probate that will and contest the later will by conventional means.

Damages

Damages typically consist of the value of the property the plaintiffs would have received in the absence of the tortious conduct. Consequential damages, such as damages for emotional distress, also are available, as are punitive damages in the proper case.[20] A successful will contest plaintiff may bring a subsequent action for tortious interference seeking punitive damages in the amount of the attorney fees incurred in the will contest.[21] If the tortfeasor received any property, the court also may place a constructive trust or equitable lien on the property or execute a monetary judgment.[22] Caution must be taken, however, to ensure that any such follow-up action is commenced within the applicable limitations period.

Payment made toward settlement of a tortious interference claim is not deductible in the estate tax context as a claim against

the estate. This is because the damages are not a personal obligation of the decedent or the estate.[23]

Because will contests are viewed as equitable claims, punitive damages generally are not available. The fact that punitive damages may not be recoverable in a typical will contest, however, does not automatically render the probate remedy inadequate to justify a tortious interference with inheritance claim.[24]

In *Smith v. Chatfield*,[25] the plaintiff successfully contested the testator's will and thereafter brought an action for tortious interference to recover the fees and costs of contesting the will, and seeking punitive damages. On appeal of the trial court's dismissal of this subsequent action, the appellate court noted that tortious interference with inheritance is a recognized cause of action in Missouri, but because the plaintiffs had earlier achieved the full relief afforded them in their successful will contest, their cause of action for tortious interference with inheritance rights was properly dismissed.

By contrast, in *Huffey v. Lea*,[26] the Iowa Supreme Court held that although the plaintiff was not successful in his will contest, he nevertheless could pursue an action for tortious interference. In vacating the lower court's decision dismissing the plaintiff's claim, the court noted that the plaintiff would not have been able to obtain a complete remedy in the will contest due to the nature of the damages he had requested in the follow-up action, including attorney fees, the value of the plaintiff's lost time away from operating his farm while he pursued the will contest, and damages for emotional distress. The appellate court also noted that the plaintiff had sought an award of punitive damages based on the intentional and malicious nature of the defendant's conduct, a remedy typically unavailable in a conventional will contest.

The following observations of the Iowa court are instructive:

> When a will is contested on the grounds of undue influence and lack of testamentary capacity[,] . . . the required proof focuses on the testator's mental strength and intent and whether infirmities or undue influence have affected the disposition of property under the will. . . . The necessary proof in an action for intentional interference with a bequest or devise focuses on the fraud, duress, or other tortious means intentionally used by the alleged wrongdoer in depriving another from receiving from a third person an inheritance or gift. *Restatement (Second) of Torts* § 744B (1979). Stated simply, in a will contest, the testator's intent or mental state is the key issue; in an intentional interference case, the wrongdoer's unlawful intent to prevent another from receiving an inheritance is the key issue. Because of the difference in proof, the actions are not the same nor will the same evidence necessarily support both actions.
>
> Our review of cases indicates that there is no bright-line rule requiring that the two actions be brought together. Rather, the case law suggests that those courts considered factors such as: (1) whether the plaintiff first sought a probate remedy or whether bringing a probate remedy was even possible (*e.g.*, in the case of a destroyed will or in a case in which the alleged wrong was not discovered until after the probate proceedings were completed); (2) whether any probate remedy obtained by the plaintiff was adequate and provided plaintiff with a complete remedy; (3) whether it was possible to litigate all issues in the probate court; and (4) whether the particular state probate court had jurisdiction of the tort claim.

Time Limits for Filing a Tortious Interference Claim

Some courts have permitted plaintiffs to bring a will contest and a tortious interference action simultaneously, even in cases where the probate action, if successful, would provide complete relief. This raises the issue of whether the probate practitioner who pursues a will contest to exhaust that remedy also should file a tortious interference action within the two-year statute of limitations, even if it is likely that the will contest will provide complete relief. In *Ebeling v. Voltz*,[27] the Florida Court of Appeals held that the two-year limitations period for will contests also applied to related tort actions for fraud, absent allegations of extrinsic fraud.

Because the defendant has interfered with an expectancy, not a certainty, and because the testator can change his or her mind before death, the nature and amount of damages in an action for tortious interference necessarily are somewhat speculative and uncertain. In the case of *Carlton v. Carlton*,[28] the court permitted the plaintiffs under unusual circumstances to proceed while the testator remained alive, but the alleged tortfeasor had died. The court recognized that if the plaintiffs were forced to wait until the testator's death, the statute of limitations on creditors' claims could have barred their claims against the tortfeasor's estate. This raises a conundrum for Colorado practitioners regarding possible application of the non-claim statute.[29]

There is no specific statute applicable to potential claims for tortious or intentional interference with inheritance. Therefore, the general two-year limitations period of CRS § 13-80-102(1)(a) most likely applies, because theories concerning tortious interference with relationships are what give rise to tortious interference

with inheritance causes of action. Alternatively, the two-year limitations period of CRS § 13-80-102(1)(i), applicable to all actions of every kind for which no other period of limitations is provided, might apply. A cause of action for losses or damages not specifically enumerated in CRS § 13-80-108 is deemed to accrue when the injury, loss, damage, or conduct giving rise to the cause of action is discovered or should have been discovered by the exercise of reasonable diligence.[30] To avoid possible statute of limitations problems, the most prudent practice is to file the tortious interference case within two years from the decedent's date of death. If the will contest is still pending after the two years, plaintiff's counsel should request a stay in the tort case until completion of the will contest. If the tortfeasor dies before the death of the testator or settlor, the plaintiff's claims against the deceased tortfeasor's estate should be timely filed pursuant to the non-claim statute.

