

A DISAPPOINTED YANKEE IN CONNECTICUT (OR NEARBY)  
 PROBATE COURT:<sup>†</sup> TORTIOUS INTERFERENCE WITH  
 EXPECTATION OF INHERITANCE—A SURVEY WITH ANALYSIS  
 OF STATE APPROACHES IN THE FIRST, SECOND, AND THIRD  
 CIRCUITS

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<sup>†</sup> With apologies to Mark Twain, A CONNECTICUT YANKEE IN KING ARTHUR’S COURT (1st ed. 1889).

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I. INTRODUCTION

Sometimes people marry for money, and sometimes people kill for money. But when someone has done you out of an inheritance, can you sue for money? That, in a nutshell, is the question of tortious interference with expectation of inheritance.<sup>1</sup>

Traditionally, the answer to that question was clearly “no.” Back in the nineteenth century, the only remedy available to persons disappointed by the contents of a will was a will contest, known in some states as a “*caveat* proceeding.”<sup>2</sup> A will contest, which usually takes place in a specialized state probate court, is an *in rem* proceeding against the estate of the decedent.<sup>3</sup>

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1. This Article is the third in a series of articles comprising a nationwide survey and analysis of this tort. See 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) [hereinafter *Fourth Circuit Survey*], and 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) [hereinafter *Fifth and Eleventh Circuit Survey*]. Because the law in this area is rapidly changing, this Article will indicate in footnotes, where relevant, changes in the law of the other states since the prior Articles appeared.

2. See, e.g., DEL. CODE ANN. tit. 12, § 1308 (2004) (“Caveat against allowance of instrument as will; procedure.”); *Pope v. Kingsley*, 191 A.2d 33, 35 (N.J. 1963); *Estate of McKee*, 108 A.2d 214 (Pa. 1954).

3. See, e.g., *Moore v. Graybeal*, 670 F. Supp. 130, 132 (D. Del. 1987) (“[A]ctions to set aside a will or its probate or to administer the estates of decedents [are] *in rem* . . . .”); *United States v. Marina Realty Co.*, 82 F. Supp. 640, 644 (D.P.R. 1949) (“[P]robate proceedings are *in rem* or quasi *in rem*.”); *Gardner v. Balboni*, 588 A.2d 634, 637 (Conn. 1991) (“The offer for probate of a putative will is in essence a proceeding *in rem*.”); *Patterson v. Patterson*, 182 A.2d 672, 673 (Me. 1962) (recognizing that a probate decree is judgment *in rem*); *Old Colony Trust Co. v. Bailey*, 88 N.E. 898, 900 (Mass. 1909); *Protective Check Writer Co. v. Theodore Collins*, 23 A.2d 770, 774 (N.H. 1942) (stating a probate decree is judgment *in rem* as to all persons constructively notified by publication of the proceeding); *Buckley v. Howard Sav. Inst.*, 186 A. 52, 53 (N.J. Sup. Ct. 1935) (“[G]ranteeing of probate and administration is a proceeding *in rem* . . . .”); *In re Estate of Roe*, 316 N.Y.S.2d 785, 789 (N.Y. Sur. Ct. 1970); *Mangold v. Neuman*, 91 A.2d

Generally, the estate bears the cost of defending the proffered will.<sup>4</sup> In theory, a will contest offers all interested parties the opportunity to determine whether the document presented for probate is in fact the testator's last will (not revoked, superseded, or procured by fraud or undue influence), and to establish the disposition intended by the deceased. This 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).

In some situations, however, a will contest will not accomplish its desired ends. To begin with, if an intended beneficiary is not related to the testator or named in a prior instrument, he or she may lack standing to bring a will contest at all. For those who have standing, even if the contest is successful

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904, 905 (Pa. 1952) (probate "decree is a decree *in rem*"); *O'Brien v. Costello*, 216 A.2d 694, 698 (R.I. 1966) (recognizing that a judgment, insofar as it affects personality within the state, is *in rem*); *Everett v. Wing*, 156 A. 393, 395 (Vt. 1931) ("In this state the probate of a will is a proceeding *in rem*."); 79 AM. JUR. 2D *Wills* § 743 (2003).

4. In some cases, the estate also pays the costs of certain good-faith challenges to the will. Curtis E. Shirley, *Tortious Interference with an Expectancy*, 41 RES GESTAE, Oct. 1997, at 16 ("Normally, the estate pays both defense attorney fees and those of a plaintiff making a good faith attempt to probate a prior will."). See, e.g., CONN. GEN. STAT. § 45a-294 (2001) (authorizing payment of fees to executors for costs of defending wills regardless of outcome); ME. REV. STAT. ANN. tit. 18-A, § 1-601 (1981) ("In contested cases in the original or appellate court of probate, costs may be allowed to either party, including . . . attorney's fees, to be paid to either or both parties, out of the estate in controversy, as justice requires. In those cases where a will is being contested on the grounds of undue influence or mental capacity, attorney's fees and costs shall not be allowed to the party contesting the will if he is unsuccessful."); MASS. GEN. LAWS ANN. ch. 215, § 45 (2004) ("In contested cases before a probate court or before the supreme judicial court on appeal, costs and expenses in the discretion of the court . . . may be awarded to either or both parties to be paid out of the estate which is the subject of the controversy, as justice and equity may require. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his counsel or may be apportioned between them."); N.Y. Surr. Ct. Proc. Act Law §§ 2301-03 (McKinney 1966); *Atchison v. Lewis*, 38 A.2d 673, 675-76 (Conn. 1944) (holding a probate court has power to direct that payment be made out of estate for reasonable attorney's fees to unsuccessful contestant); *Ableman v. Katz*, 481 A.2d 1114, 1120-21 (Del. 1984), *overruled on other grounds*; *In re Will of Melson*, 711 A.2d 783, 788 (Del. 1998) (holding an estate may be required to pay fees and costs of unsuccessful party seeking review of will in cases with "compelling special equity," where losing party has demonstrated (1) probable cause and (2) "exceptional circumstances"); *In re Macklin*, No. 1354, 1991 WL 67799, at \*2 (Del. Ch. Apr. 17, 1991) ("[O]ur law does recognize that in some circumstances a losing party in a will contest can be awarded their reasonable costs of prosecuting the action, including attorneys' fees. Most notably it is normal for one defending a presumptively valid will to be awarded reasonable costs of litigation, including attorneys' fees, from the estate even if that party fails to prevail. . . . In addition, it sometimes happens that an estate is required to pay the costs of a challenge to a presumptively valid will, when that challenge fails."); *In re Reisdorf*, 403 A.2d 873, 876 (N.J. 1979) ("Our courts currently hold . . . [e]xcept in a weak or meretricious case, courts will normally allow counsel fees to both proponent and contestant in a will dispute."). See also HARRIS 5TH N.Y. ESTATES: PROBATE ADMIN. AND LITIGATION 19:280, "Costs in will contests."

and the will is denied probate, there is no guarantee that the testator's intended disposition will take the contested will's place. The disappointed person may be unable to prove to the satisfaction of the probate court that he or she is entitled to anything. In other cases, the decedent may die intestate, having been prevented from making a will in favor of a particular person, raising similar problems of proof.<sup>5</sup> Sometimes, an expected inheritance takes the form of benefits under a revocable trust or other non-probate asset, not covered by the will and, hence, not reachable by the probate court. The estate may have been depleted through wrongfully-procured *inter vivos* transfers. As a practical matter, disappointed heirs may settle for considerably less than they are entitled to receive in order to avoid dissipating the estate through a lengthy and expensive will contest. In these and other situations,<sup>6</sup> a will contest simply does not offer the disappointed person a way to obtain the intended legacy, and may actually prevent it.

Nor will a constructive trust, the traditional equitable remedy preferred by some states (most especially, New York), fully compensate certain potential tort plaintiffs or deter certain tort defendants. First, the constructive trust remedy is necessarily imposed upon the person in possession of the estate assets. If that person is not the one who committed the misconduct, the remedy prevents unjust enrichment (and carries out the testator's actual intentions), but does not penalize the wrongdoer. If "the defendant has sold the legal interest to a bona fide purchaser for value and dissipated the proceeds . . . a constructive trust could neither reach the legal interest nor attach to the proceeds."<sup>7</sup> The constructive trust remedy is also subject to equitable defenses inapplicable to a tort action at law. An action to impose a

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5. Because the tort covers situations in which the would-be testator was prevented from making a will by the tortfeasor, it is an overstatement to say, as one commentator does, that "[t]he tort assumes a confluence of an overt act by the testator and wrongful conduct by the defendant which precipitate change in an estate plan." Shirley, *supra* note 4, at 17. There may be no such overt act, and a change may be *prevented* rather than caused by the tortious conduct.

6. Some of these examples are drawn from Shirley, *supra* note 4, at 16, which contains other examples as well. Another commentator has creatively suggested that the already-born children of a comatose man might have an action for tortious interference with expectation of inheritance against a woman who arranges to have a doctor "harvest" their father's sperm involuntarily and impregnate her with it, resulting in the birth of another heir. Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS U.L.J. 451, 456-57 (2000). The doctor is another possible defendant. *Id.* at 459.

7. Paul F. Driscoll, *Tortious Interference with the Expectancy of a Legacy: Harmon v. Harmon*, 32 ME. L. REV. 529, 536-37 n.38 (1980). Driscoll notes that a different equitable remedy, unjust enrichment, might render the defendant "liable to the plaintiff for the entire value of the legal interest" under these circumstances. *Id.* at 537 n.38.

constructive trust does not include compensatory or actual damages, punitive damages, or the right to a jury trial. A separate pecuniary award is available only where, and to the extent, necessary to accomplish complete relief.

As a result, more and more courts have recognized the need for a remedy outside the probate process and equity.<sup>8</sup> The tort of intentional interference with expectation of inheritance<sup>9</sup>—recognized by some, but by no means all, of the states<sup>10</sup>—is one way of remedying such wrong-doing.

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8. An early commentator identified four proposed remedies, three in equity/probate, one at law, depending somewhat on the type of interference: “(1) the raising of a constructive trust; (2) resistance to or setting aside of probate in the probate court; (3) setting aside of probate in equity; (4) a tort action for wrong to the plaintiff’s expectancy or some substantially equivalent action at law or in equity.” Alvin E. Evans, *Torts to Expectancies in Decedents’ Estates*, 93 U. PA. L. REV. 187, 187 (1944). Some courts evaluate the tort remedy in comparison to such remedies as an equitable action for rescission or a constructive trust. See, e.g., *Geduldig v. Posner*, 743 A.2d 247, 256-57 (Md. Ct. Spec. App. 1999) (“Traditionally, claims attacking the distribution of estate and trust assets based on undue influence and fraud were equitable actions. Equity courts could award pecuniary relief if necessary to accomplish complete relief (e.g., when dissipation of assets prevented the traditional equitable remedy). But these decisions were in the context of traditional equitable remedies such as rescission, specific performance, injunctive relief, constructive trusts, and the like . . . . In actions to set aside wills or trusts, equity focused on rectifying a situation wherein the testator or the settlor was not able to dispose of his or her estate freely . . . . The correction of that harm was a result of righting the wrong to the testator or settlor.”) See also Mark R. Siegel, *Unduly Influenced Trust Revocations*, 40 DUQ. L. REV. 241, 255-63 (2002) (comparing remedies and arguing that constructive trust should be preferred to tort remedy for interference with trust).

9. Courts and commentators call the tort by a variety of names, as these article titles illustrate: *Fifth and Eleventh Circuit Survey*, *supra* note 1; *Fourth Circuit Survey*, *supra* note 1; George J. Blum, Annotation, *Action for Tortious Interference with Bequest as Precluded by Will Contest Remedy*, 18 A.L.R. 5th 211 (1994); Driscoll, *supra* note 7, at 529; James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Traps*, 36 ARIZ. ATT’Y 26 (2000); Nita Ledford, Note, *Intentional Interference with Inheritance: Primary Remedy or Last Recourse*, 5 CONN. PROB. L.J. 295 (1991); Steven 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 or Inheritance*, 47 J. MO. B. 563 (1991); Shirley, *supra* note 4; Sonja Soehnel, Annotation, *Liability in Damages for Interference with Expected Inheritance or Gift*, 22 A.L.R. 4th 1229 (1983) (updated with post-1983 cases). These are all treated as synonyms.

10. See *infra* Parts III, IV, and V. Although a detailed survey of all fifty states is beyond the scope of a single Article, just fewer than half of the states recognize it, while about a quarter have no reported cases addressing it. The remaining twelve states have either explicitly declined to recognize the tort, or have declined to decide whether to recognize it. It should be noted that it is not always clear whether a state has recognized the tort. For example, in some states, the court speaks approvingly of the tort in general, but declines to allow the plaintiff to proceed on the particular facts or allegations of the instant case. The tort is currently recognized in at most twenty-three states: Colorado (*Peffer v. Bennett*, 523 F.2d 1323, 1325 (10th Cir. 1975) (stating that a federal court in Colorado has recognized the tort)); Connecticut (*Benedict v. Smith*, 376 A.2d 774, 775 (Conn. Super. Ct. 1977)), discussed *infra* Part III.B; Florida (*DeWitt v. Duce*, 408 So. 2d 216, 218 (Fla. 1981)); Georgia (*Mitchell v. Langley*, 85 S.E. 1050, 1050-51 (Ga. 1915),

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*but see* Copelan v. Copelan, 583 S.E.2d 562, 563 (Ga. Ct. App. 2003) (affirming summary judgment for the defendants and holding, without mentioning *Mitchell* or *Morgan v. Morgan*, 347 S.E.2d 595 (Ga. 1986), “[t]he plaintiffs can point to no Georgia law, and we can locate no Georgia law, recognizing a claim for tortious interference with an expectancy of inheritance upon someone’s death”) (*see also Fifth and Eleventh Circuit Survey, supra* note 1, at 121-24); Illinois (Robinson v. First State Bank, 454 N.E.2d 288, 293 (Ill. 1983)); Indiana (Minton v. Sackett, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996)); Iowa (Huffey v. Lea, 491 N.W.2d 518, 520 (Iowa 1992)); Kansas (Axe v. Wilson, 96 P.2d 880, 888 (Kan. 1939)); Kentucky (Allen v. Lovell’s Adm’x, 197 S.W.2d 424, 425-26 (Ky. 1946)); Louisiana (McGregor v. McGregor, 101 F. Supp. 848, 849-50 (D. Colo. 1951) (probably applying Louisiana law), *aff’d*, 201 F.2d 528 (10th Cir. 1953)); Maine (Cyr v. Cote, 396 A.2d 1013, 1018 (Me. 1979), discussed *infra* Part IIIA.1.a); Massachusetts (Labonte v. Giordano, 687 N.E.2d 1253, 1255 (Mass. 1997), discussed *infra* Part IIIA.2); Michigan (Creek v. Laski, 227 N.W. 817, 818 (Mich. 1929)); Missouri (Hammons v. Eisert, 745 S.W.2d 253, 258 (Mo. Ct. App. 1988)); New Jersey (Casternovia v. Casternovia, 197 A.2d 406, 409 (N.J. Super. Ct. App. Div. 1964), discussed *infra* Part III.C.1); New Mexico (Doughty v. Morris, 871 P.2d 380, 383 (N.M. Ct. App. 1994)); North Carolina (Dulin v. Bailey, 90 S.E. 689, 689-90 (N.C. 1916)); Ohio (Firestone v. Galbreath, 616 N.E.2d 202, 203 (Ohio 1993)); Oregon (Allen v. Hall, 974 P.2d 199, 202 (Or. 1999) (en banc)); Pennsylvania (Cardenas v. Schober, 783 A.2d 317, 327 (Pa. Super. Ct. 2001), discussed *infra* Part III.C.2.a); Texas (King v. Acker, 725 S.W.2d 750, 754 (Tex. App. 1987)); West Virginia (Barone v. Barone, 294 S.E.2d 260, 263-64 (W. Va. 1982)); and Wisconsin (Wickert v. Burggraf, 570 N.W.2d 889, 890 (Wis. Ct. App. 1997)). The following thirteen states have reported cases at the state supreme court or appellate level addressing the tort and either declining to recognize it or declining to determine whether it is recognized: Alabama (*Ex parte* Batchelor, 803 So. 2d 515, 518-19 (Ala. 2001) (Harwood, J., dissenting)); Arkansas (Jackson v. Kelly, 44 S.W.3d 328, 328 (Ark. 2004)); California (Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197, 199 (Cal. Ct. App. 1995) (“The second count suggested a theory—recognized in several states but not previously validated in California—of intentional interference with an expected inheritance or gift.”); Montegani v. Johnson, No. F041158, 2003 WL 21197217, at \*1 (Cal. Ct. App. May 21, 2003) (“The only issue raised by appellant on this appeal is whether a cause of action in tort for intentional interference with economic advantage includes interference with a prospective right to inherit. We conclude it does not.”)); Delaware (Chambers v. Kane, 437 A.2d 163, 164 (Del. 1981), discussed *infra* Part IV.B.1); Hawai’i (Foo v. Foo, No. 24158, 2003 WL 220495, at \*1 (Haw. Ct. App. Jan. 10, 2003) (“[N]one of this case [alleging, *inter alia*, ‘Interference with Inheritance Expectancy’ as Count III, based on wrongfully-procured transfers from an *inter vivos* trust] belongs in the civil court and all of it belongs in the probate court.”)); Maryland (Geduldig v. Posner, 743 A.2d 247, 255-57 (Md. Ct. Spec. App. 1999)); Minnesota (Botcher v. Botcher, No. CX-00-1287, 2001 WL 96147, at \*2 (Minn. Ct. App. Feb. 6, 2001) (unpub.) (“[C]reating a new tort is not the function of this [appellate] court. . . . Even if this court has the power to recognize the tort of interference with inheritance, we decline to do so in this case . . . .”)); Montana (Hauck v. Seright, 964 P.2d 749, 753 (Mont. 1998)); New York (Vogt v. Witmeyer, 665 N.E.2d 189, 190 (N.Y. 1996), discussed *infra* Part IV.A); Oklahoma (*In re* Estate of Estes, 983 P.2d 438, 442 n.2 (Okla. 1999)); South Carolina (Douglass *ex rel.* Louthian v. Boyce, 542 S.E.2d 715, 717 (S.C. 2001)); Tennessee (Fell v. Rambo, 36 S.W.3d 837, 850 (Tenn. Ct. App. 2000)); and Virginia (Economopoulos v. Kolaitis, 528 S.E.2d 714, 720 (Va. 2000)). A Washington case mentions the tort, without making clear whether it is recognized or not. *See* Hadley v. Cowan, 804 P.2d 1271, 1275 (Wash. Ct. App. 1991) (“The [plaintiffs] claim that the probate court could not have considered actions in tort, such as . . . the tort of interference with a parent’s testamentary gifts. This is not the law in Washington, however.”). The Wyoming Supreme Court dismissed an appeal from an order admitting a will to probate during the pendency of a civil action alleging, *inter alia*, intentional interference with expected inheritance (one of twelve causes of action). *See* Estate of McLean *ex rel.* Hall v. Benson, 71 P.3d 750, 754 (Wyo. 2003) (“[T]he civil suit will determine what assets belong to the estate.”). The remaining twelve states (Alaska, Arizona, Idaho, Mississippi, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Utah, and Vermont) have no reported cases

In Part II, the tort is briefly described and further elaboration of the rationale for recognizing it is offered. Part III describes the current status of the tort in the First, Second, and Third Circuit states that recognize it, namely, Maine, Massachusetts, Connecticut, New Jersey, and Pennsylvania, and provides an analysis of the elements of the tort and reported cases in each state. Part IV reviews the law in New York and Delaware, the two states in the Second and Third Circuits, respectively, that have explicitly declined to recognize the tort. Part V surveys the law of expectancy torts generally in the remaining states and jurisdictions of the First, Second, and Third Circuits (New Hampshire, Rhode Island, Puerto Rico, Vermont, and the Virgin Islands), where no cases addressing the tort have yet been reported.

Because neighboring states take different approaches to the tort, Part VI addresses choice of law. Unlike the probate process, where the law of the forum generally applies, contemporary choice of law in tort cases is considerably more complex than *lex fori*, or even *lex loci delicti*, the traditional “place of wrong” test.<sup>11</sup> If all the parties involved are domiciled in the state, and all alleged tortious acts took place there, courts in states recognizing the tort will almost certainly apply their own law and allow the suit,<sup>12</sup> while courts in states not recognizing the tort will dismiss any such claim. However, if the tort suit involves parties and events in multiple states, the forum state’s choice of law approach for tort cases will be necessarily implicated.

Among states and jurisdictions in the First, Second, and Third Circuits, at least six different approaches to tort choice of law are in use.<sup>13</sup> In determining which jurisdiction’s law to apply, each evaluates, in various ways, the connection between the tort claim and states other than the forum. As a result, a tort suit may be viable in the state in which the will was probated, even if that state does not recognize the tort. A tort suit may also be filed in a state that is not the probate state. Alternatively, in a state that recognizes the tort, the tort choice of law approach may nevertheless lead to

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addressing or even mentioning the tort, nor do Puerto Rico or the Virgin Islands, discussed *infra* Part V, or Washington, D.C.

11. “The traditional [tort] conflicts test, incorporated into the First Restatement, was that the law of the state where the wrong occurred governed the cause of action.” LEA BRILMAYER & JACK L. GOLDSMITH, *CONFLICT OF LAWS* 17 (5th ed. 2002).

12. A tort state court may do this even in a multistate, diversity case. See *Hegarty v. Hegarty*, 52 F. Supp. 296, 300 n.2 (D. Mass. 1943) (instructing the jury under Massachusetts law), discussed *infra* Part III.A.2.

13. See *infra* Part VI.

application of the law of a non-tort state and dismissal of the claim. This presents a variety of hazards and opportunities for litigants and practitioners, in both tort and non-tort states alike.

Once a choice of law analysis has been done and the plaintiff has determined which state to sue in, the plaintiff must also determine whether to sue in a state or federal court (which will not affect which state's law is applied<sup>14</sup>). Part VII briefly discusses the availability of a federal forum for the tort claim in light of the "probate exception" to federal diversity jurisdiction, which bars a federal court not only from probating a will or administering an estate, but also from hearing a variety of claims deemed ancillary to, or an improper interference with, probate.<sup>15</sup> Thankfully, in those states that recognize the tort, the "probate exception" is unlikely to apply and thus bar diversity jurisdiction in federal court.<sup>16</sup> Where state law is less clear, recognition of the tort and application of the probate exception involve an analysis of very similar, even overlapping, factors, such that lack of subject matter jurisdiction and denial of recognition to the tort tend to go hand in hand.

## II. A BRIEF DESCRIPTION OF THE TORT AND ITS RATIONALE<sup>17</sup>

Although tortious interference with expectation of inheritance did not appear by that name in the Restatement of Torts until the Restatement (Second) of Torts in 1979, the notion of awarding damages for interference torts, including interference with *inter vivos* and testamentary gifts, can be found in the Restatement (First) of Torts Section 870 and Section 912, together with their explanatory Comments and Illustrations.

Restatement (First) of Torts Section 870 states in relevant part: "[a] person who does any tortious act for the purpose of causing harm to another

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14. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 491 (1941), a federal district court sitting in diversity is required to apply the choice of law approach of the state in which it sits. *Klaxon* therefore extends the rationale of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to the choice of law setting.

15. See *Markham v. Allen*, 326 U.S. 490, 493-94 (1946); for First, Second, and Third Circuit interpretations of *Markham*, see *Mangieri v. Mangieri*, 226 F.3d 1, 2 (1st Cir. 2000); *Dulce v. Dulce*, 233 F.3d 143, 145 (2d Cir. 2000); *Moore v. Graybeal*, 843 F.2d 706, 709-10 (3d Cir. 1988), and cases cited therein.

16. *But see Storm v. Storm*, 328 F.3d 941, 945 (7th Cir. 2003); *Dragan v. Miller*, 679 F.2d 712, 717 (7th Cir. 1982).

17. A more complete description of the tort and its rationale can be found in *Fourth Circuit Survey*, *supra* note 1, at 263-72, and *Fifth and Eleventh Circuit Survey*, *supra* note 1, at 87-96.

or to his things or to the pecuniary interests of another is liable to the other for such harm if it results.”<sup>18</sup> Although this language is very general, Comment b provides that “[t]he rule also applies to allow recovery where the plaintiff has been prevented from receiving a gift from a third person.”<sup>19</sup> Illustrations 2 and 3 apply this rule to *inter vivos* and testamentary gift situations, respectively. Illustration 2, whose substance charmingly betrays its Depression-era origins, states:

A, who is zealous in the cause of labor, is about to make a gift to B, a college, when C, for the purpose of preventing the gift, falsely represents that the president of B is opposed to collective bargaining. As a result, A refuses to make the gift which otherwise he would have made. B is entitled to maintain an action of tort against C.<sup>20</sup>

Notice that the liability of C to B does not require that C received the gift instead, or indeed, that C obtained any tangible benefit at all.

Illustration 3 states:

A is desirous of making a will in favor of B and has already prepared but has not signed such a will. Learning of this, C, who is the husband of A's heir, kills A to prevent the execution of the will, thereby depriving B of a legacy which otherwise he would have received. B is entitled to maintain an action against C.<sup>21</sup>

Notice that here, by contrast, C obtains a benefit, albeit an indirect one; his interference enables his wife to inherit. Still, C's liability to B will be in personam—the action does not reach the estate assets.

While Section 870 is a very general liability-creating rule, Restatement (First) of Torts Section 912 specifically addresses tortious interference. It states: “Where a person can prove that but for the tortious interference of another, he would have received a gift or a specific profit from a transaction, he is entitled to full damages for the loss which has thus been caused to him

18. RESTATEMENT (FIRST) OF TORTS § 870 (1939). RESTATEMENT (SECOND) OF TORTS § 870 (1979), is worded rather differently. It provides, “One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.” *Id.* The use of *Restatement (Second) of Torts* § 870 to support a claim of intentional interference with expectation of inheritance was disapproved in *Beren v. Ropfogel*, 24 F.3d 1226, 1227, 1230 (10th Cir. 1994) (Kansas).

19. RESTATEMENT (FIRST) OF TORTS § 870 cmt. b (1939). Neither this Comment, nor any discussion of inheritance or gift, appears in RESTATEMENT (SECOND) OF TORTS § 870 (1979).

20. RESTATEMENT (FIRST) OF TORTS § 870 cmt. b, illus. 2 (1939). This Restatement section and Illustration are cited in *Harmon v. Harmon*, 404 A.2d 1020, 1024 (Me. 1979). This Illustration does not reappear in the RESTATEMENT (SECOND) OF TORTS.

21. RESTATEMENT (FIRST) OF TORTS § 870 cmt. b, illus. 3 (1939).

(see Illustration 13).”<sup>22</sup> Although it might not be entirely clear whether this rule is meant to apply to inheritances, Illustration 13 provides an explicitly testamentary example:

A is a favorite nephew of B in whose favor B tells C, an attorney, to draw a will, devising one-half of B’s property to A. C, who is B’s son and heir, pretending compliance with his mother’s wishes, intentionally draws an ineffective will. B dies believing that one-half of her property will go to A. A is entitled to damages from C to the extent of the net value to A of one-half of the property of which B died possessed.<sup>23</sup>

A few other things are notable about this illustration. First, A apparently lacks standing in probate court because C is the heir. Moreover, even if A had standing as a taker under the invalid will, A would not be able to prove up the intended gift in probate court because the will is “ineffective.” Third, the remedy is legal, not equitable, even though imposition of a constructive trust on C to the extent of one-half would appear to provide an adequate remedy for A. Finally, it is notable that C is an attorney.<sup>24</sup>

At least as early as 1939, therefore, there was widespread understanding (if not agreement) about the need for a remedy outside probate and equity for persons injured in this way who were unable to obtain relief from the probate court.

By 1979, the tort as such was included in the Restatement (Second) of Torts, where Section 774B provides: “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.”<sup>25</sup> The Restatement (Second) classifies the tort with other commercial and non-commercial “interference” torts, like interference with contract, interference with prospective economic advantage, interference with prospective employment or business relations, and interference with gift—all torts based on wrongful interference with an expectancy. Section 774B comprises all of chapter 37A,

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22. RESTATEMENT (FIRST) OF TORTS § 912 cmt. f (1939). Nearly the identical language appears in RESTATEMENT (SECOND) OF TORTS § 912 cmt. f, illus. 15 (1979): “[I]f a person can prove that but for the tortious interference of another, he would have received a gift or a specific profit from a transaction, he is entitled to full damages for the loss that has thus been caused to him.” My attention was drawn to this Restatement section by Driscoll, *supra* note 7, at 539 n.48.

23. RESTATEMENT (FIRST) OF TORTS § 912 cmt. f, illus. 13 (1939). The identical illustration reappears in RESTATEMENT (SECOND) OF TORTS § 912 cmt. f, illus. 15 (1979).

24. See discussion *infra* at Part VI.D for tortious interference claims alleged against lawyers by non-clients, thereby avoiding privity restrictions on malpractice suits.

25. RESTATEMENT (SECOND) OF TORTS § 774B (1979).

“Interference With Other Forms Of Advantageous Economic Relations,” which is a subpart or addendum to chapter 37, “Interference With Contract Or Prospective Contractual Relation.”<sup>26</sup>

The most recent American Law Reports (“A.L.R.”) annotation on the subject identifies five elements of the tort: “[T]he 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.”<sup>27</sup> However, not every state that recognizes the tort employs the Restatement or A.L.R. formulations, and of course not every state recognizes the tort at all. Like the statistics for the U.S. as a whole, just half of the states in the First, Second, and Third Circuits (five of ten) recognize it.<sup>28</sup>

26. One commentator states, “The cause of action for tortious interference with inheritance expands tort liability for interference with prospective advantages. . . . Since English common law recognized the tort of interference with prospective relations, tortious interference with inheritance is traceable to that law.” Marmai, *supra* note 9, at 297.

27. Soehnel, *supra* note 9, at 1233.

28. The First, Second, and Third Circuits also include the Territory of the Virgin Islands and the Commonwealth of Puerto Rico, which have no reported cases. *See infra* Part V.

The U.S. has twelve unincorporated territories, also known as possessions, and two commonwealths.

The major possessions are American Samoa, Guam, and the U.S. Virgin Islands. . . . The major commonwealths are Puerto Rico and the Northern Marianas. . . . The residents of all of these places are full U.S. citizens, with the exception of those on American Samoa who are U.S. nationals, but not citizens.

Welcome to Puerto Rico website, at <http://welcome.topuertorico.org/government.shtml> (last visited Oct. 4, 2004). U.S. Commonwealths/Territories include: American Samoa, Baker Island, Howland Island, Guam, Jarvis Island, Kingman Reef, Midway Islands, Navassa Island, Northern Mariana Islands, Palau, Palmyra Atoll, Puerto Rico, U.S. Virgin Islands (St. Croix, St. John and St. Thomas), and Wake Island. *Id.* Puerto Rico is a self-governing Commonwealth in association with the United States. *Id.* It is part of the First Circuit for United States federal court purposes. Geographic Boundaries of United States Courts of Appeal and United States District Courts, at <http://www.uscourts.gov/alllinks.html> (last visited Oct. 4, 2004). The U.S. Virgin Islands is an unincorporated U.S. Territory. U.S. Virgin Islands Official Business, at [http://www.usvitourism.vi/en/home/vi\\_official\\_business.html](http://www.usvitourism.vi/en/home/vi_official_business.html) (last visited Oct. 4, 2004). It is part of the Third Circuit. 28 U.S.C. § 1294(3) (2004). *See also* Gov’t of the Virgin Islands v. Rivera, 333 F.3d 143, 145-46 (3d Cir. 2003) (“The Virgin Islands court structure consists of the Territorial Court of the Virgin Islands, which has original jurisdiction over local civil actions, local criminal actions, and certain other matters, 4 V.I. CODE ANN. § 76; 1993 V.I. Sess. Laws 5890, and the District Court of the Virgin Islands, which has ‘the jurisdiction of a District Court of the United States,’ as well as jurisdiction over certain other matters, 48 U.S.C. § 1612. . . . The United States Court of Appeals for the Third Circuit has ‘jurisdiction of appeals from all final decisions’ of the District Court when the District Court acts as a trial court and also in its capacity as the Appellate Division. 28 U.S.C. § 1291 (‘The court [ ] of appeals . . . shall have jurisdiction of appeals from all final decisions of . . . the District Court of the Virgin Islands. . . .’); 48 U.S.C. § 1613a(c) (‘The United States Court of Appeals for the Third Circuit shall have jurisdiction of appeals from all final decisions of the district court on appeal from the courts established by local law.’).”).

The need for the tort is most clearly demonstrated by situations in which the probate court fails by its own standards—that is, when probate proceedings cannot fully correct a wrongful attempt to frustrate the testator’s desires. Here are just a few examples.

Example 1: *When the Tortfeasor Is an Intestate Heir*

Assume a testator-parent wishes to divide the estate equally between a son and a daughter, but the son tortiously induces the parent to make a will much more favorable to him. Perhaps this will also names the son as executor. Should his sister bring a will contest, the estate will pay the costs of defending the will, and we can assume the son will defend the will vigorously. Should the sister succeed in her contest, and have the will struck down, the tortfeasor will still collect his one-half share by intestacy or a prior will—the same inheritance he would have received had he never committed the tort (albeit reduced by half the cost of the defense, if he, as executor, elects to mount one—but her share will be similarly reduced). Only the costs of the contest would deter the tortious conduct just described.<sup>29</sup>

Example 2: *The Would-Be Beneficiary Without Standing*

Assume the testator wishes to make a bequest to an unrelated companion (not a spouse or parent of the testator’s children) or an entity like a foundation. A third party’s tortious conduct (such as destruction of a will, codicil, or deed of trust, or prevention of its execution) prevents it. In many cases, the intended beneficiary, as neither an intestate heir nor a taker under a prior will, lacks standing to bring a will contest at all. In other cases, even if the beneficiary has standing, it may be impossible to prove up the gift. The testator, of course, is unable to testify, and the contestant’s own testimony

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29. This factual situation occurred in *Glickstein v. SunBank/Miami*, 922 F.2d 666, 669 (11th Cir. 1991), discussed in *Fifth and Eleventh Circuit Survey*, *supra* note 1, at Part III.B.1, except with five nieces and nephews rather than two siblings. The tortfeasor received one-quarter of the residuary estate under a valid prior will, and one-half of the residuary estate under the later will he procured by undue influence. *Glickstein*, 922 F.2d at 669. Hence, the successful probate challenge simply left him in the same position as if he had never committed the tort. *Id.* at 670. Fassold has described a similar situation, somewhat misleadingly, as “the perfect crime.” Fassold, *supra* note 9, at 26 (“[The tortfeasor] has virtually nothing to lose . . . [If the wrongfully-procured will is set aside] he is right back where he started, with no penalty paid for his conduct. . . . [A]nd regardless of the outcome, [the] estate pays for [the wrongdoer’s] lawyers.”). The same situation results if the tortfeasor outright forges a will, but ultimately fails to have it probated.

alone is typically insufficient in probate court.<sup>30</sup> Worse yet, if the will contest succeeds, the tortfeasor may actually receive a *larger* share of the estate, depending on how intestacy compares to the proffered will.<sup>31</sup>

Example 3: *The Beneficiary "Cut Out" of the Will*

The tortfeasor might use undue influence to induce a testator to replace the name of one beneficiary with that of the tortfeasor in a will (or trust). Even if the probate court declined to probate the affected provision of the will, it would not restore the gift or penalize the tortfeasor. If the tortfeasor were a residuary beneficiary, he might still benefit.

Example 4: *Inter Vivos Conveyances that Deplete the Estate*

The tortfeasor may use undue influence or fraud to induce the donor to make *inter vivos* transfers that deplete the estate. There is no change in the will as written and executed, but specific gifts of particular items of personal or real property are adeemed and out of the estate by the time the will takes effect, and/or the assets needed to satisfy pecuniary gifts to others are no longer owned by the testator. If the tortfeasor is the personal representative of the estate, it is unlikely that the estate will attempt to recapture such assets even if this were possible.

Despite the demonstrated shortcomings of the probate system in these and similar situations,<sup>32</sup> in which the probate system cannot ensure that the

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30. This analysis applies to the situation in RESTATEMENT (FIRST) OF TORTS § 912 cmt. f, illus. 13 (1939).

31. For example, the intended disposition might be seventy-five percent to charity, fifteen percent to adult child A, and ten percent to adult child B, the tortfeasor. The disposition by will is sixty percent to child A, forty percent to child B. Under intestacy, the division is fifty percent to child A, fifty percent to child B. If the charity successfully contests the will but cannot establish the intended disposition, B "wins."

32. Evans, *supra* note 8, at 194, discusses a number of such situations. As Evans remarks, "it would be better to probate the will as an entirety and have the defendant declared a trustee. This would probably be a more adequate remedy than a tort action would be, but the latter action should be available." *Id.* (footnote omitted). Presumably, Evans comes to this conclusion on the basis of problems of proof the plaintiff might encounter in setting up the original bequest. Evans is especially vigorous in his advocacy of the tort in the destroyed evidence problem of proof cases:

Probate may be impossible because the defendant has deprived the plaintiff of the proof required to establish a will. This is a wrong involving the plaintiff's loss of evidence and a tort remedy should be available. This remedy constitutes no attack upon the probate decree. An essentially different cause of action is stated in the complaint. . . . [W]hile the plaintiff cannot have probate in equity [i.e., have the equity court set up the will], it does not follow that he could not have an action in tort because of his loss of evidence, which loss made probate impossible.

testator's testamentary desires are carried out, the tort faces a further problem—the inherently speculative and uncertain interest the tort plaintiff possesses.<sup>33</sup> Even without the interference, the tort plaintiff might never have received anything. There is no right to inherit, and a competent donor-testator is free at any time to alter a disposition. Alternatively, the property might be lost some other way. What then is there, legally speaking, to be interfered *with*? Some courts refuse to recognize the tort primarily for this reason.<sup>34</sup> They simply are not prepared to extend legal protection to an interest that might never take effect. Advocates of the tort acknowledge this vulnerability, but argue that what the tort protects is not a non-existent right to inherit, but rather the right not to be interfered with in receiving an inheritance. Like a river, the flow of the testator's generosity might have changed course and left the would-be beneficiary high and dry. But this does not give a third party the right to divert it away from another and toward himself. Seen this way, the tort protects both free testation and beneficiary expectations.<sup>35</sup>

Other courts refuse to recognize the tort because it would improperly interfere with the probate process.<sup>36</sup> However described, there is no disguising the acute threat the tort poses to the core business of the probate court.<sup>37</sup> The

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*Id.* at 203-04 (citations omitted). Other examples are identified in Mignogna, *supra* note 9, at 48. Examples specifically involving undue influence in the creation and revocation of trusts are found in Siegel, *supra* note 8, at 258-63.

33. For example, being named in a will creates a right that is assignable only under limited circumstances. This issue is discussed in detail in Driscoll, *supra* note 7, at 533-36 and notes thereto.

34. See *Hall v. Hall*, 100 A. 441 (Conn. 1917) (discussing *inter vivos* conveyance); *Ross v. Wright*, 286 Mass. 269, 190 N.E. 514 (Mass. 1934) (discussing *inter vivos* gift of trust shares); *Hutchins v. Hutchins*, 7 Hill 104 (N.Y. Sup. Ct. 1845).

35. See Blum, *supra* note 9, at 217.

It is well established that a party to a contract, whether of employment or otherwise, has a right of action against one who has procured a breach or termination of the document by the other involved party. . . . Interference with a noncontractual relationship may be as actionable as interference with a contractual relationship.

*Evans*, *supra* note 8, at 187, 204 (arguing for a progressive extension of a tort remedy for the protection of interests in advantageous relations; “[p]rospective advantages may be protected,” citing, e.g., protection . . . to expectancies in decedents’ estates from fraudulent interference” as occupying “a twilight zone”; ultimately, *Evans* concludes “that interferences with benefits reasonably to be expected from decedents’ estates . . . are, after all, indistinguishable from interferences with prospective advantages in business relations and other types of cases”).

36. See, e.g., cases cited *supra* note 10 declining to recognize the tort.

37. As one commentator states, “[T]he tort can play havoc with traditional probate law.” Fassold, *supra* note 9, at 30. Of course, the tort also applies to *inter vivos* gifts. However, because effective *inter vivos* transfers can be quite informal, requiring little more than delivery, the tort is less likely to come into conflict with other aspects of the law of gifts.

central task of the probate court is to ensure distribution of decedents' estates in accordance with their expressed desires if testate, and otherwise in accordance with the state laws of intestate descent and distribution. In all states, testamentary transfers remain highly formal, and are further protected by special probate courts, which are usually given exclusive jurisdiction over wills and estate administration.<sup>38</sup> State law typically gives probate courts exclusive jurisdiction to determine whether a particular document is the testator's will (*devisavit vel non*), whether the testator had testamentary capacity, and otherwise to impeach or establish a will.

Yet, the tort remedy permits a court of general jurisdiction to render judgments that redistribute estate assets and, in effect, undermine the finality of probated wills (or probate decrees of intestacy). The tort litigation may determine either that a person was wrongly deprived of a bequest because the probated will was the product of undue influence, or that the true will was never probated because it was tortiously destroyed or suppressed, thus effectively impeaching the will, regardless of whether these arguments were made before the probate court. The tort case necessarily involves (re-)evaluating the testator's true intentions, allowing a prevailing plaintiff to

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38. See, e.g., N.Y. CONST. art. 6, § 12(d); CONN. GEN. STAT. § 45a-98 (1993 & Supp. 2004) (giving probate courts sole and exclusive jurisdiction over the settlement of estates); DEL. CODE STAT. tit. 12, § 2331 (2001) (providing for jurisdiction in the Court of Chancery to distribute assets of decedents' estates); ME. REV. STAT. ANN. tit. 18-A, § 3-105 (West 1998) (stating a probate court has exclusive jurisdiction over proceedings relating to estates of decedents, including determination of heirs); MASS. ANN. LAWS ch. 215, § 3 (West 1989 & Supp. 2004) ("Probate courts shall have jurisdiction of probate of wills, of granting administration on the estates of persons who at the time of their decease were inhabitants of or residents in their respective counties and of persons who die out of the commonwealth leaving estate to be administered within their respective counties . . . of all matters relative to the estates of such deceased persons and wards."); N.H. REV. STAT. ANN. § 547:3 (1997 & Supp. 2003) (stating the probate court has exclusive jurisdiction over probate of will and matters relating to administration of decedent's estates); N.Y. SURR. CT. PROC. ACT LAW §§ 201(3), 202 (2004) (stating that the surrogate's court has exclusive jurisdiction over all affairs of deceased); 20 PA. CONS. STAT. ANN. 20 § 711(1) (West 1975 & Supp. 2004) (granting jurisdiction of court of common pleas exercised through orphans' court division as to administration and distribution of decedents' estate); 4 VT. STAT. ANN. tit. 4, § 311 (1999 & Supp. 2003) (indicating a probate court has plenary and exclusive jurisdiction over the probate of wills and the settlement of estates); Dugdale v. Chase, 157 A. 430, 430-31 (R.I. 1931) ("The probate court has exclusive original jurisdiction in matters relating to the probating of wills."). But see N.J. STAT. ANN. §§ 3B:2-2, 2-3 (West 1983), and *In re Estate of Aich*, 395 A.2d 921 (N.J. Sup. Ct. Ch. Div. 1978) (providing for jurisdiction in the superior court over probate matters and strictly limiting powers of Surrogate to probate of wills, granting of letters of administration and certain other statutory functions); 32 P.R. LAWS ANN. § 2301 (2004) (dealing with probate conducted by "Court of First Instance" (Superior Court of the Commonwealth of Puerto Rico) in decedent's district of domicile at death); 4 V.I. LAWS ANN. § 76 (2004) (recognizing that the territorial court has jurisdiction over all civil matters including supervision and administration of estates).

establish a different disposition than the one found in the probated document. An unappealed, unreversed probate decree may, in effect, be set aside. If the tortfeasor was a taker under the will or intestacy (as is typical), as a practical matter the judgment will probably come out of the inheritance, effectively redistributing estate assets. In these ways and others, a common law court that recognizes the tort may, in effect, invalidate or modify a probated will or establish a will for a decedent already adjudicated to have died intestate or testate under another instrument.<sup>39</sup>

The existence of a common law tort remedy also threatens the integrity of the probate system at the procedural level. Probate law requirements for proving a testamentary disposition, including, for example, multiple witnesses, are non-existent in courts of general civil jurisdiction, which require plaintiffs to prove the elements of a tort—including the existence of the expectancy itself—by a simple preponderance of the evidence. Validating the tort seems to require or allow the court to second-guess a competent testator, and often in doing so, to rely on the testimony of a very interested third party. In addition, modern probate statutes of limitations for will contests are typically around a year, much shorter than the corresponding tort statutes.<sup>40</sup> These relatively relaxed tort procedures are one factor that has led some, though not all, states to require plaintiffs to exhaust probate remedies or demonstrate the inadequacy of those remedies before maintaining the tort action, or even to bar the remedy altogether.