Conclusion

Tortious interference claims frequently are being asserted, along with the traditional will contest claims of lack of testamentary capacity or undue influence. As previously noted, although Colorado federal courts have recognized the common law tort of tortious interference with inheritance, Colorado state courts have yet to do so. As a result, no Colorado statute or case specifically sets forth the limitations period applicable to this tort. The U.S. District Court for the District of Colorado and Tenth Circuit Court of Appeals have acknowledged that the traditional will contest or probate remedy must be exhausted before pursuing claims for tortious interference. However, under the right set of circumstances where the will contest remedy would not provide complete relief, Colorado state courts may very well permit a tortious interference claim to go forward. It may be only a matter of time until there is a Colorado Court of Appeals or Supreme Court case addressing tortious interference claims in state courts.

Notes

1. *See, e.g., Memorial Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.*, 690 P.2d 207 (Colo. 1984); *Amoco Oil Co. v. Erwin*, 908 P.2d 493 (Colo. 1995). *See also* Anderson, "Tortious Interference Law in Colorado: A Practitioner's Guide," 30 *The Colorado Lawyer* 8 (Aug. 2001). *CJI-Civ.* 24:1 (CLE ed., 2012) embodies the stock Colorado jury instruction on intentional interference with contract.

2. *Lindberg v. United States*, 164 F.3d 1312 (10th Cir. 1999). *See also Peffer v. Bennett*, 523 F.2d 1323 (10th Cir. 1975).

3. *McGregor v. McGregor*, 101 F.Supp. 848 (D.Colo. 1951), *aff'd* 201 F.2d 528 (10th Cir. 1953).

4. *Id.*

5. *Id.* at 850.

6. *McMullin v. Borgers*, 761 S.W.2d 718, 720 (Mo.App. 1988).

7. *In re Estate of Hoover*, 513 N.E.2d 991 (Ill.App. 1987).

8. *Milton v. Sackett*, 671 N.E.2d 160 (Ind.App. 1996).

9. *See* Marmai, "Tortious Interference with Inheritance: Primary Remedy or Last Recourse," 5 *Conn. Probate L.J.* 295 (1991).

10. *Beckwith v. Dahl*, 205 Cal.App.4th 1039 (2012).

11. States that recognize, to varying degrees, the tort of tortious interference with inheritance or expectancy: Alabama: *Holt v. First Nat'l Bank of Mobile*, 418 So.2d 77 (Ala. 1982); California: *Beckwith v. Dahl*, 205 Cal.App.4th 1039 (2012); Connecticut: *Benedict v. Smith*, 376 A.2d 774 (Conn.Super.Ct. 1977); Florida: *DeWitt v. Duce*, 408 So.2d 216 (Fla. 1981) (this UPC state adopted only the 1989 revisions to Article VI); 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); Maine: *Cyr v. Cote*, 396 A.2d 1013 (Me. 1979) (a UPC state); Massachusetts: *Monach v. Koslowski*, 78 N.E.2d 4 (Mass. 1948); Michigan: *Creek v. Laski*, 227 N.W. 817 (Mich. 1929) (this UPC state also adopted only the 1989 revisions of Article VI); 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) (a UPC state); 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). States that specifically do not recognize tortious interference with inheritance or other expectancy include Montana: *Hauck v. Seright*, 964 P.2d 749 (Mont. 1998) (a UPC state) and New York: *Vogt v. Witmeyer*, 665 N.E.2d 189 (N.Y. 1996).

12. *Beckwith, supra* note 10 at 1052 (citations omitted).

13. *Nemeth v. Banhalmi*, 425 N.E. 2d 1187 (Ill.App. 1981).

14. *Restatement (Second) of Torts* § 774B, Comment b (1979).

15. *Allen v. Leybourne*, 190 So.2d 825 (Fla.App. 1966).

16. *Holt, supra* note 11.

17. *See, e.g., Hammons, supra* note 11; *Davison v. Feuerherd*, 391 So.2d 799 (Fla.App. 1980).

18. *Restatement (Second) of Torts* § 774B, Comment c.

19. *In re Marshall*, 253 B.R. 550, 560 (Bankr.C.D.Cal. 2000).

20. *Restatement (Second) of Torts* § 774B, Comment e.

21. *King, supra* note 11.

22. *Restatement (Second) of Torts* § 774B, Comment e.

23. *Lindberg v. U.S.*, 927 F.Supp. 1401 (D.Colo. 1996), *aff'd* 164 F.3d 1312 (10th Cir. 1999).

24. *In re Estate of Roeseler*, 679 N.E.2d 393 (Ill.App. 1997).

25. *Smith v. Chatfield*, 797 S.W.2d 508 (Mo.App. 1990).

26. *Huffey, supra* note 11.

27. *Ebeling v. Voltz*, 454 So.2d 783, 785 (Fla.App. 1984).

28. *Carlton v. Carlton*, 575 So.2d 239 (Fla.App. 1991).

29. CRS §§ 15-12-801 *et seq.*

30. CRS § 13-80-108(8). ■