Without such safeguards, the tort appears to pose a serious threat to the integrity and self-sufficiency of the probate regime by allowing a disappointed heir to ignore the probate process (with its time limits and special burdens of proof) entirely and pursue an inheritance in the form of damages at law. This approach inevitably derogates from the authority of the probate court, either

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39. See *Moore v. Graybeal*, 843 F.2d 706, 710 (3d Cir. 1988), discussed *infra* at Part IV.B.2. See also *Reaves*, *supra* note 9, at 565 (“[S]uch a tort action offends the probate code by seeking in effect the revocation of an accepted will and the probate of a rejected will.”).

40. In Maine, the applicable statute of limitations is “borrowed” from the underlying wrong. So, for example, if the tortious conduct alleged is fraud, the statute of limitations is six years from discovery of the fraud. *Burdzel v. Sobus*, 750 A.2d 573, 576 n.5 (Me. 2000) (citing ME. REV. STAT. ANN. tit. 14, § 859 (West 2003)). Maine has a “basic limitation period of three years within which it may be determined whether a decedent left a will and to commence administration of his estate.” Comment to ME. REV. STAT. ANN. tit. 18-A (West 1998). The time limit for appealing a decree of probate is one year. 20 PA. CONS. STAT. ANN. § 908 (West 1975 & Supp. 2004). Pennsylvania imposes a three-month statute of limitations on presentation of a “later” will or codicil. 20 PA. CONS. STAT. ANN. § 3138 (West 1975). The general statute of limitations for injury to personal property is two years. 42 PA. CONS. STAT. ANN. § 5524(7) (2004) (“Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct . . .”).

by redistributing estate assets if the defendant is a taker—a task generally within the exclusive jurisdiction of the probate court by state statute, or, by allowing a common law trial court to issue a judgment contradicting an unappealed probate court judgment which distributed estate assets differently. It is almost inevitable that a successful tort plaintiff will obtain a judgment from the civil court that is importantly inconsistent with that rendered by the probate court. The sense in which the tort is, or threatens to be, an impermissible collateral attack on the probate decree, therefore, cannot simply be defined away.

By this point, it should be clear that a state's decision to recognize the tort is more than a minor expansion of its tort scheme. Just as recognition of the tort of interference with prospective economic advantage adjusts the boundaries between tort and contract, the tort of interference with prospective inheritance alters the division of labor between the probate court and the general civil law court, and is not to be undertaken lightly.

### III. STATES RECOGNIZING THE TORT

Strictly speaking, of course, a state should only be said to “recognize” the tort if the state court of last resort (typically called the supreme court) has said it does. Of the five states in the First, Second, and Third Circuits with published opinions favorably addressing the tort, only Maine and Massachusetts meet this standard, and of the two, Maine has the better-developed jurisprudence. For the purposes of this Article, however, a state will be classified as “recognizing” the tort on lesser authority as well, including unreversed, unappealed cases at all levels. This results in some degree of uncertainty. For example, Connecticut Superior Court cases are both sympathetic and unsympathetic to the tort. One Connecticut federal district court has denied that Connecticut recognizes the tort, but the Second Circuit recently concluded that it does. The one published New Jersey case on the tort is an appellate case with dicta favorable to the tort so long as the donor is deceased. One Pennsylvania Superior Court Judge has written two opinions using the tort, and has convinced one federal district court judge that Pennsylvania recognizes it, although no state appellate case so holds. It should be noted that Massachusetts and Pennsylvania each apply versions of the tort significantly different than the one found in the Restatement (Second).

### A. *First Circuit*

Two states of the First Circuit, Maine and Massachusetts, recognize the tort. Maine generally follows the Restatement (Second) approach, but Massachusetts does not. New Hampshire, Rhode Island, and Puerto Rico have no reported cases.

#### 1. *Maine*

In the past twenty-five years, Maine has developed a significant body of law on tortious interference with expectation of inheritance. Nine decisions by Maine's Supreme Judicial Court ("SJC") between 1979 and 2000 have clarified the elements and scope of the tort in Maine, and several subsequent Superior Court cases have further applied it. Because Maine's first cases were decided the same year the tort first appeared in the Restatement (Second), obviously the early cases do not rely on it. However, later cases bring the Maine tort within the ambit of Restatement (Second) of Torts Section 774B. Very notably, nearly the entire body of Maine jurisprudence on the tort arises from disputes between siblings over wrongfully-procured *inter vivos* transfers from parents, rather than wrongfully-procured or wrongfully-prevented wills or revocations. With this focus, it is perhaps less surprising that Maine was the first state to permit the tort to lie even before the death of the testator. Maine also recognizes concurrent jurisdiction for the tort in the Superior Court and the probate court, and permits the injured party to elect a tort remedy without exhausting probate court remedies or demonstrating their inadequacy. Maine also has one of the very few reported cases of tortious interference alleged against an out-of-state estate-planning attorney—based on a wrongfully-prevented change to a will—putting Maine at the cutting edge even among states that recognize the tort.

##### a. *Cyr v. Cote*

Maine first recognized the tort in the 1979 case of *Cyr v. Cote*.<sup>41</sup> In this case, four of the decedent's seven children sued the other three, alleging that two of them used undue influence over their ill father to procure "deathbed"

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41. *Cyr v. Cote*, 396 A.2d 1013 (Me. 1979). This case is discussed in Driscoll, *supra* note 7, at 532-33 and 536-38, and notes thereto.

conveyances to them.<sup>42</sup> The conveyances were made in the hospital, four days before his death.<sup>43</sup> In this leading case, the alleged tortious interference resulted in *inter vivos* conveyances that depleted the estate. The plaintiffs did not challenge the validity of the will, or whether it represented the testator's intentions, but only the ultimate contents of the estate itself.

The Maine SJC first acknowledged that the plaintiffs' claims of undue influence and duress were not part of a will contest, and hence, could not be heard by the probate court.<sup>44</sup> Though the legal issue presented was the right to a jury trial on the undue influence and duress claims, the SJC treated it as a question of remedy, querying whether "any action can be maintained where, as here, the plaintiffs had only an expectation that they would have received a share of . . . the [ ] estate . . . and do not deny that at any time before his death the testator could have willed the property to someone else."<sup>45</sup> The SJC analogized the situation to tortious interference with expectancy of a prospective advantage "in the business realm," already recognized by Maine, and found that the new cause of action "falls well within the controlling principles" of the case recognizing that tort.<sup>46</sup>

Favoring Prosser's 1971 treatise and the reasoning of academic commentators, rather than much older, out-of-state cases rejecting the tort, the Maine SJC reviewed decisions in other states that have "recognized an independent action for the wrongful interference with an intended bequest," and held: "Under appropriate circumstances Maine recognizes an action for the wrongful interference with an expected legacy or gift under a will."<sup>47</sup> Such a claim is an action at law, entitling plaintiffs to a jury trial.<sup>48</sup> Nevertheless, after recognizing the tort, the SJC affirmed the lower court's judgment in favor of the defendants, denying the plaintiffs' appeal on the basis of insufficient evidence.<sup>49</sup> Thus, although *Cyr* "recognized" the tort, a trial on the merits of the claim had to await another case.

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42. *Cyr*, 396 A.2d at 1015. The third child was made a defendant after refusing to join as a plaintiff. *Id.* at 1015 n.1.

43. *Id.* at 1015.

44. *Id.* at 1017.

45. *Id.*

46. *Id.* at 1018.

47. *Id.*

48. *Id.* at 1019. *But see* *DesMarais v. Desjardins*, 664 A.2d 840, 844-45 (Me. 1995), discussed *infra* at Part III.A.1.c, holding that no jury is available if the relief sought is equitable (rescission) rather than legal (damages).

49. *Cyr*, 396 A.2d at 1019-20. The trial judge stated, "the jury verdict is wholly unsupported by the weight of the evidence in this case." *Id.* It is not clear which elements were insufficiently supported (or if all of them were).

b. *Harmon v. Harmon*

Later the same year, however, the SJC found such a case in *Harmon v. Harmon*.<sup>50</sup> This case was the subject of prompt and thorough scholarly analysis, and is therefore only briefly recapitulated here.<sup>51</sup> *Harmon* involved another sibling dispute about an allegedly wrongfully-procured *inter vivos* transfer of property.<sup>52</sup> It is distinguishable from *Cyr* primarily on the basis that the donor, the brothers' mother, was still living when the suit was filed.<sup>53</sup> In a bold departure even from other states that recognize the tort, the Maine SJC held that the tort could be maintained even before the death of the testatrix.<sup>54</sup> Because the lower court had dismissed the case before evidence was taken, it is unknown whether the plaintiff actually recovered on this theory on remand.

Interestingly, the SJC did not address or attempt to harmonize its holding with the equitable rule “that an expectant heir may not maintain an action to set aside a transfer during the life of the ancestor or impose a constructive trust over it, unless the incompetency of the ancestor is shown.”<sup>55</sup> By neither rejecting nor endorsing that rule (for which no Maine case was cited on either side), the SJC held that a legal remedy is available where an equitable one may not be—that is, where the donor is competent—further broadening the incursion of tort into the traditional precincts of probate and equity.

c. *DesMarais v. Desjardins*

*DesMarais v. Desjardins*<sup>56</sup> was the first of two 1995 cases further clarifying the scope of the tort, and in particular, the availability of a jury to hear the claim. Notwithstanding *Cyr*, after *DesMarais*, if the remedy sought is equitable—in this case, rescission of a deed conveying real property—there is no jury right.

*DesMarais* concerned a Maine beachhouse which an elderly testator gave as a gift to a couple who cared for her rather than leaving it to her relatives by

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50. *Harmon v. Harmon*, 404 A.2d 1020 (Me. 1979).

51. See, e.g., Driscoll, *supra* note 7.

52. *Harmon*, 404 A.2d at 1021.

53. *Id.*

54. *Id.* at 1022.

55. *Id.* at 1022 n.1.

56. *DesMarais v. Desjardins*, 664 A.2d 840 (Me. 1995).

will.<sup>57</sup> After her death, her relatives sued the couple for, *inter alia*, tortious interference with expectation of a legacy, seeking rescission of the conveyance of the beachhouse.<sup>58</sup> After the plaintiffs' jury trial demand was stricken, the defendants prevailed at a bench trial.<sup>59</sup> On appeal, the Maine SJC affirmed the lower court's holding that there had been no undue influence or other misconduct by the couple.<sup>60</sup> The Maine SJC also affirmed that the plaintiffs were not entitled to a jury trial because they sought an equitable remedy.<sup>61</sup> Although the plaintiffs' complaint demanded rescission "and/or" damages, the court identified the damages as "flow[ing] from the defendants' possession of the property,"<sup>62</sup> and hence analyzed the relief sought as primarily equitable. The court took care to distinguish *Cyr*, in which the primary remedy was damages.<sup>63</sup> After *DesMarais*, plaintiffs in Maine wishing to ensure a jury trial must seek damages independent from equitable remedies (such as a constructive trust of property wrongfully obtained or rescission).

*d. Plimpton v. Gerrard*

In *Plimpton v. Gerrard*,<sup>64</sup> Bernard Plimpton, the son and only child of testators Flossie and Axel Plimpton, sued Martin Gerrard, an unrelated person who became the elderly couple's residuary legatee.<sup>65</sup> According to Bernard, Gerrard interfered with his inheritance both by wrongfully procuring an *inter vivos* transfer of a remainder interest in their real property, and by wrongfully procuring a revision of his parents' wills.<sup>66</sup> After his father died a year following his mother, Bernard filed an undue influence challenge to the will in probate court, which was ultimately unsuccessful.<sup>67</sup> However, during the pendency of his probate challenge, he also filed a suit in Superior Court, alleging tortious interference with his inheritance—both the real estate and the residuary estate—and seeking a declaratory judgment setting aside the will.<sup>68</sup>

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57. *Id.* at 842.

58. *Id.* at 843.

59. *Id.*

60. *Id.* at 844.

61. *Id.* at 845.

62. *Id.*

63. *Id.*

64. *Plimpton v. Gerrard*, 668 A.2d 882 (Me. 1995).

65. *Id.* at 884.

66. *Id.*

67. *Id.* at 884 n.1, 885.

68. *Id.* at 885.

The trial court erroneously dismissed the claim relating to the real estate (and seeking a constructive trust and damages) for lack of standing, on the basis that Bernard had no beneficial right to the property in the will; the Maine SJC clarified that standing does not require such a right.<sup>69</sup> In fact, the SJC noted that Bernard could have filed suit *before* his parents' death, when no will at all would have been in effect.<sup>70</sup>

Gerrard also sought dismissal on the basis that Bernard was required to exhaust his probate court remedy before filing a civil suit while Bernard argued for jurisdiction in Superior Court on the basis that the probate court could not provide an adequate remedy.<sup>71</sup> The SJC made clear that Bernard need not have made this argument. Maine imposes neither an exhaustion requirement nor a demonstration of the inadequacy of probate remedies: "[t]he theoretical possibility of adequate relief in the Probate Court does not compel Bernard to go there to pursue his tortious interference claim. The law provides concurrent jurisdiction in the Probate Court and the Superior Court . . . ."<sup>72</sup> The SJC provided a similar analysis for the claim based on his expectancy in his parents' estate.<sup>73</sup> However, the SJC affirmed the trial court's dismissal of the claim to set aside the will, as that is exclusively a probate court remedy.<sup>74</sup> In this case, the Maine SJC also cited the Restatement (Second) of Torts Section 774B for the first time.<sup>75</sup>

*e. Morrill v. Morrill*

The dispute between brothers in *Morrill v. Morrill* reached the Maine SJC twice.<sup>76</sup> Like so many other Maine tortious interference cases, it stemmed from *inter vivos* transfers of real estate and stock. Gardner Morrill, one of three brothers, sued his brother George Morrill and others in the first suit,

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69. *Id.* at 885-86.

70. *Id.* at 886.

71. *Id.*

72. *Id.* at 887.

73. *Id.* It is interesting that the SJC permitted Bernard to pursue the claim for tortious interference with expectation of inheritance of the residuum of the estate, although the probate court denied his attempt to be appointed special administrator based on undue influence. It would appear that collateral estoppel would bar any subsequent attempt to relitigate the issue of whether the will favoring Gerrard was the product of Gerrard's undue influence.

74. *Id.* at 887-88.

75. *Id.* at 885 n.2.

76. *Morrill v. Morrill*, 679 A.2d 519 (Me. 1996) ["*Morrill I*"]; *Morrill v. Morrill*, 712 A.2d 1039 (Me. 1998) ["*Morrill II*"].

alleging that the transfers were the result of undue influence.<sup>77</sup> The trial court erroneously dismissed the suit on the basis that Gardner had no expectancy, because his parents were neither intestate nor was he the beneficiary of their will at the time of the alleged interference.<sup>78</sup> In *Morrill I*, the Maine SJC reversed and apparently created a *per se* rule that any child has an expectancy of inheritance from his parent, regardless of the parents' estate plan or lack thereof. "Simply by proving that he is their child and therefore a natural recipient of his parents' bounty, Gardner has established an expectancy of inheriting a portion of his parents' estate."<sup>79</sup> Hence, in Maine, the tort element of the existence of the expectancy is satisfied by proof of a parent-child relationship alone, although demonstration that one is the beneficiary under a will also suffices, under *Harmon*,<sup>80</sup> discussed *supra*.

On remand, a jury found that George had tortiously interfered with Gardner's expectancy of inheritance.<sup>81</sup> Two years after *Morrill I*, the Maine SJC in *Morrill II* found that the trial court had committed two reversible errors. First, the trial court had improperly excluded as hearsay negative statements made by the testators about the plaintiff.<sup>82</sup> The Maine SJC analyzed the statements as falling under the "state of mind hearsay exception," and held that their exclusion was not harmless because the underlying issue was whether the defendant unduly influenced his parents to make certain transfers.<sup>83</sup> The parents' state of mind about the plaintiff was therefore highly relevant to the defendant's effort to show the "entire fairness of the transaction."<sup>84</sup>

Equally significant, the Maine SJC in *Morrill II* clarified the apparent *per se* rule about children's expectancy in the estate of their parents. Although the parent-child relationship alone is enough to satisfy the "existence" of the expectancy, which is the first element of the tort under the Restatement formulation explicitly adopted by Maine, the Maine SJC interpreted the element of "reasonable certainty" that the expectancy would have been received to require the plaintiff to demonstrate the "source, nature and extent of the expected inheritance."<sup>85</sup> Here, proof of intestacy or status as a will

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77. *Morrill I*, 679 A.2d at 520.

78. *Id.* at 520-21.

79. *Id.* at 521.

80. *Harmon v. Harmon*, 404 A.2d 1020, 1022 (Me. 1979).

81. *Morrill II*, 712 A.2d at 1040.

82. *Id.*

83. *Id.* at 1041.

84. *Id.*

85. *Id.* at 1042.

beneficiary is needed,<sup>86</sup> along with evidence of the “amount or value” of the property.<sup>87</sup> Although the majority opinion did not say so explicitly, the concurrence makes clear that this result partially overrules *Morrill I*, to the extent that *Morrill I* held that a plaintiff’s proof of the parent-child relationship “was sufficient to meet his burden on *all* issues related to the expectancy.”<sup>88</sup>

*f. York Insurance Group v. Lambert*

This 1999 case presented a unique issue: whether an insurance company has a duty to defend an insured who has been sued for interference with expectation of inheritance.<sup>89</sup> In *York Insurance Group v. Lambert*, Richard Lambert, the insured under a homeowner’s policy, sought coverage from his insurer.<sup>90</sup> Lambert had been sued by an intestate heir and representative of the estate of Hugh Graff.<sup>91</sup> York Insurance argued that it had no duty to defend Lambert in that action because the damages sought were economic damages not covered by his policy.<sup>92</sup> However, the Maine SJC (over the dissenting votes of three judges) held that interference with expectancy of inheritance “carr[ies] the possibility of an award for emotional distress,” which is, in turn, a variety of “bodily injury” covered by the policy.<sup>93</sup> Thus, even though the complaint did not allege emotional distress or bodily injury, because such damages might be awarded, the duty to defend was triggered.<sup>94</sup>

The dissent argued forcefully, but unsuccessfully, that the policy covered loss of “tangible” property, while an expectancy is “intangible.”<sup>95</sup> The dissent also noted, apparently correctly, that “a claim of wrongful interference with an expected inheritance can only succeed with proof of conduct sufficiently intentional . . . that it would be excluded by the intentional loss exclusion of the York policy.”<sup>96</sup> Nevertheless, Maine insurers should be aware that under

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86. *Id.*

87. *Id.*

88. *Id.* at 1043 (Saufley, J., concurring) (emphasis added).

89. *York Ins. Group v. Lambert*, 740 A.2d 984 (Me. 1999). For a good discussion of the case in the insurance context, see Brett D. Baber, *Ten Rounds With The Insurance Company*, 16 ME. B.J. 148, 150 (2001).

90. *York Ins. Group*, 740 A.2d at 984.

91. *Id.*

92. *Id.* at 985.

93. *Id.* at 986.

94. *Id.* at 985-86.

95. *Id.* at 987-88.

96. *Id.* at 988.

*York Insurance Group*, there is an additional risk, particularly among insureds holding powers of attorney over the property of another.

g. *Burdzel v. Sobus*

*Burdzel v. Sobus*,<sup>97</sup> decided in 2000, is another sibling dispute that reached the Maine SJC. Plaintiff Klemens Burdzel is the brother of defendants Emily Sobus and Raymond Burdzel.<sup>98</sup> In his 1997 suit, Klemens alleged, *inter alia*, that his brother and sister tortiously interfered with his inheritance from their father, who died in September 1992.<sup>99</sup> Klemens's sole gift under his father's will was a coin collection; 162 of the many coins recorded on a 1988 inventory of the collection were not included in those delivered to Klemens in November 1992.<sup>100</sup> The trial court granted summary judgment against Klemens based on the statute of limitations; the SJC affirmed on a different basis—that “the record does not generate a triable issue of material fact on the tortious interference claim.”<sup>101</sup>

The court relied on *Cyr v. Cote* for the elements of the claim.<sup>102</sup> The defect here was lack of evidence of tortious conduct. That his siblings had their names put on their father's bank account, without more, “does not indicate malfeasance.”<sup>103</sup> Nor will evidence of wrongful distributions from the estate suffice, because any such distributions necessarily occurred *after* the testator's death, and therefore do not constitute “evidence of tortious conduct causing the testator to revoke or alter a will, preventing him from making or revoking his will, or causing him to convey inter-vivos what would have passed through his will.”<sup>104</sup> In the absence of evidence of tortious conduct affecting the testator during his life, the defendants were entitled to summary judgment in their favor.<sup>105</sup>

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97. *Burdzel v. Sobus*, 750 A.2d 573 (Me. 2000).

98. *Id.* at 574.

99. *Id.* at 574-75.

100. *Id.* at 574.

101. *Id.* at 576. However, the SJC notes that if there were evidence of fraud, the statute of limitations would be six years from the discovery of the fraud, not when it was committed, and his claim would be timely. *Id.* at 576 n.5 (citing ME. REV. STAT. ANN. tit. 14, § 859 (West 2003)).

102. *Id.* at 576.

103. *Id.* at 577.

104. *Id.* These would also be issues the probate court could remedy, although the Maine SJC does not mention that.

105. *Id.*

*h. Francis v. Stinson*

*Francis v. Stinson*, decided a few months after *Burdzel*, is the most recent of the tortious interference cases to reach the SJC.<sup>106</sup> It is another sibling dispute, this time arising from two brothers' management of the multimillion-dollar canning company in which the founder's six children (and their children) held stock.<sup>107</sup> Beginning in 1980, the brothers in control of the company bought back stock held by their siblings, allegedly at well below market prices.<sup>108</sup> Ultimately, the company was sold very profitably, and in October of 1995, the families of the siblings who sold back their stock sued their brothers.<sup>109</sup> The original five-count complaint did not include tortious interference; the plaintiffs were granted leave to amend to add wrongful interference with a legacy based on the brothers' procuring "their late father's signature to certain deeds of real estate in the years immediately before he died" when he was allegedly incompetent.<sup>110</sup> Summary judgment was granted to the defendants on alternative grounds: the six-year statute of limitations had run, and the plaintiffs had presented insufficient evidence to warrant a trial on the claim.<sup>111</sup>

On appeal, the SJC affirmed the applicability of Maine's general six-year civil statute of limitations.<sup>112</sup> The court also held that plaintiffs failed "to show that they were entitled to anything under the decedent's will," or enough about the deeds or the defendants' role in obtaining signatures on them, for the claim to proceed.<sup>113</sup>

*i. Superior Court Cases*

A series of recent superior court cases have further applied the tort in Maine.<sup>114</sup>

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106. *Francis v. Stinson*, 760 A.2d 209 (Me. 2000).

107. *Id.* at 211-12.

108. *Id.*

109. *Id.* at 215.

110. *Id.* at 216.

111. *Id.*

112. ME. REV. STAT. ANN. tit. 14, § 752 (West 2003) provides: "All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards . . . ."

113. *Francis*, 760 A.2d at 220.

114. *Ricci v. Terry*, No. Civ. A. CV-04-056, 2004 WL 3196593 (Me. Super. Ct. Nov. 8, 2004), was decided after this Article went to print. In this case, the son of the testator challenged a death-bed alteration to a pour-over trust which reduced his share in favor of his step-mother. The Superior Court denied the step-mother's motion for summary judgment, and bound the matter over for a jury trial. *Id.* at \*6.

In the 2001 case of *Guinan v. Baker*, three sisters sued their father (Romeo Baker), stepmother, stepsister, and the step-sister's fiancé (as well as certain business entities created by them), over interests in real property originally given to the plaintiffs by their late mother.<sup>115</sup> They alleged that they conveyed their interests to their father in the early 1970s, in return for his promise to hold the property in trust and devise it to them at his death.<sup>116</sup> In 1983, just before his third marriage, Romeo Baker changed his will to favor his bride-to-be.<sup>117</sup> Between that date and 2000, he made a variety of changes to his testamentary plan, none of which returned the property to his daughters.<sup>118</sup> (At the time of the lawsuit, he was still alive.<sup>119</sup>)

In addition to other claims alleged directly against their father, the sisters alleged tortious interference by their stepmother, stepsister, her fiancé, and the business entities.<sup>120</sup> Although the court found that the sisters had an expectation of inheritance, and were damaged by its loss,<sup>121</sup> it ruled that they had “failed to establish any evidence that the defendants interfered with that expectation through some sort of tortious conduct.”<sup>122</sup> Instead, the evidence showed that before his marriage, Baker simply “changed his mind about leaving the farm to his children.”<sup>123</sup> On this basis, the court granted summary judgment for defendants on this claim.<sup>124</sup>

In *Davis v. Grover*,<sup>125</sup> the court reaffirmed the availability of the tort, making clear that the denial of a motion for leave to amend to add a cause of

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115. *Guinan v. Baker*, No. Civ. A. CV-00-41, 2001 WL 1869944, at \*1 (Me. Super. Ct. Dec. 13, 2001).

116. *Id.* at \*3.

117. *Id.* at \*2, \*7.

118. *Id.* at \*2.

119. *Id.* at \*4 (“He is still very much alive.”).

120. *Id.* at \*5.

121. *Id.* at \*6.

122. *Id.*

123. *Id.* at \*5 (quoting Baker's affidavit #17).

124. *Id.* at \*8. It is interesting that the daughters did not allege tortious interference directly against their father, on the basis that his post-1983 wills deprived them of their expected inheritance from him (or from their mother). The “tortious conduct” would be the making of a will in favor of others, in violation of an agreement to devise the property back to them. Perhaps such a claim will be brought at his death, although Maine permits the tort suit during the life of the donor. Perhaps the barrier is ME. REV. STAT. ANN. tit. 18-A, § 2-701 (West 1998), which requires a contract to make a will to be in writing. However, older cases do enforce (in equity) oral contracts to make a will, fully performed on one side, against the decedent's heirs or devisees. The court will compel specific performance by constructive trust. *Brickley v. Leonard*, 149 A. 833, 836 (Me. 1930). The daughters may yet get the farm.

125. *Davis v. Grover*, No. Civ. A. CV-01-34, 2002 WL 748890 (Me. Super. Ct. Apr. 3, 2002).

action for tortious interference was denied based solely on untimeliness, not on non-availability of the claim.<sup>126</sup>

In *Smith v. Brannan*,<sup>127</sup> Priscilla Smith, the widow of the testator, sued her late husband's estate planning attorneys, Kaye [sic] Parker Jex<sup>128</sup> and James Brannan, alleging tortious interference.<sup>129</sup> The widow alleged that her late husband, Richard, sought to make a change in his will to provide a monthly stipend to her, but that Jex argued against it because of its consequences for a trust of the residuary set up for his children.<sup>130</sup> She further alleged that Jex instructed Brannan to draft an amendment to the will providing for the stipend out of a marital trust, rather than the residuary trust to be funded with the first \$625,000 of estate assets, and that Jex knew the estate would be worth less than \$625,000, leaving no assets to fund the marital trust or the stipend.<sup>131</sup> She further alleged that Jex misled Richard about whether the widow was provided for, for the benefit of Richard's children and "to interfere with and frustrate Richard's estate plan and Priscilla's expectancy interest."<sup>132</sup> For the Maine court, these allegations were more than sufficient to withstand a motion to dismiss, in one of the few reported cases with attorney defendants.<sup>133</sup> This is especially significant because: "Maine case law is well settled that third parties may not bring an action for professional malpractice against an attorney if they do not have privity of contract with that attorney."<sup>134</sup> *Smith v. Brannan* thus suggests the tort can serve as an alternate remedy not only for those who lack standing before the probate court, but also for those lacking standing to assert a malpractice claim.

In *Brown v. Brown*,<sup>135</sup> the defendant, by counterclaim, alleged tortious interference with an expectant interest in a particular parcel of real property.<sup>136</sup>

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126. *Id.* at \*4.

127. *Smith v. Brannan*, No. Civ. A. CV-01-58, 2002 WL 1974069 (Me. Super. Ct. June 14, 2002).

128. *Id.* at \*1. The opinion calls her "Kaye," but on the Westlaw "Profiler" Directory, her name appears as "Kay."

129. *Id.* at \*2.

130. *Id.*

131. *Id.* Although the widow was also a discretionary beneficiary of the residuary trust, the trustee, her husband's son-in-law, made clear she would receive nothing from that trust. *Id.*

132. *Id.*

133. *Id.* at \*1-7. This case also raised interesting personal jurisdiction and choice of law issues, discussed *infra* Part VI.

134. Homeowners' Assistance Corp. v. Merrimack Mortgage Co., No. CV-99-132, 2000 WL 33679263, at \*2 (Me. Super. Ct. Jan. 24, 2000) (citing *Nevin v. Union Trust Co.*, 726 A.2d 694, 701 (Me. 1999)) ("[W]ill beneficiaries do not have standing to sue estate planning attorneys for malpractice because they are not the client.").

135. *Brown v. Brown*, No. Civ. A. RE-02-27, 2003 WL 1673731 (Me. Super. Ct. Jan. 29, 2003).

136. *Id.* at \*1.

The court denied a motion to dismiss the counterclaim, which alleged interference by “intimidation and undue influence,”<sup>137</sup> and made clear that the heightened pleading standard associated with fraud allegations does not apply to tortious interference by non-fraudulent means. Few other facts were provided, but the case also appears to affirm that the tort is available based on interference with an interest passing in trust.<sup>138</sup>

*j. Summary*

In Maine, tortious interference with expectation of inheritance is recognized and may even be alleged before the death or incompetency of the donor. The elements track Restatement (Second) Section 774B, and cover *inter vivos* transfers as well as testamentary expectancies and interests in trust. The availability of a jury depends upon the nature of the remedy sought. There is concurrent jurisdiction in the probate and superior courts, and no requirement that the plaintiff must exhaust probate remedies or demonstrate their inadequacy before filing a tort suit. Because emotional distress damages are available, a tort suit will trigger an insurer’s duty to defend on a policy that covers “bodily injury.” The action may be maintained against an out-of-state defendant (including by a non-client against an attorney), under appropriate circumstances. The underlying wrong must be pleaded with no more than the usual degree of specificity for that wrong outside the tortious interference context. The statute of limitations is six years. Taken together, Maine is clearly a strongly pro-plaintiff state on this tort.

*2. Massachusetts*

Massachusetts was one of the first states to recognize the tort, although the early cases are somewhat ambiguous about its application to *inter vivos* conveyances that deplete the estate.<sup>139</sup> In cases spanning more than 90 years, Massachusetts has applied a distinctive understanding of the tort, requiring specific allegations and proof that the wrongful conduct of the defendant acted

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137. *Id.* at \*1-2. The original counterclaim also alleged interference by fraud, which was stricken. *Id.*

138. “The expectancy is alleged to flow either from an *inter vivos* trust or from an inheritance.” *Id.* at \*1.

139. For quite unclear reasons, the A.L.R. annotation, Soehnel, *supra* note 9, at 1241, classifies Massachusetts among “unsettled” jurisdictions, though Section 7[a] discusses *Hegarty v. Hegarty*, 528 F. Supp. 296 (D. Mass. 1943) among actionable *inter vivos* transfer cases.

“continuously” upon the donor until the legacy would be “realized” (i.e., the donor’s death). One 1999 superior court case permitted plaintiffs who had successfully challenged a wrongfully-procured will in the probate court to recover their attorney’s fees as damages in a subsequent tort suit, using collateral estoppel to avoid relitigating the underlying liability issues. As an additional note, in Massachusetts, it appears that the statute of limitations applicable to the tort depends on the underlying tortious conduct alleged.<sup>140</sup>

*a. Lewis v. Corbin*

This 1907 case was one of the first in the nation to recognize the tort, although the defendant’s demurrer was granted based on insufficient pleading.<sup>141</sup> Plaintiff Lewis, the child of testatrix Jane Corbin’s second cousin, Henry Lewis, alleged that defendant Corbin, Jane’s executor and residuary legatee, induced Jane, who wished to give a gift to Henry Lewis, to execute an invalid codicil giving Henry \$5,000.<sup>142</sup> The codicil was invalid because it was witnessed only by Corbin, although two witnesses were required.<sup>143</sup> Unbeknownst to either Jane or Corbin, Henry had died before the codicil was executed.<sup>144</sup> Lewis sued Corbin.

In recognizing the cause of action, the Massachusetts SJC specifically distinguished and declined to follow the reasoning of the New York court in *Hutchins v. Hutchins*.<sup>145</sup> The SJC agreed that during the life of the donor, no action would lie, because the donor might still change his testamentary arrangements.<sup>146</sup> If, however, it appears that “the fraud [was] operative up to the time of [the donor’s] death,”<sup>147</sup> then “the fraud directly and proximately caused the plaintiff’s loss of his legacy,”<sup>148</sup> and the action will lie. On the particular facts of *Lewis*, however, the court granted the defendant’s demurrer because “the pleading is defective in not averring facts which exclude the

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140. For example, the statute of limitations for an action based on undue influence is three years, and the 2000 case of *Calautti v. Pasquarello*, No. CA962445E, 2000 WL 1273851, at \*5 (Mass. Super. Ct. May 24, 2000) (dictum), indicates that this three-year statute would apply to a claim of tortious interference based on undue influence.

141. *Lewis v. Corbin*, 81 N.E. 248, 249-50 (Mass. 1907).

142. *Id.* at 249.

143. *Id.*

144. *Id.*

145. *Hutchins v. Hutchins*, 7 Hill 104 (N.Y. Sup. Ct. 1845), discussed *infra* Part IV.A.

146. *Lewis*, 81 N.E. at 250.

147. *Id.* at 250.

148. *Id.*

possibility that the testatrix changed her purpose in regard to this legacy, and which show that the fraud continued operative to the time of her death.”<sup>149</sup> This case thus introduced the “continuous” element that distinguishes the tort in Massachusetts.

*b. Hegarty v. Hegarty*

The 1942 case of *Hegarty v. Hegarty* involved a suit by one brother against his siblings, alleging *inter vivos* conveyances diminishing his inheritance.<sup>150</sup> The Massachusetts federal district court held relatively summarily that a cause of action for tortious interference with expectation of inheritance will lie based on allegations that:

[F]rom January 9, 1939, to his death, the deceased, who was possessed of considerable personal and real property, was induced through fraud and undue influence on the part of the defendants to transfer all of his property to [the siblings] with the intention of obtaining for themselves all the decedent’s property and wrongfully defeating the plaintiff’s right of inheritance.<sup>151</sup>

In reaching this result, the federal district court relied not only on *Lewis v. Corbin*,<sup>152</sup> but also on *Ross v. Wright*, an *inter vivos* gift case.<sup>153</sup>

Interestingly, *Ross v. Wright* did not validate, but rather denied, that a tort action would lie based on a defendant’s refusal to complete a gift of trust shares as directed by the donor before his death. The court offered two primary reasons for sustaining the demurrer: that the donee had no legally protected interest in the gift, as her expectancy was too “indefinite,”<sup>154</sup> and that, because of the precise legal relationship of the donor and his son as clerk of the business trust, the son had no legal obligation to complete the gift and therefore the conduct alleged was not “unlawful in itself.”<sup>155</sup> Despite citing *Lewis v. Corbin*, the court neither endorsed nor rejected the defendants’ claim that “[t]here is no cause of action for the interference with a voluntary gift.”<sup>156</sup>

Hence, as late as 1934, there seemed to be some doubt as to whether a plaintiff could recover on this tort theory in the *inter vivos* context. *Hegarty*,

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149. *Id.*

150. *Hegarty v. Hegarty*, 46 F. Supp. 319 (D. Mass. 1942).

151. *Id.* at 319-20.

152. *Lewis*, 81 N.E. at 248.

153. *Ross v. Wright*, 190 N.E. 514 (Mass. 1934).

154. *Id.* at 515-17.

155. *Id.* at 514, 517.

156. *Id.* at 518.

therefore, represents not simply an application, but also an extension, of *Lewis v. Corbin* and *Ross v. Wright*. However, because the plaintiff in *Hegarty* alleged conduct wrongful in itself, it would appear to satisfy the requirements of *Ross*, and bring this case within the rule of *Lewis*.

On remand, the trial court identified three issues the jury needed to answer, which correspond to elements of the tort:

- (1) If no one interfered with [the donor], *what would have been* the value, including interest, of the property, if any, that he would have given or left to [the plaintiff]?
- (2) Did [the defendants] *intentionally interfere* with [the donor] giving or leaving property to [the plaintiff]?
- (3) Did [the defendants] use *unlawful means* to interfere with [the donor] giving or leaving property to [the plaintiff]?<sup>157</sup>

The judge further clarified that intentional interference, the second element, requires “that the defendants not only interfered maliciously, that is to say, intentionally [but also] that that interference was continuously operating, that is to say, it was effective at the time that the gift otherwise would have taken [effect].”<sup>158</sup>

Notwithstanding *Hegarty*, in 1948’s *Monach v. Koslowski*, the Massachusetts SJC, citing *Lewis* and *Ross*, would go no further than to say:

There are *strong intimations* in our decisions that one who has been deprived of a devise, legacy or gift which a testator or donor would have given to him but for the wrongful interference of another may maintain an action of tort against the latter for the recovery of damages.<sup>159</sup>

*c. Labonte v. Giordano*

After decades without any cases addressing the tort, in 1997, the Massachusetts SJC in *Labonte v. Giordano* confirmed that Massachusetts recognizes tortious interference with expectation of inheritance, and, in declining to extend the action to the situation in which the donor is still alive, clarified its elements in Massachusetts.<sup>160</sup> *Labonte* identified the three elements of the tort in Massachusetts this way: (1) “[t]he plaintiff must have a legally protected interest”; (2) “[t]he defendant must intentionally interfere

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157. *Hegarty v. Hegarty*, 52 F. Supp. 296, 298 (D. Mass. 1943).

158. *Id.* at 301.

159. *Monach v. Koslowski*, 78 N.E.2d 4, 6 (1948) (emphasis added) (granting relief on a constructive trust theory).

160. *Labonte v. Giordano*, 687 N.E.2d 1253, 1254-56 (Mass. 1997).

with the plaintiff's expectancy in an unlawful way"; and (3) "the defendant's interference [must] act[] continuously on the donor until the time the expectancy would have been realized."<sup>161</sup> *Labonte* specifically addressed the distinctive Massachusetts approach to causation, element (3).

This case arose from yet another sibling dispute over *inter vivos* transfers. Kathleen Labonte sued her brother, Dominic Giordano, for tortious interference with her inheritance from their then-living mother, Martha Giordano.<sup>162</sup> Kathleen, the sole beneficiary under Martha's will, alleged that when her brother learned of the contents of his mother's will, he wrongfully procured *inter vivos* transfers of assets to himself, thereby depleting the estate.<sup>163</sup> The SJC explicitly declined to follow *Harmon*<sup>164</sup> and permit the action during the life of the donor,<sup>165</sup> but remanded so the plaintiff could amend the complaint in light of her mother's death.<sup>166</sup>

In *Labonte*, the SJC reiterated that in Massachusetts, "[t]he plaintiff must show that the defendant's interference acted continuously on the donor until the time the expectancy would have been realized."<sup>167</sup> This heightened standard of causation is unique to Massachusetts, and represents a novel approach to countering the inherently speculative nature of the plaintiff's interest. It provides an especially robust understanding of the idea that "but for" the defendant's conduct, the inheritance would have been received by the plaintiff. Moreover, this standard "necessarily implies that a cause of action cannot arise for tortious interference with the expectancy of receiving a legacy until the donor's death, because any such expectancy would only be realized at that time."<sup>168</sup> The SJC further explained that a variety of other remedies are available for addressing the alleged wrong to a living donor, including petitioning the court to appoint a guardian for Martha, who could then sue Giordano; a suit by the executor or administrator of the estate once Martha has

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161. *Id.* at 1255. This language, which seems clearly to recognize the tort although declining to apply it here, makes it difficult to understand why one commentator, citing *Labonte*, states, "Massachusetts recently refused to recognize a cause of action for tortious interference with an expectancy. The court believed that plaintiffs had adequate remedies under current law." JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS AND ESTATES* 222 (6th ed. 2000).

162. Martha Giordano died during the pendency of the appeal. *Labonte*, 687 N.E.2d at 1254.

163. *Id.*

164. *Harmon v. Hamon*, 404 A.2d 1020 (Me. 1979), discussed *infra* Part III.A.1.b.

165. *Labonte*, 687 N.E.2d at 1255-56.

166. *Id.* at 1256.

167. *Id.* at 1254-55.

168. *Id.* at 1255.

died; or a will contest (though the court recognized its limitations on these facts).<sup>169</sup>

The status of interference with *inter vivos* gifts remains unclear. On the elements as articulated by *Labonte*, however, it would appear that interference with a specific *inter vivos* gift could be actionable, because once the donor has irrevocably given the item to another, “the time the expectancy would have been realized” is past (even if the donor is still alive), and thus the tort would be complete.<sup>170</sup> For example, if the donor promised a set of silver to one grandchild upon her marriage, and then gave it to another, once the original would-be donee got married, the tort would be complete (though not until then).

*d. Hadayia v. Kayakachoian*

In this 1999 Massachusetts Superior Court case,<sup>171</sup> relatives of Jane Naimey filed suit against Garabed Kayakachoian and James Willing, arising from their conduct in procuring a will for the benefit of Cecilia Kayakachoian, Garabed’s wife, and her sister, Elizabeth Huebel, former co-workers of Jane Naimey.<sup>172</sup> The three plaintiffs prevailed in probate court and had that will struck down as the product of fraud and undue influence, and obtained the probate of an earlier will benefiting the relatives.<sup>173</sup> After they succeeded in probate court, the plaintiffs then used the doctrine of collateral estoppel to obtain a summary judgment in their favor on a tortious interference claim in superior court.<sup>174</sup> What is especially striking about the case is that the plaintiffs had already received their legacy in probate court;<sup>175</sup> their basis for damages in tort consisted solely of the attorney’s fees expended in the prior action (exceeding \$350,000).<sup>176</sup>

This is significant because formerly, contestants whose expenses were not paid by the estate risked their own money, with the size of the estate and the inheritance necessarily limiting the amount it was rational to spend challenging the will. For example, suppose a third party uses undue influence

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169. *Id.* at 1256.

170. *Id.* at 1255.

171. *Hadayia v. Kayakachoian*, No. Civ. A. 97-01110, 1999 WL 1565174 (Mass. Super. Ct. Dec. 20, 1999).

172. *Id.* at \*1-2.

173. *Id.* at \*1, \*3-4.

174. *Id.* at \*5-9.

175. *Id.* at \*7.

176. *Id.*

to induce a testator to write a will in that person's favor, depriving the plaintiff of a one-half share of a \$100,000 estate by intestacy. Suppose further that the plaintiff brings a successful will contest, and the will is struck down as the product of undue influence. Imagine the plaintiff spends \$50,000 in attorney's fees in this effort. Even if a later determination were made that the estate would cover the costs of the challenge, the \$100,000 estate would now be reduced to \$50,000, and plaintiff's one-half share would be just \$25,000. The successful contestant would in effect have spent half of his or her inheritance prosecuting the contest. If the contest cost \$100,000, the estate would be completely depleted, and neither the plaintiff nor the other intestate takers would get anything at all.

Under the reasoning of *Hadayia*, however, the tort truly operates to make successful plaintiffs "whole": the probate action establishes their entitlement to the legacy and orders its payment, and the tort action "refunds" the attorney's fees spent obtaining the probate decree to the extent the estate was depleted thereby (or, alternatively, "restores" the estate to full size). It thus powerfully changes the calculus of risk and benefit to a party contemplating a tort suit.

In holding that tort damages may consist exclusively of attorney's fees, the Massachusetts court relied on and extended an exception to the "American Rule."<sup>177</sup> In *M.F. Roach Co. v. Town of Provincetown*,<sup>178</sup> the Massachusetts SJC held that where the interference "require[es] the victim of the tort to sue or defend against a third party in order to protect his rights," attorney's fees are recoverable as damages. In *Hadayia*, the court extended this exception, recognized for tortious interference with contract, to tortious interference with expectation of inheritance.<sup>179</sup>

Although collateral estoppel established underlying liability, the court did not apply the doctrine to the *amount* of attorney's fees. The named tort plaintiff, appointed the administratrix of the estate, petitioned for and received permission to use estate assets to pay fees of \$359,933.67, spent on the will contest.<sup>180</sup> It was not clear whether the defendants "were entitled to, or received, notice of the petition for instructions [permitting payment], whether they had an opportunity to or did take any position on the reasonableness of

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177. "The traditional 'American Rule' is that attorney fees are not awardable to the winning party (i.e. each party must pay his own attorney fees) unless statutorily or contractually authorized." BLACK'S LAW DICTIONARY 82 (6th ed. 1990).

178. *M.F. Roach Co. v. Town of Provincetown*, 247 N.E.2d 377 (Mass. 1969).

179. *Hadayia*, 1999 WL 1565174, at \*7.

180. *Id.* at \*4.

the amount, or whether any hearing was held.”<sup>181</sup> Because they had already lost the will contest, they “no longer had any interest in the estate . . . [and] may not even have had standing to contest the amount of the attorneys fees to be paid from it.”<sup>182</sup> On this basis, the court found that “the defendants cannot be held bound by the Probate Court’s order authorizing the administratrix to pay attorneys fees for the will contest.”<sup>183</sup> The tort plaintiffs will thus still need to establish the precise amount of fees to which they are entitled as damages. Nevertheless, having established liability in this way represents an unmistakable victory for tort plaintiffs and an expansion of the tort in Massachusetts.<sup>184</sup>

### B. Second Circuit—Connecticut

Although there are reported Connecticut Superior Court cases on the tort, neither the Connecticut Supreme Court, nor any Connecticut appellate courts, have addressed it, leaving the law of Connecticut on this tort rather unsettled. This is reflected in federal court disagreement: the Connecticut federal district court denies that Connecticut recognizes the tort, but the Second Circuit has held that it does.

At least as of 1990, the Connecticut Superior Court seemed to hold open the possibility that Connecticut might recognize the tort. In *Bria v. Saumell*,<sup>185</sup> the court stated (in dicta), “[t]here is authority for the proposition that the plaintiffs have the right to maintain an action for damages.”<sup>186</sup> The court also cited *Benedict v. Smith*,<sup>187</sup> in which the Connecticut Superior Court sustained a demurrer to a tort suit based on the defendant’s alleged failure to present a will in the plaintiffs’ favor, but only because the plaintiffs had not alleged any attempt to probate the lost will.<sup>188</sup> Had they first attempted to probate the

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181. *Id.*

182. *Id.* at \*7.

183. *Id.*

184. In *Ellis v. Varney*, No. 9801397, 2004 WL 574827, at \*49 (Mass. Super. Ct. Jan. 9, 2004), the Superior Court affirmed the availability of the tort based on a trustee’s wrongful refusal to distribute trust assets. In *Sacramone v. Cranney*, No. 03-P-528, 2004 WL 1152727, at \*1 (Mass. App. Ct. May 24, 2004), decided after this Article went to press, the Massachusetts Court of Appeals reiterated the elements of the tort as found in *Labonte v. Giordano*.

185. *Bria v. Saumell*, No. 26-84-56, 1990 WL 271047 (Conn. Super. Ct. 1990).

186. *Id.* at \*1 (citing *Liability for Damages for Interference with Expected Inheritance or Gift*, 22 A.L.R. 4th 1229 §§ 4, 6(a)).

187. *Benedict v. Smith*, 376 A.2d 774 (Conn. Super. Ct. Mar. 2, 1977).

188. *Id.* at 776.

alleged will in their favor, the court seemed to imply that an action at law might be viable.

However, in an unreported 1998 case, *Troy v. Folger*,<sup>189</sup> the superior court seemed much less sympathetic to the tort. Two children of the testator alleged that their stepmother presented them with a phony will purporting to leave each of them \$20,000, in order to prevent them from acting to ensure that their father executed a proper will before his death.<sup>190</sup> The court permitted them to proceed on a count for fraud,<sup>191</sup> but did not permit them to allege a cause of action for “interference with a prospective advantage” outside the business context.<sup>192</sup>

In an unpublished 1999 case, *Cutler v. Agostinelli*,<sup>193</sup> one sister alleged before the Connecticut Superior Court that another sister, by withdrawing funds from a bank account set up in trust for the first sister, interfered with, and deprived the first sister of her inheritance from their father.<sup>194</sup> However, the case was settled, so the opinion does not address the viability of the claim.<sup>195</sup> No subsequent state cases address the tort.<sup>196</sup>

In the 1999 federal district court case of *DiMaria v. Silvester*,<sup>197</sup> the court granted one party’s motion to dismiss and another’s motion for summary judgment “on the grounds that Connecticut does not recognize a cause of action for intentional interference with an inheritance.”<sup>198</sup> The court did hold, however, that filing such a claim did not constitute a “will contest” and hence did not trigger the will’s in terrorem no-contest clause.<sup>199</sup> According to the district court, Connecticut does recognize “a cause of action for interference with a financial (or business) expectancy,” and the will beneficiaries, who alleged that the executor of the estate mishandled certain assets, were allowed

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189. *Troy v. Folger*, No. CV 97-0161947S, 1998 WL 252355 (Conn. Super. Ct. May 8, 1998).

190. *Id.* at \*1.

191. *Id.*

192. *Id.* at \*2.

193. *Cutler v. Agostinelli*, No. CV 97-0398566S, 1999 WL 512621 (Conn. Super. Ct. 1999) (unpublished decision).

194. *Id.* at \*2.

195. *Id.* at \*3.

196. One 2003 case, *Cogswell v. Paige*, No. CV0101868225, 2003 WL 21297606, at \*1 (Conn. Super. Ct. May 22, 2003), mentions the tort but does not discuss its elements.

197. *DiMaria v. Silvester*, 89 F. Supp. 2d 195 (D. Conn. 1999).

198. *Id.* at 196 nn.2-3. Unfortunately, the district court cites only to its own prior Ruling on Defendant’s Motion to Dismiss, dated July 21, 1999, but not available online. No subsequent cases cite *DiMaria*.

199. *Id.* at 199.

to proceed on this theory.<sup>200</sup> Arguably, this cause of action might be expanded in a proper case to cover the “financial expectancy” enjoyed by an actual or intended will beneficiary; as in *Troy v. Folger*, non-recognition of the tort in this case did not deprive the plaintiff of a remedy.

However, in 2003’s *Devlin v. United State*,<sup>201</sup> Judge Guido Calabresi of the Second Circuit held that “Connecticut follows the majority of jurisdictions . . . in recognizing the tort of interference with an inheritance,”<sup>202</sup> citing *Benedict v. Smith*, and noting that the court in *DiMaria* reached the contrary conclusion “without citation or explanation.”<sup>203</sup>

On this basis, it appears that the better reading of Connecticut law makes the tort available, and filing such a suit will not be regarded as a “will contest” for purposes of no-contest clauses. Unfortunately, the cases provide no specific guidance about elements of the tort, although *Benedict* seems to impose an exhaustion requirement, at least where plaintiffs would have standing in probate court.

### C. Third Circuit

No court of last resort in the Third Circuit has yet addressed the tort. A single New Jersey appellate case appears to recognize the tort, in dicta, although not if the donor is still alive. Although no Pennsylvania appellate courts have addressed it, one Pennsylvania Superior Court Judge, Zoran Popovich, seems determined to single-handedly establish the tort in that state, and has convinced one federal district court judge that Pennsylvania recognizes it.

#### 1. New Jersey

Just one published New Jersey case addresses tortious interference, *Casternovia v. Casternovia*,<sup>204</sup> and that one does so in a rather back-handed way. Two brothers sued their third brother, his wife, and their mother, alleging undue influence resulting in an *inter vivos* conveyance to the third brother of property that had been promised to them all as an inheritance.<sup>205</sup>

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200. *Id.* at 201-02.

201. *Devlin v. United States*, 352 F.3d 525 (2d Cir. 2003).

202. *Id.* at 542.

203. *Id.* at 542 n.22.

204. *Casternovia v. Casternovia*, 197 A.2d 406 (N.J. Super. Ct. App. Div. 1964).

205. *Id.* at 407.

The court stated that no reported decision in New Jersey, up until that time, addressed “a tort action for malicious interference with an expected gift,” although New Jersey recognized “malicious interference with prospective economic advantages in the realm of business transactions.”<sup>206</sup> While endorsing “the *ratio decidendi* of the decisional law giving recognition to causes of action for the protection of an expectant donative interest,” the court nevertheless held “that, if the donor is alive and competent, no such action as asserted here will lie.”<sup>207</sup> The opinion therefore strongly implies that at least after the death of the donor, the tort action is available in New Jersey.

The only subsequent appellate case in New Jersey that addresses the tort, *Estate of Bednarz*,<sup>208</sup> unfortunately did not generate a published opinion. In *Bednarz*, the appellate division affirmed the dismissal of an inter-sibling tort claim “even assuming the existence of the tort of interference with an expected legacy,” for lack of evidence of intentional interference.<sup>209</sup> Decades ago, Iowa’s Supreme Court stated that the New Jersey appellate court “by way of dictum, indicated a cause of action for the wrongful interference with a gift or legacy would lie,”<sup>210</sup> and New Jersey is generally so regarded.<sup>211</sup>

206. *Id.* at 409.

207. *Id.* at 409-10. The court cites, with approval, the decision in *Holt v. Holt*, 61 S.E.2d 448 (N.C. 1950), discussed in *Fourth Circuit Survey*, *supra* note 1, at 276-78.

208. *Estate of Bednarz*, 172 N.Y. L.J. 1100, June 16, 2003, at 80 (N.J. Super. Ct. App. Div. June 10, 2003) (per curiam).

209. *Id.*

210. *Frohwein v. Haesemeyer*, 264 N.W.2d 792, 795 (Iowa 1978).

211. One important commentator saw a recent case, *In re Niles Trust*, 823 A.2d 1 (N.J. 2003), as standing for near-recognition of the tort with a living donor. The commentator wrote:

Niles was still alive during all the proceedings, through the trial results. Traditionally, New Jersey courts have struggled with whether the validity of a will can be adjudicated while the ‘testator’ is still alive, and in turn whether the tort of interference with inheritance is viable. In general, the courts have balked at such claims, on the reasoning that the issues are not ripe until the testator has died. *Niles* is a breakthrough on these points. Although other states are increasingly recognizing the tort of interference with inheritance, New Jersey has lagged. Although *Niles* does not expressly recognize the tort, the decision opens the door to bringing the tort and contesting a will before the testator’s death.

Steven K. Mignogna, *Uncharted Implications in Exception to American Rule: State Supreme Court Ruling is Bad News for Executors, Trustees in Cases Involving Established Undue Influence*, 173 N.J. L.J. 483 (2003). *But see Arena v. McShane*, No. 02-07639, 2003 U.S. Dist. LEXIS 7778, at \*15-16 (E.D. Pa. Apr. 17, 2003), in which the Pennsylvania federal district court appears to have accepted a party’s representation that New Jersey does not recognize the tort at all, based on *Pivnick v. Beck*, 741 A.2d 655, 660 (N.J. Super. Ct. App. Div. 1999), without mentioning or distinguishing *Casternovia*. In fact, however, *Pivnick* was a malpractice suit by a non-client beneficiary, not a tortious interference claim, and the decisive issue was the privity requirement for malpractice suits. *Id.* at 660-61. The Pennsylvania federal court in *Arena* might have saved itself a complicated choice of law analysis had it realized that both New Jersey and Pennsylvania recognize the tort.

## 2. *Pennsylvania*

In a pair of recent Pennsylvania Superior Court cases on appeal from the Montgomery County Court of Common Pleas, Judge Zoran Popovich has held that Pennsylvania recognizes the tort, although not in its Restatement (Second) Section 774B formulation.<sup>212</sup> Instead, apparently relying on the 1904 case of *Marshall v. De Haven*,<sup>213</sup> Judge Popovich has identified a Pennsylvania-specific version of the tort, available exclusively when the tortious conduct prevents the execution of a will in favor of the plaintiff. This specific version of the tort remedies the specific injury of one who lacks standing to challenge a will, or would not benefit from such a challenge because the instrument under which he or she would benefit was never executed. It cannot handle some of the other situations the more general tort was designed to remedy—wrongfully-prevented or wrongfully-procured *inter vivos* transfers, revocations, etc.

Because these recent cases were the first to recognize the tort explicitly, their historical caselaw antecedents are discussed within the contemporary case discussion. This is also intended to reflect the fact that, until Judge Popovich, apparently no other Pennsylvania jurist regarded *Marshall v. De Haven* (or *Mangold v. Neuman*, or *Cole v. Wells*, other cases cited by Judge Popovich) as recognizing the tort. The last case discussed is the 2003 federal district court case of *Arena v. McShane*, in which a tortious interference claim survived a Rule 12(b)(6) motion to dismiss.<sup>214</sup> The federal district court relied on *Cardenas*.

### a. *Cardenas v. Schober*

*Cardenas v. Schober*, decided in 2001, involved the estate of Eleanor Harper, who died September 24, 1997, leaving an estate of over \$1.5 million.<sup>215</sup> Under the probated will, dated March 20, 1997, plaintiffs Mirales and Gudula Cardenas received \$10,000, and a third tort plaintiff, Albert

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212. *McNeil v. Jordan*, 814 A.2d 234, 238-39 n.4 (Pa. Super. Ct. 2002); *Cardenas v. Schober*, 783 A.2d 317, 325-26 (Pa. Super. Ct. 2001).

213. *Marshall v. De Haven*, 58 A. 141 (Pa. 1904).

214. *Arena*, 2003 U.S. Dist. Lexis 7778. *But see* *Golden v. Cook*, 293 F. Supp. 2d 546, 553 n.1 (W.D. Pa. 2003), discussed *infra* Part VII.

215. *Cardenas*, 783 A.2d at 319-20.

Luecke, received nothing.<sup>216</sup> The defendant in the tort suit was Robert Schober, the executor of the will and the residuary beneficiary of Harper's home, its contents, and approximately \$1.5 million.<sup>217</sup> The Cardenases and Luecke alleged that although Harper intended to execute another will leaving the Cardenases \$80,000 each, and leaving Luecke \$60,000, and drafted handwritten documents so indicating, Schober failed to have them drawn up in a new will as agreed, and hid or destroyed those documents, as well as a July 1997 will.<sup>218</sup>

The plaintiffs filed multiple civil lawsuits, as well as an appeal from the probate decree.<sup>219</sup> None of the original complaints mentioned tortious or intentional interference with inheritance, although the plaintiffs attempted unsuccessfully to amend their complaints to add it.<sup>220</sup> Ultimately, the appeals were consolidated and heard by Judge Popovich of the Superior Court.<sup>221</sup>

Judge Popovich reversed the dismissals by the court of common pleas, and found that the complaint could be amended to add intentional interference with inheritance as a legal theory, based on facts already alleged. However, rather than endorsing the Restatement (Second) of Torts Section 774B<sup>222</sup> formulation of the tort, Judge Popovich classified Pennsylvania with "four other states" (not identified) that "permit an action for intentional interference with an inheritance, but have not expressly adopted the Restatement of Torts (Second) Section 774B."<sup>223</sup> In Pennsylvania, according to Judge Popovich, the elements of the tort are:

- (1) The testator indicated an intent to change his will to provide a described benefit for plaintiff;
- (2) The defendant used fraud, misrepresentation or undue influence to prevent execution of the intended will;
- (3) The defendant was successful in preventing the execution of a new will; and
- (4) But for the Defendant's conduct, the testator would have changed his will.<sup>224</sup>

Applying these elements to the Cardenases' complaint, Judge Popovich found the allegations sufficient. The allegations about handwritten documents

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216. *Id.* at 320.

217. *Id.* at 319-20.

218. *Id.*

219. *Id.* at 320-21.

220. *Id.*

221. *Id.* at 321.

222. *Id.* at 325 (incorrectly cited in the opinion as "Section 744B").

223. *Id.*

224. *Id.* at 326.

including specific gifts to the plaintiffs met the “described benefit” requirement.<sup>225</sup> The allegations that Schober did not carry out his agreement with Harper to have her handwritten instructions drawn up into a will sufficed for “fraud.”<sup>226</sup> The allegations about Harper’s never-executed intent to change her testamentary plan showed the “success” of the interference and “but-for” causation.<sup>227</sup> On this basis, the superior court reversed the probate court’s grant of the motion to dismiss.<sup>228</sup>

In identifying these elements, Judge Popovich cited *Marshall v. De Haven*,<sup>229</sup> but his reliance on this century-old case is creative, to say the least. In *Marshall*, the testator’s niece (and sole intestate heir) was given a legacy of five dollars of a \$250,000 estate.<sup>230</sup> She alleged that the testator expressed a desire to change his will in her favor, but the residuary legatee, William De Haven, paid a Mr. George Faddis \$3,000 to talk her uncle out of it.<sup>231</sup> In dismissing her claim, in a one paragraph per curiam opinion, the court stated that neither her status as an intestate heir nor the testator’s “unexecuted wish or desire to change his will gave plaintiff” any “right or legal interest.”<sup>232</sup> The court further elucidated the defects in her averments: the absence of any allegation that Faddis “was to, or did, use any fraud, misrepresentation, or undue influence; that he was successful in preventing any change; that but for him the testator would have changed his will, or, if the testator had done so, what he would have given to the plaintiff.”<sup>233</sup> The court concluded that the niece’s complaint “wholly fails to show any tort redressible at law.”<sup>234</sup> It is not at all clear that, even had the absent allegations been present, the complaint would have described a tort the 1904 Pennsylvania court would have recognized.

Judge Popovich’s opinion in *Cardenas* also stated that the tort was “alluded to” in the 1952 case of *Mangold v. Neuman*,<sup>235</sup> with a “see also”

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225. *Id.*

226. *Id.*

227. *Id.* at 326-27.

228. *Id.* at 327. The Supreme Court of Pennsylvania granted an appeal in one of the consolidated cases, *Cardenas v. Schober*, 797 A.2d 909 (Pa. 2002), but no opinion has been issued.

229. *Marshall v. De Haven*, 58 A. 141 (Pa. 1904).

230. *Id.* (from syllabus).

231. *Id.* at 141-42.

232. *Id.* at 142.

233. *Id.*

234. *Id.*

235. *Cardenas v. Schober*, 783 A.2d 317, 325 (Pa. Super. Ct. 2001) (citing *Mangold v. Neuman*, 91 A.2d 904 (Pa. 1952)).

citation to 1962's *Cole v. Wells*.<sup>236</sup> Yet, the reasoning of *Mangold* is clearly hostile to the tort. *Mangold* affirmed a dismissal from the court of common pleas of a complaint alleging procurement of a codicil revoking a testamentary gift to one of the testator's daughters.<sup>237</sup> The complaint alleged that the codicil was procured by fraud and undue influence on an incapacitated testator.<sup>238</sup> The will, including the codicil, had been probated, and no appeal was taken.<sup>239</sup> The court held that it had no jurisdiction over this collateral attack on the will, or indeed "to entertain an action the effect of which is to collaterally attack a will or codicil."<sup>240</sup> The court further rejected the appellants' attempt to distinguish between an "attack on the will" and "an attack on the *conduct of the tortfeasor*,"<sup>241</sup> saying:

But what the learned counsel overlooks is that plaintiffs charge that the alleged wrongful act was the fraudulent procurement and probate of an *invalid codicil* which had the effect of depriving them of testator's bounty under the admittedly valid will. This is in direct impeachment of an unreversed or unannulled judicial decree of the register of wills to the contrary.<sup>242</sup>

This is precisely the sort of analysis used by courts to reject tortious interference on the grounds that it constitutes an attack (albeit an indirect one) on the probate decree.

The *Mangold* court did show some sympathy, however, for a remedy when "the testator has been prevented from modifying or revoking the admittedly valid probated document through physical restraint or fraud to the injury of an intended testamentary beneficiary,"<sup>243</sup> citing Restatement (First) of Torts Section 870, comment b.<sup>244</sup> The court described, with approval, the provision of a remedy for a beneficiary against the testator's murderer if the beneficiary's gift is prevented when the testator is murdered before executing the will containing the gift.<sup>245</sup> Indeed, the *Mangold* court went beyond Restatement Section 870 by broadening the tortious conduct to include

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236. *Id.* (citing *Cole v. Wells*, 177 A.2d 77 (Pa. 1962)).

237. *Mangold v. Neuman*, 91 A.2d 904, 904-05, 907 (Pa. 1952).

238. *Id.* at 905.

239. *Id.*

240. *Id.* (citing the lower court opinion).

241. *Id.* at 906.

242. *Id.*

243. *Id.* at 907.

244. *See, e.g.*, discussion *supra* Part II and notes 17-40.

245. *Mangold*, 91 A.2d at 907.

“physical restraint or fraud” and did not specify that the expectancy must be reflected in an unexecuted, about-to-be-signed will.<sup>246</sup>

After *Mangold*, then, Pennsylvania law apparently distinguished a tort action based on alleged fraudulent *procurement* of a testamentary instrument (an invalid collateral attack on the probate decree) from one based on *preventing* the *execution* of a testamentary instrument, which might be proper under the rationale of Restatement Section 870, broadened to include other forms of tortious conduct beyond fraud. By way of example, the *Mangold* court remarked that the plaintiff in *Marshall v. De Haven* “obviously would be without a remedy in a probate court” and that “[a]n action at law for damages against such a tort-feasor would not constitute an impeachment of the decree of probate.”<sup>247</sup>

It is worth pausing a moment to ask why the plaintiff in *Marshall* was “obviously” without a remedy in the probate court. As the sole intestate heir and a taker under the will (although of just five dollars), she clearly had standing to challenge the will. The problem is that the probated will was never validly revoked (although the testator allegedly wanted to change it), and the fraud she alleged did not amount to a revocation. The remedy she sought—denial of probate—was therefore unavailable, because the fraud prevented a revocation (as well as execution of any new instrument). The *Mangold* court is correct—the niece “obviously” has no remedy in probate court—but element (2), as Judge Popovich has construed it, is a bit narrower than it needs to be. The *Mangold* approach would not only validate the tort in prevention of execution cases, but it would also cover prevention of revocation cases (*Marshall* is either or both; the niece would have received her inheritance if the prior will were revoked, even if no new will were made).

In *Cole v. Wells*,<sup>248</sup> the other case mentioned by Judge Popovich, nephews of the testator filed a complaint in general civil court against the executor of their uncle’s will, seeking discovery about the execution of the will, without first having filed a will contest in orphan’s court or any underlying civil action.<sup>249</sup> The court dismissed the premature discovery request for lack of any underlying action, but stated:

[A]n action at law against appellee on the ground that he exerted undue influence on decedent either to make this will or not to change this will which deprived appellant of

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246. *Id.*

247. *Id.*

248. *Cole v. Wells*, 177 A.2d 77 (Pa. 1962).

249. *Id.* at 78.

the right to a substantial inheritance . . . [is a possibility]. . . . There are situations, as illustrated in *Mangold v. Neuman*, which are outside the jurisdiction of a probate or orphans' court, but they are by their nature not an attack on the will itself, and hence, do not constitute an impeachment of the decree of probate.<sup>250</sup>

Thus, taken together, *Mangold* and *Cole* do seem to provide support for Judge Popovich's next step: actually articulating the elements of a tort cognizable by the Pennsylvania court.

Judge Popovich's first element reflects an attempt to cure the defect resulting from the absence of an averment of "what . . . would have [been] given to the plaintiff" by adding the "described benefit" requirement to the "indicat[ion of] an intent to change" requirement.<sup>251</sup> By hewing this closely to the language of *Marshall*, Popovich's tort excludes other testator mental states that often are recognized as creating a valid expectancy for this tort, such as, the testator's intent to write a *first* will in favor of the plaintiff, or an intent to *revoke* an existing will to provide for the plaintiff under intestacy. By its plain language, Judge Popovich's tort also does not cover trusts or other testamentary substitutes. By contrast, the *Mangold* approach explicitly covered situations in which the testator was prevented from revoking, and is broad enough to cover trusts and *inter vivos* gifts. Judge Popovich's tort also seems to deny standing to the intestate heir.

Judge Popovich's second element is also narrower than either the Restatement (Second) or other states' approaches, which typically can be satisfied by any independently wrongful or tortious conduct, not necessarily limited to fraud, misrepresentation, or undue influence. Judge Popovich further narrows the wrongful conduct element by requiring that the conduct be used to "prevent execution" of the contemplated will. Hence, for example, intimidation used to induce a revocation would not appear to satisfy this element. Judge Popovich's third and fourth elements reflect familiar notions of proximate cause of the "but for" variety.

However, although Judge Popovich's tort is narrow in some respects, it is broad in others. For example, nothing in Judge Popovich's formulation requires that the plaintiff exhaust probate court remedies, although the *Mangold* and *Cole* courts impliedly adopted this requirement in distinguishing impermissible collateral attacks on the probate decree from proper actions at law, and describing the *Marshall* plaintiff favorably for the tort because she was "obviously without a remedy in the probate court." On the elements as

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250. *Id.* at 80-81 (citations omitted).

251. *Cardenas v. Schober*, 783 A.2d 317, 325-26 (Pa. Super. Ct. 2001).

Judge Popovich identifies them, but not as the *Mangold* court apparently contemplated, a plaintiff who might obtain an adequate remedy from the probate court (for example, because his intestate share is equal to or larger than the intended gift under the unexecuted will) could nevertheless elect to pursue the tort remedy (with punitive damages) in civil court, and obtain relief from the tort-feasor rather than the estate itself.

*b. McNeil v. Jordan*

A year after *Cardenas*, in 2002's *McNeil v. Jordan*,<sup>252</sup> Judge Popovich revisited the issue of tortious interference with inheritance, with much larger stakes. The *McNeil* estate was worth in excess of \$650 million,<sup>253</sup> and the dispute arose between one (relatively) disinherited<sup>254</sup> brother and his sister.<sup>255</sup> After reviewing the elements of the tort as he had identified them in *Cardenas*, Judge Popovich concluded that alleged statements by the plaintiff's mother that "if her relationship with [Henry Jr.] improved, then she would adjust her Will to leave [him] an equal share of her estate and the Marital Trust"<sup>256</sup> did not satisfy the first element of the tort, and affirmed the dismissal.<sup>257</sup>

*c. Arena v. McShane*

In *Arena v. McShane*,<sup>258</sup> the children of the testator filed a federal diversity suit against their father's New Jersey estate planning attorneys<sup>259</sup> for drafting a will that left the bulk of the estate to another of the attorneys' clients.<sup>260</sup> The defendants sought dismissal on a variety of bases, including lack of personal jurisdiction, improper venue, and failure to state a claim.<sup>261</sup>

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252. *McNeil v. Jordan*, 814 A.2d 234 (Pa. Super. Ct. 2002).

253. *Id.* at 236 n.1.

254. Henry McNeil, Jr. received outright gifts totaling \$2 million. *Id.* at 236.

255. *Id.* Two other siblings, who shared a very large inheritance equally with their sister, were not named in the lawsuit. *Id.*

256. *Id.* at 240.

257. In *Hollywood v. First National Bank of Palmerton*, 859 A.2d 472, 476-478 (Pa. Super. Ct. 2004), decided after this Article was accepted for publication, Judge Johnson specifically applied the elements of the tort as identified by Judge Popovich, rather than under the Restatement (Second).

258. *Arena v. McShane*, No. 02-07639, 2003 U.S. Dist. Lexis 7778 (E.D. Pa. Apr. 17, 2003). Due to its multistate character, this case is discussed in detail *infra* Part VI.

259. *Id.* at \*19.

260. *Id.* at \*1.

261. *Id.* at \*2.

The motion was denied on all three bases.<sup>262</sup> In evaluating the sufficiency of the complaint under Rule 12(b)(6), the district court looked to the law of Pennsylvania, and straightforwardly applied the elements of the tort as they had been identified in *Cardenas*.<sup>263</sup>

#### IV. STATES DECLINING TO RECOGNIZE THE TORT

Two states—New York and Delaware—have explicitly rejected the tort. New York focuses on the constructive trust remedy for loss of an inheritance. Although an early Delaware Supreme Court case apparently held open the tort, a later case, *Moore v. Graybeal*, generated both federal and state opinions quite hostile to the tort, and subsequent Delaware Chancery Court cases follow those opinions. On the basis of these later cases, Delaware has been classified as a non-tort state.

##### A. *Second Circuit—New York*

New York does not recognize a tort remedy for wrongful interference with an inheritance. Instead, New York has a very well-developed jurisprudence relating to an equitable remedy (the imposition of a constructive trust) in this situation.

In the 1845 case of *Hutchins v. Hutchins*,<sup>264</sup> William Hutchins, one of the sons of testator Benjamin Hutchins, Sr., alleged that he was the devisee of the family farm under a prior will of his father.<sup>265</sup> He further alleged that his brother, Benjamin Hutchins, Jr. and others (perhaps his sisters and their husbands, as the other defendants are two couples with different last names) procured the revocation of that will and the execution of a will disinheriting William, by misrepresentations about him to their father.<sup>266</sup> The court granted the defendants' demurrer, on the basis that William failed "to show that he had any such interest in [the property] as the law will recognize."<sup>267</sup> The court emphasized that "the contemplated gift was not to be realized till after the death of the testator, which might not happen until after the death of the

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262. *Id.* at \*14-15.

263. *Id.* at \*20-21.

264. *Hutchins v. Hutchins*, 7 Hill 104 (N.Y. Sup. Ct. 1845).

265. *Id.* (citing to the syllabus).

266. *Id.* at 108.

267. *Id.* at 109.

plaintiff; or the testator might change his mind, or lose his property.”<sup>268</sup> Other nineteenth century cases similarly decline to protect gratuitous expectancies.<sup>269</sup>

More than a century later, in *In re Estate of Young*,<sup>270</sup> a plaintiff alleged before the surrogate’s court, in essence, that her mother interfered with her intestate inheritance rights from her biological father (not her mother’s husband) by concealing the father’s identity from his daughter.<sup>271</sup> The court dismissed the claim, but only after a thorough and useful discussion of the tort itself, including Restatement (Second) of Torts Section 774B, and its availability in New York after *Hutchins*. The Surrogate dismissed the daughter’s claim as too speculative, but ventured that *Hutchins* “may not express the majority position at this time, since it involved an actual interference with a presently existing will, nevertheless, the language of the court is particularly apposite; that is, that the claim here is ‘altogether too shadowy and evanescent to be dealt with by courts of law.’”<sup>272</sup>

However, in the 1996 case of *Vogt v. Witmeyer*,<sup>273</sup> the New York Court of Appeal held that *Hutchins* is still good law in New York, and that no tort action is available. In *Vogt*, a former one-fifth remainder beneficiary under a revocable *inter vivos* trust filed a tort suit for damages in connection with an amendment of the trust which excluded her completely.<sup>274</sup> The supreme court dismissed the claim, and the appellate division and the court of appeals, citing *Hutchins*, both affirmed on the basis that “New York, however, has not recognized a right of action for tortious interference with prospective inheritance.”<sup>275</sup> Interestingly, the court, citing the Restatement (Second) of Torts Section 774B, added that “such a cause of action would require that the interference be accomplished by some type of independently tortious conduct,”<sup>276</sup> a different defect than the one at issue in *Hutchins*, where slander, defamation, and misrepresentation were adequately alleged, but the

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268. *Id.* at 110.

269. In *Di Messiah v. Gern*, 30 N.Y.S. 824, 825 (1894), the court cited *Hutchins* for the point that “[i]f the effect of the fraud were merely to intercept an intended gratuity to the defendant, in a legal sense she would suffer no injury.” See also *Braem v. Merchants’ Nat’l Bank*, 6 N.Y.S. 846, 848 (1889).

270. *In re Estate of Young*, 592 N.Y.S.2d 905 (N.Y. Sur. Ct. Dec. 9, 1992).

271. *Id.* at 906.

272. *Id.* at 907.

273. *Vogt v. Witmeyer*, 665 N.E.2d 189, 190 (N.Y. 1996).

274. *Id.* at 189-90.

275. *Id.* at 190. Appellate division opinion reported at 622 N.Y.S.2d 393 (N.Y. App. Div. 1995).

276. *Vogt*, 665 N.E.2d at 190.

expectancy itself was adjudged “too shadowy and evanescent.”<sup>277</sup> It seems at least possible that the *Vogt* court might actually have recognized the tort on the *Hutchins* facts.<sup>278</sup>

However, New York uses the constructive trust remedy rather than the tort to “undo” transfers resulting from fraud and undue influence, thanks in large part to the leading case of *Latham v. Father Divine*.<sup>279</sup> In *Latham*, the testatrix, Mary Lyon White, left a will giving “almost her whole estate” to a Depression-era religious figure known as Father Divine (and others associated with him).<sup>280</sup> Her distributees contested the will, and reached a compromise agreement with Father Divine and his associates, in which Father Divine received a significant sum.<sup>281</sup> Subsequently, certain cousins (not distributees) of the testatrix sued Father Divine and others, alleging that the testatrix had expressed an intention to revoke the will and make another giving them \$350,000; that such a will had been drafted but not signed; and that its execution was prevented by undue influence, force, and ultimately by murdering the testatrix.<sup>282</sup> The defendants sought the imposition of a constructive trust on that share of the estate received by Father Divine under the compromise agreement.<sup>283</sup> Because of the remedy sought, the opinion focused on the requirements of equity.<sup>284</sup> Ultimately, the New York Court of Appeals held that a constructive trust is available on these facts.<sup>285</sup>

The only discussion of an action at law for damages is indirect. The court of appeals noted that at the time of *Hutchins*, cases at law and equity were brought before different courts, and the *Hutchins* court therefore could not impose a constructive trust.<sup>286</sup> The court of appeals states further that *Hutchins*, “it seems, holds only this: that in a suit at law there must, as a basis for damages, be an invasion of a common-law right,” while equitable remedies

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277. *Hutchins v. Hutchins*, 7 Hill 104, 110 (N.Y. Sup. Ct. 1845).

278. Nevertheless, *Vogt* has been followed in subsequent New York cases, such as *Estate of Jean I. Stralem, Deceased Trustee*, N.Y. L.J., Apr. 23, 1997, at 29 (dismissing claim for tortious interference).

279. *Latham v. Father Divine*, 85 N.E.2d 168 (N.Y. 1949).

280. *Id.* at 169. For an entertaining discussion (with a picture) of Father Divine, see DUKEMINIER & JOHANSON, *supra* note 161, at 215-17 n.10.

281. *Latham*, 85 N.E.2d at 169.

282. *Id.* The allegations are very similar to RESTATEMENT (FIRST) OF TORTS § 870 cmt. b, illus. 3, (1939), *supra* discussed at Part II and text accompanying note 23.

283. *Latham*, 85 N.E.2d at 169.

284. *Id.* (“We find in New York no decision directly answering the question as to whether or not the allegations above summarized state a case for relief *in equity*.”) (emphasis added).

285. *Id.* at 172.

286. *Id.* at 170-71.

impose no such requirement.<sup>287</sup> Finally, the court of appeals concluded that “despite the broad language of *Hutchins v. Hutchins* . . . it is not the law that disappointed expectations and unrealized probabilities may never, under any circumstances, be a basis for recovery.”<sup>288</sup> On this basis, the expansion of the common-law understanding of protected expectancies is compatible with (though it may not mandate) recognition of the tort.

In the absence of recognition of the tort, disappointed heirs in New York have resorted to rather extraordinary theories of recovery, including 18 U.S.C. § 1961 (“civil RICO”). In *Gunther v. Dinger*,<sup>289</sup> Mary Ann Gunther, the daughter of decedent August Dinger, sued her father’s widow, three of Dinger’s other children, and the appraiser of the estate, on claims of fraud on the estate.<sup>290</sup> The claim withstood defendants’ motion to dismiss for lack of subject matter jurisdiction, and the district court held that plaintiff was not required to exhaust state or surrogate’s court remedies.<sup>291</sup> The court also specifically held that an estate may be an “enterprise” under 18 U.S.C. § 1962.<sup>292</sup>

In *Baekeland v. Baekeland*,<sup>293</sup> the appellate division dismissed a novel claim for interference that alleged that the plaintiff’s ex-husband and his second wife induced his stepmother “to execute a codicil to her [the stepmother’s] will changing the named legatee of a substantial bequest to [the second wife] instead of [the ex-husband] so that plaintiff’s payments under the formula contained in the separation agreement would not be increased.”<sup>294</sup> Presumably, the first Mrs. Baekeland received variable maintenance based on Dr. Baekeland’s assets, and a substantial inheritance would have therefore indirectly benefited her. Even in a state that recognized the tort, this form of “expectancy” might be a stretch—the ex-wife does not expect an inheritance from Dr. Baekeland’s stepmother—yet if the codicil was indeed executed in order to defraud the ex-wife while effectively transferring the assets to Dr. Baekeland, it does not seem far beyond the scope of the tort. Unsurprisingly, though, the New York court dismissed the claim.<sup>295</sup>

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287. *Id.* At least one commentator treats tortious interference as “traceable” to a common-law right. See Marmai, *supra* note 9, and text accompanying *supra* note 28.

288. *Latham*, 85 N.E.2d at 171.

289. *Gunther v. Dinger*, 547 F. Supp. 25 (S.D.N.Y. 1982).

290. *Id.* at 26.

291. *Id.* at 26-27.

292. *Id.* at 27.

293. *Baekeland v. Baekeland*, 542 N.Y.S.2d 624 (N.Y. App. Div. 1989).

294. *Id.* at 625.

295. *Id.* The claim is not denominated as one based on “interference,” and the case cited by the court

As set out in *Latham v. Father Divine*, New York exclusively utilizes the constructive trust remedy for wrongful conduct resulting in loss of an inheritance.<sup>296</sup> *Howland v. Smith* held that in the event that the property comprising the inheritance has been conveyed to an innocent third party, a person entitled to a constructive trust can obtain a money judgment.<sup>297</sup> However, this must be distinguished from a tort action for damages.<sup>298</sup> That the tort is still not available in New York was recently confirmed by the Southern District of New York federal district court's dismissal of a tort claim under this theory in *Weizmann Institute of Science v. Neschis*.<sup>299</sup>

## B. Third Circuit—Delaware

### I. Chambers v. Kane

The holding of the leading case in Delaware, *Chambers v. Kane*,<sup>300</sup> is very close to that of New Jersey's 1964 case, *Casternovia v. Casternovia*.<sup>301</sup> As in *Casternovia*, the donor in *Chambers* was still alive when the suit was filed.<sup>302</sup> Carole Chambers sued her brother, Richard Kane, "for interference with her prospective right to inherit from their mother" (through the mother's exercise of a power of appointment over the principal of a marital trust from their

stands only for the uncontroversial point that every testator can dispose of her property as she wishes. "[T]he law permits a person possessing testamentary capacity to dispose of property to any person in any manner and for any object or purpose so long as such disposition is not illegal or against public policy." *In re Estate of Walker*, 476 N.E.2d 298, 300 (N.Y. 1985).

296. See, e.g., *Dawson v. Vasquez*, 528 N.Y.S.2d 255, 256 (N.Y. Sup. Ct. 1988) ("[T]he combined actions of the defendant and the attorney were a proximate cause of the decedent's wishes being frustrated and the plaintiff's being deprived of her inheritance. Plaintiff argues that in these circumstances equity demands that a constructive trust be created and that the legatee or devisee who prevented the testator from making a new will in favor of another holds the property in trust for the intended legatee or devisee. The court agrees."), *aff'd*, 545 N.Y.S.2d 682 (N.Y. App. Div. 1989).

297. *Howland v. Smith*, 193 N.Y.S.2d 140, 144 (N.Y. App. Div. 1959).

298. However, one (misguided) commentator has cited *Howland* for the proposition that under New York law: "A person harmed as a result of wrongful interference with an expectancy may bring a tort action for damages." JAMES LOCKHART, CAUSE OF ACTION FOR INTERFERENCE WITH EXPECTED GIFT OR INHERITANCE, 2 *Causes of Action* 2d 1, 10-11 (Shepard's Editorial staff eds., 2003).

299. *Weizmann Inst. of Science v. Neschis*, 229 F. Supp. 2d 234, 254 (S.D.N.Y. 2002). See also *Jung v. Neschis*, No. 01 Civ. 6993 (RMB), 2003 WL 1807202 (S.D.N.Y. Apr. 7, 2003).

300. *Chambers v. Kane*, 437 A.2d 163 (Del. 1981). See also *Chambers v. Kane*, 424 A.2d 311 (Del. Ch. 1980).

301. *Casternovia v. Casternovia*, 197 A.2d 406 (N.J. Super. Ct. App. Div. 1964), discussed *infra* at Part III.C.1.

302. In fact, on appeal to the Delaware Supreme Court, she intervened in the suit. *Chambers*, 437 A.2d at 164.

father).<sup>303</sup> However, Chambers did not seek damages, but only the equitable remedies of an accounting and surcharge (in relation to the trust), a constructive trust on assets held or administered by him, and an injunction.<sup>304</sup> Chambers' primary allegation was that *inter vivos* transfers wrongfully procured by her brother reduced the marital trust from \$1.5 million to less than \$700,000.<sup>305</sup>

Prior to this case, "there [was] no Delaware authority either recognizing or refusing to recognize the tort of intentional interference with an expectancy of inheritance."<sup>306</sup> After carefully and thoroughly reviewing the Restatement, Prosser, and the Maine case of *Harmon v. Harmon*,<sup>307</sup> the vice-chancellor ultimately concluded that it was "unnecessary to reach a decision" on whether to adopt the *Harmon* rationale (permitting the claim even when the donor is still alive), "because even under the plaintiff's authorities . . . [the claim] must be dismissed."<sup>308</sup>

The chancery court gave two reasons for this conclusion. The weaker of the two was that the plaintiff had, at most, alleged tortious conduct that "reduced the size of the expectancy" rather than eliminating it altogether.<sup>309</sup> This clearly makes little sense: if the tortious interference of a third party led to the revocation of a will leaving everything to a particular person, who also happens to be an intestate taker to the extent of one percent, it hardly makes sense to suggest the tort will not lie. Similarly, if wrongfully-procured *inter vivos* conveyances reduce a one million dollar estate to \$100, a taker of "half" has been damaged more than someone who entirely loses an outright bequest of \$10,000.<sup>310</sup>

The second and stronger basis for the chancery court's conclusion, however, was that the equitable relief sought by the plaintiff was only available to redress the injury to the donor (a non-party), the originally victimized, still-living party, and not a prospective heir of that victim. Put another way, giving Chambers the equitable remedy she seeks would, in effect, distribute (or hold for future distribution) the estate of a living person,

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303. *Chambers*, 424 A.2d at 312.

304. *Id.*

305. *Id.* at 313.

306. *Id.* at 314.

307. *Harmon v. Hamon*, 404 A.2d 1020 (Me. 1979), discussed *supra* at Part III.A.1.b.

308. *Chambers*, 424 A.2d at 314-15.

309. *Id.* at 315.

310. States that recognize the tort do not require that the expectancy be completely extinguished. *See, e.g., Cardenas v. Schober*, 783 A.2d 317, 319-20 (Pa. Super. Ct. 2001), discussed *supra* Part III.C.2.a (tort claim based on intended gift of \$80,000, compared to \$10,000 gift under probated will).

who still has the legal capacity to dispose of it differently.<sup>311</sup> The remedy sought by Chambers is clearly an unacceptable invasion of the living donor's testamentary freedom.

The vice-chancellor stated: "I pass no judgment on whether or not the plaintiff may have a present cause of action, in tort, for the recovery of money damages against her brother for his alleged tortious interference with her expectation of receiving an inheritance from her mother."<sup>312</sup> On appeal, the Delaware Supreme Court affirmed the vice-chancellor's treatment of the claim for tortious interference.<sup>313</sup> It is quite unclear where this left the tort claim, although it clearly did not rule it out.

## 2. Moore v. Graybeal

The series of state, probate, and federal cases arising from the estate of Jean Purse clarified that Delaware does not recognize the tort. Purse died in 1986.<sup>314</sup> Purse's will, dated 1984, was probated in Delaware.<sup>315</sup> In 1987, beneficiaries under Purse's 1979 will (including Barbara Purse Moore) sued the beneficiaries of the 1984 will (including Dr. Edward Graybeal) in federal district court, seeking damages based on undue influence.<sup>316</sup> After a searching review of applicable Delaware law, the federal district court concluded that the case was, in substance, a will contest; that there was no general civil action *inter partes* for contesting a will; and that the sole forum for such a contest was the probate court.<sup>317</sup> The federal district court then dismissed the claim for lack of subject matter jurisdiction.<sup>318</sup>

On appeal to the Third Circuit, Moore, the plaintiff, sought to clarify the tort claim as such, and attempted to resist the court's characterization of it as an attack on the probate of the will.<sup>319</sup> This attempt was unavailing; the Third Circuit stated that "[r]egardless of how Moore characterizes her claim, she is

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311. This is distinguishable from the situation in which a living donor has transferred assets *inter vivos* to a wrongdoer, who then becomes the defendant.

312. *Chambers*, 424 A.2d at 316.

313. *Chambers v. Kane*, 437 A.2d 163, 164 (Del. 1981). The Supreme Court reversed only with respect to whether Chambers might bring an equity action on behalf of her mother, a determination requiring further proceedings about her mother's competence. *Id.* at 164-65.

314. *Moore v. Graybeal*, 670 F. Supp. 130, 130 (D. Del. 1987).

315. *Id.*

316. *Id.* at 130-31.

317. *Id.* at 133-34.

318. *Id.* at 134.

319. *Moore v. Graybeal*, 843 F.2d 706, 709 (3d Cir. 1988).

seeking in substance to invalidate the will on the basis of undue influence and lack of capacity.<sup>320</sup> The Third Circuit, acknowledging Restatement (Second) of Torts Section 774B, nevertheless concluded that the tort “is so inconsistent with the Delaware statutory plan for exclusive review of probate proceedings that allowing it would subvert the probate law”<sup>321</sup> in two ways: by effectively revoking the bequests to the tort defendants, and, “in practical terms,” obtaining the probate of the 1979 will in the plaintiff’s favor.<sup>322</sup>

However, the Third Circuit also said that “we are not to be understood as implying that we believe that Delaware would, in no circumstances, allow an action for tortious interference with an inheritance,”<sup>323</sup> but “[t]here is no controlling case on the point in Delaware.”<sup>324</sup> The Third Circuit suggested generally that if no remedy is available to the plaintiff under the statutory review procedures for probated wills, the tort might lie.<sup>325</sup> For example, tort liability might exist “if the tortfeasor himself was not a beneficiary of the will of the decedent or in privity with the beneficiary,”<sup>326</sup> or if the tortfeasor concealed a will conferring standing upon a beneficiary until after the statute of limitations had run.<sup>327</sup> Nevertheless, on the actual facts of *Moore v. Graybeal*, the district court’s dismissal was affirmed.<sup>328</sup>

On appeal from a subsequent suit in Delaware Superior Court, the Delaware Supreme Court stated its agreement with the federal courts and held “that [Moore’s] claim of tortious interference with an inheritance if pursued in a court of law would constitute a collateral attack upon the probate of the will of Jean L. Purse. Such an attack is clearly precluded by Delaware law.”<sup>329</sup> Yet a year later, the chancery court, still dealing with *Moore v. Graybeal*, remarked:

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320. *Id.* at 710.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 710 n.4.

325. *Id.* at 710-11.

326. *Id.* at 710.

327. *Id.* at 711.

328. *Id.* at 712. The plaintiffs filed the same case in Delaware Superior Court; it was also dismissed. *Moore v. Graybeal*, No. CIV. A. 88C-AP-194, 1988 WL 912055, at \*1 (Del. Super. Ct. June 29, 1988). The Delaware Supreme Court affirmed the dismissal. *Moore v. Graybeal*, 550 A.2d 35 (Del. 1988). When the plaintiffs brought their challenge in the chancery court, that court ultimately concluded that it was time-barred. *Moore v. Graybeal*, No. CIV. A. No. 9851, 1989 WL 17430, at \*6 (Del. Ch. Feb. 24, 1989). The Delaware Supreme Court affirmed this determination. *Moore v. Graybeal*, 567 A.2d 522 (Del. 1988).

329. *Moore*, 550 A.2d 35.

Whether such a tort might exist or not under Delaware law has been addressed by none of the courts required to address the petitioners' pleadings. The question might arise in a situation in which the complaining party did not allege a want of testamentary capacity or otherwise attack the effectiveness of the later will, as is plainly the gist of this action.<sup>330</sup>

Subsequent Delaware cases follow *Moore v. Graybeal*, interpreting it in various ways, but all of them are hostile to an independent tort claim in civil court. In *Shuttleworth v. Abramo*,<sup>331</sup> Chancellor Allen stated:

In *Moore v. Graybeal*, the Supreme Court affirmed an opinion of this Court holding that an action for tortious interference with a prospective bequest (premised upon claims of undue influence) was in fact an action attacking a will governed by Section 1309 of Title 12. Earlier the Supreme Court had approved a dismissal of an action between those named parties in the Superior Court on the ground that the tortious interference theory was "merely attempting to put another label on a probate claim."<sup>332</sup>

*Williams v. Wilmington Trust Co.*<sup>333</sup> took a slightly different approach, interpreting *Moore* to mean "that a claim of tortious interference with an inheritance must be pursued in the court of chancery because such a claim would constitute a collateral attack on the validity of a will."<sup>334</sup> In *East v. Tansey*,<sup>335</sup> the chancellor described *Moore* much like the *Shuttleworth* chancellor: "the complaint constituted an attempt to declare invalid a will already admitted to probate . . . . Chancellor Allen rejected the plaintiffs' alternative characterization of their complaint as a tort action for interference with an expectancy the plaintiffs retained under an earlier will."<sup>336</sup>

Yet, uncertainty about whether Delaware recognizes the tort has persisted for decades. In the most recent Delaware case on the tort, *In re Wilson*,<sup>337</sup> decided September 25, 2003, the plaintiff alleged intentional interference with inheritance.<sup>338</sup> The chancery court stated:

Gunnar has failed to establish the elements of the tort of intentional interference with inheritance, *even if* that tort is one that is recognized under Delaware law. See *Chambers v. Kane* [citation omitted] for a discussion of the presumptive elements of such a tort in those jurisdictions in which it is recognized.<sup>339</sup>

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330. *Moore*, 1989 WL 17430, at \*3 n.1.

331. *Shuttleworth v. Abramo*, No. CIV. A. No. 11650, 1991 WL 160260 (Del. Ch. Aug. 15, 1991).

332. *Id.* at \*4.

333. *Williams v. Wilmington Trust Co.*, No. 338, 1993 WL 539210 (Del. Super. Ct. Nov. 22, 1993).

334. *Id.* at \*1.

335. *East v. Tansey*, No. CIV. A. No. 1592, 1993 WL 487807 (Del. Ch. Oct. 22, 1993).

336. *Id.* at \*4.

337. *In re Wilson*, No. CIV. A. 19527, 2003 WL 22227850 (Del. Ch. Sept. 25, 2003).

338. *Id.* at \*1.

339. *Id.* at \*3 n.8 (emphasis added).

On this basis, although Delaware is classified among states not recognizing the tort, *Chambers v. Kane*, the Third Circuit and chancery opinions in *Moore v. Graybeal*, and this very recent chancery case suggest that under the right factual circumstances, the tort might lie. For example, a tort suit based on a wrongfully-procured *inter vivos* conveyance to a person not a beneficiary under the will would seem to satisfy the Third Circuit and the chancery court, as such a claim would not fall within the statutory review procedures regarding a will. Nevertheless, until such a suit is brought, Delaware must be classified among states that do not recognize the tort.<sup>340</sup>

#### V. STATES AND JURISDICTIONS WITH NO REPORTED CASES ADDRESSING THE TORT

Three states (New Hampshire, Rhode Island, and Vermont), Puerto Rico, and the Virgin Islands have never explicitly addressed the tort, and they take varying approaches to expectancy torts in general.

##### A. First Circuit

As discussed in Part III.A, *supra*, Maine and Massachusetts recognize tortious interference with expectation of inheritance. The remaining jurisdictions of the First Circuit have no reported cases addressing it.

##### 1. New Hampshire

As of this writing, New Hampshire has no reported cases addressing tortious interference with expectation of inheritance.<sup>341</sup> New Hampshire permitted the imposition of a constructive trust in a rather unusual interference-style case, in which the intestate heirs of an elderly woman alleged that her husband fraudulently married her in order to inherit from

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340. *In re Rich*, No. Civ. A. 218-N, 2004 WL 1366978, at \*1-3 (Del. Ch. June 15, 2004), included an allegation of tortious interference together with a challenge to a will, but the entire case was dismissed on statute of limitations grounds.

341. On-line Westlaw and LexisNexis searches of all New Hampshire cases, state and federal, for “interfer! /s (inherit! beque! legacy)” were performed on March 3, 2005. The facts of *Loveren v. Eaton*, 113 A. 206 (N.H. 1921), in which a son (made the beneficiary of a spendthrift trust rather than an outright gift as in a former instrument) unsuccessfully alleged the undue influence of his father’s housekeeper, were suggestive of tortious interference, but no tort claim was alleged.

her.<sup>342</sup> Although the court refused to annul the marriage, the heirs were permitted to proceed with a constructive trust action.<sup>343</sup> New Hampshire also recognizes an action for interference with “business and trade expectancies.”<sup>344</sup> While the recognition of this tort relating to interference with an expectancy might render recognition of tortious interference with expectation of inheritance somewhat likelier, New Hampshire also might follow New York and rely on the constructive trust approach.

### 2. *Puerto Rico*

As of this writing, Puerto Rico has no reported cases addressing tortious interference with expectation of inheritance.<sup>345</sup> Nor does Puerto Rico recognize tort claims based on business expectancies in the absence of a contract, or claims based on expectations or advantageous economic relationships in general.<sup>346</sup> It thus seems very unlikely that Puerto Rico will recognize the tort anytime soon.

### 3. *Rhode Island*

As of this writing, Rhode Island has no reported cases addressing tortious interference with expectation of inheritance.<sup>347</sup> However, Rhode Island recognizes the “expectancy” tort of interference with prospective business advantage, as articulated in Restatement (Second) of Torts Section 766B.<sup>348</sup> Given the inclusion of tortious interference with expectation of inheritance in

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342. *Patey v. Peaslee*, 131 A.2d 433, 435 (N.H. 1957).

343. *Id.* at 436.

344. *See, e.g., J. Dunn & Sons, Inc. v. Paragon Homes of New England, Inc.*, 265 A.2d 5, 8 (N.H. 1970) (“[T]he trial court could properly rule that, on their face, the first two counts in each action alleged tortious breaches by the defendant of a duty not to cause the plaintiffs economic harm in their business and trade expectations.”).

345. On-line Westlaw and LexisNexis searches of all Puerto Rico cases for “interfer! /s (inherit! beque! legacy)” were performed on March 3, 2005.

346. *See A.M. Capen’s Co. v. Am. Trading & Prod. Corp.*, 200 F. Supp. 2d 34, 48 (D.P.R. 2002); *Peguero v. Hernandez Pellot*, 139 D.P.R. 487, 508 n.18 (P.R. 1995) (“In fact, the existence of a contract is an indispensable requirement in our jurisdiction for tortious interference actions; the action does not lie if what is affected is a mere expectation or an advantageous economic relationship.”); *Gen. Office Prods. v. A.M. Capen’s Sons, Inc.*, 115 D.P.R. 553, 559 (P.R. 1984) (“Si lo que se afecta es una expectativa o una relación económica provechosa sin que medie contrato, la acción no procede, aunque es posible que se incurra en responsabilidad bajo otros supuestos jurídicos.”).

347. On-line Westlaw and LexisNexis searches of all Rhode Island cases, state and federal, for “interfer! /s (inherit! beque! legacy)” were performed on March 3, 2005.

348. *Mesoлева v. City of Providence*, 508 A.2d 661, 669 (R.I. 1986).

the Restatement (Second) of Torts at Section 774B, it seems possible that Rhode Island might recognize the tort in proper circumstances.

*B. Second Circuit—Vermont*

As of this writing, Vermont has no reported cases addressing tortious interference with expectation of inheritance.<sup>349</sup> However, Vermont does recognize the “expectancy” tort of interference with “prospective contractual relations,”<sup>350</sup> under Restatement (Second) of Torts Section 767. This tort covers interference with “a valid business relationship or expectancy.”<sup>351</sup> Should the proper case present itself, Vermont might be willing to extend recognition to interference with expectation of inheritance, under Restatement (Second) of Torts Section 774B.

*C. Third Circuit—Virgin Islands*

As of this writing, the Virgin Islands has no reported cases addressing tortious interference with expectation of inheritance.<sup>352</sup> However, the Virgin Islands recognizes tortious interference with prospective contractual relations under Restatement (Second) Section 766B,<sup>353</sup> and tortious interference with family relations.<sup>354</sup> This suggests that under proper circumstances, the Virgin Islands might recognize tortious interference with expectation of inheritance.

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349. On-line Westlaw and LexisNexis searches of all Vermont cases, state and federal, as well as the Vermont Bar Journal, for “interfer! /s (inherit! beque! legacy)” were performed on March 3, 2005.

350. *See, e.g.*, *Gifford v. Sun Data, Inc.*, 686 A.2d 472, 474 nn.1-2 (Vt. 1996).

351. *Id.* at 474 n.2.

352. On-line Westlaw and Lexis searches of all Virgin Islands cases for “interfer! /s (inherit! beque! legacy)” were performed on March 3, 2005.

353. *Gov’t Guar. Fund v. Hyatt Corp.*, 166 F.R.D. 321, 326 (D.V.I. 1996) (“Virgin Islands law recognizes a cause of action for interference with a prospective contractual relation. RESTATEMENT (SECOND) OF TORTS § 766B. The elements of a claim for intentional interference with a prospective contractual relation are: 1) a prospective contractual relationship; 2) an intent to harm the plaintiff by preventing the relationship from occurring; 3) the absence of privilege or justification on the part of the defendant; and 4) the occasioning of actual damage resulting from the defendant’s conduct.”). *See also* *Gov’t Guar. Fund v. Hyatt Corp.*, 955 F. Supp. 441, 455 n.10 (D.V.I. 1997) (reciting the same elements for intentional interference with prospective contractual relations).

354. *See, e.g.*, *Sullivan v. deColigny*, 432 F. Supp. 689, 690 (D.V.I. 1977) (discussing whether plaintiff alleged a *prima facie* case for tortious interference with contractual relations).

VI. THE SIGNIFICANCE OF TORT CHOICE OF LAW PRINCIPLES FOR FORUM SELECTION, OR, WHY A COURT IN A NON-TORT STATE MIGHT FIND ITSELF ADJUDICATING A TORTIOUS INTERFERENCE CLAIM ANYWAY (AND WHY LAWYERS SHOULD CARE)<sup>355</sup>

Probate is one of the few areas in which American choice of law doctrine is reasonably clear and well-settled.<sup>356</sup> In general, a will is valid if it is valid when and where it was executed, or under the law of the testator's domicile when executed, or under the law of the testator's domicile or residence at death.<sup>357</sup> In a wholly "domestic" case, in which the testator executes his will in the state of his domicile at death (and all property of the estate is located there), the will will be probated in that state,<sup>358</sup> and *lex fori* will therefore generally apply. By contrast, a tortious interference claim, as an ordinary action at law, can be brought in any state court of general jurisdiction where there is personal jurisdiction over the defendant. Moreover, the relative simplicity of choice of law in most estates cases most emphatically does not carry over to the tort context. To understand why not, we will work through several examples.

*A. Tort Claims in Non-Tort States: A Hypothetical*

In order to explore the consequences of a multi-state situation, consider the following hypothetical:

A family (most of whose members are New York domiciliaries) maintains a second residence in Vacation State. Various members of the family spend

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355. The author would especially like to thank Prof. Pat Reyhan for assistance with this section, particularly the New York material. Any errors, of course, are the responsibility of the author alone.

356. PETER HAY, *CONFLICT OF LAWS* 204 (3d ed. 2000) ("Since different [state] laws may have different formal requirements [for wills] . . . [m]any states have therefore modified the traditional rule and have adopted *alternative validating references*. Thus situs law may provide that a will is valid if valid under situs law *or* the law of the place of execution *or* the law of the testator's domicile at death *or* the law of the testator's nationality.") (citation omitted). *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(c), (d) (McKinney 1998).

357. UNIF. PROB. CODE § 2-506 (1990).

358. MARGARET VALENTINE TURANO & C. RAYMOND RADIGAN, *NEW YORK ESTATE ADMINISTRATION* § 19.01 (2003) ("A decedent's will is usually probated in his domicile."). Ancillary administration may also be required in any state where real property of the estate is located. "If real property is located in another jurisdiction, ancillary administration in the jurisdiction is required." DUKEMINIER & JOHANSON, *supra* note 161, at 39. *See also* RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 314 (1971).

significant time, from a few weeks to a few months out of the year, in the second residence, a vacation home. Vacation State recognizes the tort of intentional interference with expectation of inheritance.<sup>359</sup> Suppose, while there, that one member of the family (a New Yorker) prevails upon the elderly patriarch or matriarch, also a New York domiciliary, either to make, or to refrain from making, a change in his or her estate plan. This is accomplished by wrongful means—for example, by telling lies about another member of the family who happens to be domiciled in Vacation State. The testamentary changes are either made or not made as a result, to the detriment of the Vacation State domiciliary. At the end of the vacation, everyone returns to his or her home state, and shortly thereafter, the elderly family member dies, domiciled in New York.

If the Vacation State domiciliary sues the New Yorker for tortious interference with expectation of inheritance in a New York court, will the claim be dismissed?<sup>360</sup> Assume, in order to make the need for the tort as clear as possible, that the injured would-be heir is neither an intestate taker (perhaps because his or her parent is still alive), nor a beneficiary under the existing will (if there is one). Hence, the Vacation State domiciliary lacks standing to challenge the distribution (by will or intestate) in the New York probate court, called the “Surrogate’s Court”; even if an existing will is challenged successfully on other grounds, the Vacation State tort plaintiff will take nothing. Assume further that, perhaps for reasons of personal jurisdiction over other defendants on other causes of action or perceived procedural advantages, New York is where the plaintiff wishes to file suit.

It might seem obvious that because New York does not recognize the tort,<sup>361</sup> the claim is doomed. In fact, it is far from obvious, because what matters is *not* whether New York recognizes the tort, but rather, under the applicable choice of law rules, whether the New York court would apply the

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359. The problem is generated if a domiciliary of a non-tort state has significant connections with a tort state. Many New Yorkers in fact have significant connections with such states as Florida, Maine, and Massachusetts, all of which recognize the tort. See *DeWitt v. Duce*, 408 So. 2d 216, 218 (Fla. 1981); see also *supra* Part III.A for Maine and Massachusetts cases. The possibility that a New York court might adjudicate a tortious interference claim under Florida law was raised in *Gimbel v. Feldman*, No. CV-93-4761, 1996 WL 342006, at \*6-7 (E.D.N.Y. June 17, 1996).

360. The Vacation State domiciliary could almost certainly obtain personal jurisdiction over the New Yorker in Vacation State on the tort claim. However, the Vacation State domiciliary might have other reasons for preferring to litigate in New York.

361. See *supra* Part IV.A.

substantive law of Vacation State (be it Florida, Maine, Massachusetts, or any of the other states that currently recognize the tort<sup>362</sup>) rather than New York.

None of the states of the First, Second, and Third Circuits applies a simple *lex loci delicti* approach to tort conflicts of law, though all display greater or lesser deference to the law of the place of injury as appropriate to govern the tort claim. Under the right set of circumstances, therefore, courts in the non-tort states might find themselves adjudicating such claims, and attorneys representing persons interested in estates in non-tort states need to be aware of multi-state facts that might make the tort available to their clients or their clients' opponents in litigation. If we apply each choice of law approach taken by the states of the First, Second, and Third Circuits, it quickly becomes clear that under the set of facts described above, the tort claim would indeed be viable even in non-tort states, notwithstanding that if the facts were all "domestic," the injured party would have no remedy.<sup>363</sup>

## B. Choice of Law Approaches in Non-Tort States

### 1. Neumeier Rules (New York)

New York led the nation in moving away from *lex loci delicti* toward modern approaches.<sup>364</sup> Since 1963's *Babcock v. Jackson*,<sup>365</sup> New York has used some variety of "interest analysis" for tort choice of law,<sup>366</sup> further specified, beginning in 1972, by the three "*Neumeier* rules," so named from the case that articulated this approach.<sup>367</sup> Once it is clear that there actually is a conflict between the substantive provisions of the laws of states somehow

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362. See *supra* note 10 and cases cited therein.

363. Conversely, it is also possible that courts in tort states might dismiss similar claims arising from events in a non-tort Vacation State, if their choice of law approaches so required. This possibility is discussed *infra* Part VI.C.

364. BRILMAYER & GOLDSMITH, *supra* note 11, at 183 ("New York was the first state to experiment with explicit departure from the First Restatement [*lex loci delicti*].").

365. *Babcock v. Jackson*, 191 N.E.2d 279, 285 (N.Y. 1963) ("Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as does the issue of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.").

366. *Babcock* was extended beyond its own limited guest-statute situation to other torts. See, e.g., *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 685 (N.Y. 1985) ("Although most of our major choice-of-law decisions after *Babcock* involved foreign guest statutes in actions for personal injuries, we have not so limited them, but have applied the *Babcock* reasoning to other tort issues as well.").

367. *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277 (N.Y. 1993); *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972).

connected to the action, the next task is to determine whether the conflicting rules are “conduct-regulating” or “loss-allocating.”<sup>368</sup> While any tort law is obviously amenable to either classification, laws against interference clearly are intended *both* to deter wrongful interference, and to re-allocate pecuniary consequences of such wrongful interference. If we conclude that the law prohibiting tortious interference with expectation of inheritance is conduct-regulating, the law of the tort state where the conduct occurred (Vacation State) is applied.<sup>369</sup> In this specific situation, the actual conflict of laws is between the remedies available. Like the tort states, New York makes (at least some forms of) unlawful interference with an inheritance actionable; however, the only remedy is through probate or equity (constructive trust). Such differences of remedy are probably best classified as loss-allocating, as they are remedial rather than prospective, and “prohibit, assign, or limit liability after the tort occurs.”<sup>370</sup> In that case, we apply the *Neumeier* rules.

Application of the proper *Neumeier* rule next requires identification of party domiciles and the place where the conduct giving rise to the tort occurred. In our hypothetical, the plaintiff is domiciled in a tort state (Vacation State), the defendant is domiciled in New York, and the defendant’s conduct occurred in a tort state. On this basis, the first *Neumeier* rule (which applies to parties with a common domicile) is inapplicable.<sup>371</sup>

The second of the three *Neumeier* rules applies when the parties are domiciled in different states, the situs of the tort is in a state in which a party is domiciled, and “the local law favors the respective domiciliary.”<sup>372</sup> This rule applies to our facts. The parties are domiciled in different states, the tort took place in the plaintiff’s domicile, and the conflicting state laws favor the

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368. *Padula v. Lilam Props. Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994) (“[A] distinction must be made between a choice-of-law analysis involving standards of conduct and one involving the allocation of losses. In the former case the law of the place of the tort governs.”).

369. *Id.* To the extent that a traditional (First Restatement) approach distinguishes between place of injury and place of conduct, place of conduct is considered the place of wrong for intentional (as opposed to negligent) torts. BRILMAYER & GOLDSMITH, *supra* note 11, at 17.

370. *Padula*, 644 N.E.2d at 1003.

371. The first *Neumeier* rule applies where the possibly-applicable state laws conflict, but the parties share a common domicile in one state or the other. In that situation, the law of the common domicile applies. “Where the conflicting rules at issue are loss allocating and the parties to the lawsuit share a common domicile, the loss allocation rule of the common domicile will apply.” *Id.* If the injured party were also a New Yorker, therefore, there would be no tort liability *inter partes* for acts of interference that took place elsewhere. But if the tortfeasor were a Vacation State domiciliary, like the tort plaintiff, the action would lie, despite the fact that the inheritance in question derives from the estate of a New York domiciliary. In that situation, of course, New York’s personal jurisdiction over the tortfeasor would have to be based on minimum contacts, rather than domicile.

372. *Cooney*, 612 N.E.2d at 281.

domiciliary; that is, the tortfeasor's local law does not recognize the tort remedy, but the tort plaintiff's local law does. Such a "tie" is broken in favor of the place of injury—the New York court applies the law of Vacation State, and the tort remedy is available. As a recent New York case put it, "[t]he second rule essentially 'adopts a "place of injury" test.'<sup>373</sup>

The third *Neumeier* rule, not relevant here, also generally breaks "ties" in favor of the law of the place of injury, which applies unless "it appears that displacing [the] normally applicable rule will advance the relevant substantive law purposes . . . [without impairing] the smooth working of the multi-state system [or producing] great uncertainty for litigants."<sup>374</sup>

To summarize, if the first *Neumeier* rule applied (the parties were both domiciled in a tort state and the conduct giving rise to the claim took place there), the law of that state would be applied in a New York court. If the second *Neumeier* rule applied, that is, if the plaintiff was domiciled in a plaintiff-protecting tort state, and the events took place there, the New York court again would apply the law of the tort state. If the third *Neumeier* rule applied, and it was the defendant rather than the plaintiff who was domiciled in a tort state (modifying our hypothetical, the tortfeasor lived in Vacation State, while the tort plaintiff is a New Yorker), again, the tie would likely be broken in favor of the law of the place of the wrong, Vacation State.<sup>375</sup> Because of these rules, used only in New York, New York's choice of law approach is arguably one of the most complex and idiosyncratic.<sup>376</sup> Yet in all

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373. *Bodea v. TransNat Express, Inc.*, 731 N.Y.S.2d 113, 116 (N.Y. App. Div. 2001).

374. *Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972) (quoting *Tooker v. Lopez*, 249 N.E.2d 394, 399 (N.Y. 1969) (Fuld, J., concurring)). See also *Cooney*, 612 N.E.2d at 281 ("Assuming that the interest of each state in enforcement of its laws is roughly equal . . . the situs of the tort is appropriate as a 'tie breaker' because that is the only state with which both parties have purposefully associated themselves in a significant way.").

375. This is eminently reasonable. If the tortfeasor is engaging in conduct that is unlawful by the laws of his own home state, he should hardly benefit from the fact that the injury he is inflicting is not recognized by the laws of his victim's state of domicile. A "governmental interest" analysis approach reaches the same result, though for a very different reason. If the plaintiff's domicile provides no remedy, although the defendant's domicile permits liability on the given facts, this is the "unprovided-for" case, in which *neither* state has a legitimate interest! The defendant's state has no injured plaintiff to compensate, while the plaintiff's state has no defendant to shield from liability.

376. *But see* BRILMAYER & GOLDSMITH, *supra* note 11, at 214 ("[D]oesn't New York's choice-of-law rule for torts boil down to: Apply the law of the place of injury unless the issue involves a loss-allocation dispute between common domiciliaries, in which case apply the law of the domicile? If this is correct, then the New York 'revolution' amounts to nothing more than the First Restatement with a narrow exception for common domicile cases involving loss-allocation issues.").

of these not unlikely scenarios, the New York court would adjudicate the tort claim, rather than dismiss it.<sup>377</sup>

2. *Restatement (Second) of Conflict of Laws Sections 6, 145 (Rhode Island, Vermont, Delaware, Puerto Rico, Virgin Islands)*

After the breakdown of the Restatement (First) consensus that the appropriate choice-of-law principle in tort cases was *lex loci delicti*, the law of the “place of wrong,”<sup>378</sup> a variety of tort choice-of-law approaches emerged. One of the most widely accepted is codified at Restatement (Second) of Conflict of Laws, Sections 6 and 145, widely known as the “most significant relationship” test.

Restatement (Second) of Conflict of Laws, Chapter 1, “Introduction,” under Section 6, “Choice-of-Law Principles,” states:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
  - (a) the needs of the interstate and international systems,
  - (b) the relevant policies of the forum,
  - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
  - (d) the protection of justified expectations,
  - (e) the basic policies underlying the particular field of law,
  - (f) certainty, predictability and uniformity of result, and
  - (g) ease in the determination and application of the law to be applied.<sup>379</sup>

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377. Of course, it is at least possible that the New York court would apply the “public policy” exception and apply New York law even if application of the *Neumeier* rules indicated that the law of the tort state should apply. However, this seems quite unlikely. As one New York court stated:

The courts of our state have recognized, if sometimes only implicitly, that the necessity for the public policy exception has virtually disappeared with the institution of the governmental interest analysis partially codified in the *Neumeier* rules. Despite language which might locate public policy in statutes or judicial decisions, only foreign statutes directly violating our supreme law, the state Constitution, have been rejected under the public policy exception since the *Babcock* decision. *Feldman v. Acapulco Princess Hotel*, 520 N.Y.S.2d 477, 487-88 (N.Y. Sup. Ct. 1987). Historically, federal courts have been more inclined to do this than state courts. *Compare* *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973) (holding, dividedly, that the rules announced in *Neumeier* did not apply to limitations of foreign jurisdiction on wrongful death recovery because New York had a ‘strong public policy’ against limiting liability in that area), *with* *Reale v. Herco, Inc.*, 589 N.Y.S.2d 502 (N.Y. App. Div. 1992) (applying Pennsylvania law and declining to apply “public policy” exception).

378. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934) (“The law of the place of wrong determines whether a person has sustained a legal injury.”).

379. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

This extremely general and abstract approach is further specified in Restatement (Second) of Conflict of Laws, which provides, under Section 145, "The General Principle," that:

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
  - (a) the place where the injury occurred,
  - (b) the place where the conduct causing the injury occurred,
  - (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
  - (d) the place where the relationship, if any, between the parties is centered.
 These contacts are to be evaluated according to their relative importance with respect to the particular issue.<sup>380</sup>

Rhode Island, Vermont, Delaware, Puerto Rico, and the Virgin Islands have adopted the Restatement (Second)'s "most significant relationship" approach to tort choice of law.<sup>381</sup> If the plaintiff is domiciled in a tort state, that will be treated as the state where the injury occurred (§ 145(2)(a)). In our hypothetical, the conduct causing the injury also occurred in Vacation State, a tort state (§ 145(2)(b)). The plaintiff is domiciled there (§ 145(2)(c)), although the defendant is not. Finally, it can certainly be argued that the relationship between the parties is "centered" in Vacation State (if anywhere) (§ 145(2)(d)). It is difficult to imagine, therefore, that any Restatement (Second) state would decline to apply Vacation State law and instead would

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380. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

381. *Berry v. Am. Airlines, Inc.*, No. 1996-0152, 2000 WL 34205757, at \*1 (D.V.I. 2000) (Virgin Islands); *Wadsworth, Inc. v. Schwarz-Nin*, 951 F. Supp. 314, 322 (D.P.R. 1996) (Puerto Rico); *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40 (Del. 1991) (Delaware); *Brown v. Church of the Holy Name of Jesus*, 252 A.2d 176, 179 (R.I. 1969) (Rhode Island); *McKinnon v. F.H. Morgan & Co.*, 750 A.2d 1026, 1028 (Vt. 2000) (adopting both the general Restatement (Second) sections and any specific applicable section). Under 1 V.I.C. § 4,

the restatements of the law approved by the American Law Institute . . . [are] the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary. . . . Only in rare cases is a jurisdiction other than that in which the conduct and injury occurred more significant.

In *Benjamin v. Eastern Airlines, Inc.*, 18 V.I. 516, 519-520 (D.V.I. 1981), the Virgin Islands court stated, "actions for personal injuries . . . are governed by the 'local law of the state where the injury occurred,' . . . unless . . . some other state has a more significant relationship," citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).

dismiss a tortious interference claim, even though none of these jurisdictions has yet recognized the tort, and Delaware has declined to do so.<sup>382</sup>

### 3. *Choice-Influencing Considerations (New Hampshire)*

Since 1966, New Hampshire has used Professor Leflar's "five choice-influencing considerations" to resolve choice of law disputes.<sup>383</sup> In the recent case of *LaBounty v. American Insurance Co.*,<sup>384</sup> New Hampshire residents employed by a Massachusetts corporation were injured at a Maine jobsite.<sup>385</sup> The New Hampshire court therefore had to determine whether to apply the law of New Hampshire, Massachusetts, or Maine. The court stated:

In a choice-of-law question, this court has rejected the traditional *lex loci delicto* rule that the law of the forum where the injury occurs is paramount and instead has considered five choice-influencing considerations: (1) the predictability of results; (2) the maintenance of reasonable orderliness and good relationships among the States in the federal system; (3) simplification of the judicial task; (4) advancement of the governmental interest of the forum; (5) and the court's preference for what it regards as the sounder rule of law.<sup>386</sup>

The New Hampshire court explained that consideration (1), predictability, applies primarily to "consensual transactions," rather than unplanned "accident[s]."<sup>387</sup> In *LaBounty*, the court discussed this factor in detail, although it was a tort case between fellow employees, because a worker's compensation agreement was also at issue. Hence, this division does not depend simply on the categories of "contract" and "tort," and cannot be ignored here. Because Maine (the place of the accident) and Massachusetts (the place of the employer's incorporation and from which the worker's compensation agreement was issued) had the same substantive rule, the court did not choose between them. However, nothing in the opinion gives any clear reason to ignore the law of the place of injury, or suggests that predictability is not furthered by applying the law of the place of injury (which is, after all, the traditional approach in tort). Arguably, intentional torts are

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382. See *supra* Part IV.B.

383. The court explicitly relied on Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282-304 (1966), in *Clark v. Clark*, 222 A.2d 205 (N.H. 1966), decided the same year this important article appeared.

384. *LaBounty v. Am. Ins. Co.*, 451 A.2d 161 (N.H. 1982).

385. *Id.* at 162.

386. *Id.* at 163 (citing *Gordon v. Gordon*, 387 A.2d 339, 340 (N.H. 1978); *Doiron v. Doiron*, 241 A.2d 372, 373 (N.H. 1968); *Clark v. Clark*, 222 A.2d 205, 208-09 (N.H. 1966)).

387. *LaBounty*, 451 A.2d at 163.

more like consensual transactions, in that the tortfeasor (at least) can anticipate that the law of the place of his wrongful conduct may apply and adjust his behavior accordingly.

According to the New Hampshire court, consideration (2), “maintenance of reasonable orderliness and good relationships among the States in the federal system,” requires no more “than that a court not apply the law of a State which does not have a substantial connection with the total facts and the particular issue being litigated.”<sup>388</sup> Clearly, Vacation State, whose law the plaintiff wishes to see applied, has such a substantial connection, insofar as it is the state in which the plaintiff is domiciled and where the tort took place. Vacation State has also demonstrated its connection to this issue by recognizing the tort. Should New Hampshire apply the law of Vacation State, it would not upset “reasonable orderliness and good relationships among the States”; indeed, from Vacation State’s point of view, it would enhance them.

With regard to consideration (3), simplification of the judicial task, the New Hampshire court held in *LaBounty* that “this consideration carries little weight in this case [because] [t]he only real question involved is the availability of a tort action.”<sup>389</sup> In *LaBounty*, New Hampshire law (at the time of the accident) permitted the suit, but Massachusetts and Maine law prohibited it.<sup>390</sup> Our hypothetical presents the reverse situation—Massachusetts, Maine, and the hypothetical Vacation State permit the suit, but New Hampshire law is silent. Yet the same conclusion applies. As the New Hampshire court stated, “[i]f no such action may be maintained, then the suit will be dismissed. If the action is permitted, then it will present issues regularly decided by our courts in tort suits.”<sup>391</sup> Similarly, if New Hampshire applies Vacation State’s tort law, and permits the suit, the action will present issues decided by New Hampshire courts in tort suits based on interference with “business and trade expectancies.”<sup>392</sup>

Consideration (4) is “[t]he advancement of the forum’s governmental interest.”<sup>393</sup> In *LaBounty*, the court held that the plaintiff’s domicile in the forum was not enough to warrant application of New Hampshire law.<sup>394</sup> In our hypothetical case, New Hampshire’s only interest would arise from the

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388. *Id.* at 163-64 (citing *Clark*, 222 A.2d at 208).

389. *Id.* at 164.

390. *Id.* at 162 (“Application of Massachusetts or Maine law would bar the suit; New Hampshire law, at the time of the accident, would have permitted it.”).

391. *Id.* at 164.

392. *See J. Dunn & Sons, Inc. v. Paragon Homes of New England, Inc.*, 265 A.2d 5, 8 (N.H. 1970).

393. *LaBounty*, 451 A.2d at 164.

394. *Id.*

defendant's (and the decedent's) domicile there, which is presumably somewhat more significant, but hardly decisive. Moreover, New Hampshire shares with Vacation State an interest in ensuring that injured parties obtain relief.

"The final consideration to which we look [consideration (5)] is our preference for applying the sounder rule of law."<sup>395</sup> Here, it may be significant that New Hampshire (unlike New York) has not expressly rejected the tort, but rather has simply failed thus far to recognize it or address it either way. It is at least possible, therefore, that a New Hampshire court might regard non-recognition as "obsolete," and see recognition as the "sounder rule of law."<sup>396</sup>

Because of their complexity and flexibility, it cannot be asserted with confidence that these five "choice-influencing considerations" would mandate application of Vacation State law. Nevertheless, neither can it be said that New Hampshire will never apply the law of a state recognizing the tort unless and until it becomes one such state itself. The choice-influencing considerations approach has as one of its benefits that it minimizes "conflicts localism," and, indeed, New Hampshire has used this test to justify application of non-New Hampshire law in *LaBounty*. It might well do the same on the tortious interference facts in our hypothetical.

#### 4. Summary

Whether a state that does not recognize the tort applies the widely-accepted Restatement (Second) approach to tort choice of law, the less common "choice-influencing considerations" approach (New Hampshire), or the state-specific *Neumeier* rules (New York), it should be clear that under a range of quite plausible circumstances, a non-tort state might be required by its own tort choice-of-law approach to apply the substantive law of a state that recognizes the tort. This outcome is perhaps most likely when either the plaintiff or both parties are domiciled in the tort state, and the conduct giving rise to the claim took place there, as in our hypothetical.<sup>397</sup>

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395. *Id.*

396. The early New Hampshire cases typically applied New Hampshire law, though *Clark* held open the possibility that New Hampshire's might not be the "better law." *Clark v. Clark*, 222 A.2d 205, 209 (N.H. 1966) ("If it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state's law.").

397. Of course, as discussed *supra* note 377 with respect to New York, it is possible that non-tort states might use the "public policy" exception to avoid adjudicating a tort claim even if that state's own tort choice-of-law approach seemed to warrant it.

### C. Choice of Law Approaches in Tort States

The tort choice of law approaches taken by the states that do recognize the tort (Maine, Massachusetts, Connecticut, New Jersey, and Pennsylvania) also contain the potential for surprising results in tortious interference cases. Just as non-tort states will not necessarily dismiss such claims, tort states will not necessarily entertain them.

#### 1. Restatement (Second) of Conflict of Laws Section 145 (Maine, Connecticut)

Like Rhode Island, Vermont, Delaware, Puerto Rico, and the Virgin Islands, Maine and Connecticut are Second Restatement jurisdictions for tort choice of law.<sup>398</sup> Hence, if a non-tort state had the “most significant relationship” to the tort, Maine and Connecticut would apply that state’s law and dismiss the claim. If, for example, both plaintiff and defendant were domiciled in non-tort states, and the conduct giving rise to the claim took place in a non-tort state, even if the suit were filed in Maine (or Connecticut), the court would not apply its own substantive law.

#### 2. Traditional Approach Unless Another State Is “More Concerned or More Involved” (Massachusetts)

Massachusetts “traditionally” applies the law of the jurisdiction “wherein the tort occurred,” unless another state is “more concerned or more involved” in a particular issue.<sup>399</sup> Under this approach, if the tort “occurred” in a non-

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398. Maine abandoned *lex loci delicti* in *Beaulieu v. Beaulieu*, 265 A.2d 610, 616-17 (Me. 1970), and identified its approach with the RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145 (1971) approach in *Collins v. Trius, Inc.*, 663 A.2d 570, 571-72 (Me. 1995). Maine has also explicitly endorsed RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971), which states:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

*Flaherty v. Allstate Ins. Co.*, 822 A.2d 1159, 1165-66 (Me. 2003). Connecticut’s approach is found in *O’Connor v. O’Connor*, 519 A.2d 13, 21-22 (Conn. 1986), and *Dugan v. Mobile Medical Testing Services, Inc.*, 830 A.2d 752, 759 (Conn. 2003) (noting that the Connecticut Supreme Court “abandoned categorical allegiance to the doctrine of *lex loci delicti* in tort actions,” in favor of the choice of law analysis contained in RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971)).

399. *Commerce Ins. Co. v. Cameron*, No. 970073, 1998 WL 1181687, at \*1 (citing *Cohen v.*

tort state, and no other facts indicated that a tort state was “more concerned or more involved” (for example, because a party was a domiciliary of a tort state), Massachusetts courts should apply the substantive law of the non-tort state and dismiss the claim. Under a “traditional” approach, the tort “occurs” where the last event necessary for liability takes place. If the tort is only available after the death of the donor, that will be the “last event” necessary for liability, which, in our hypothetical, took place in a non-tort state. If the testator died in Massachusetts (a tort state), it might be less likely that another state would appear to be “more concerned or more involved” with the availability of the tort, although it is not impossible.

### 3. *Governmental-Interest Test (New Jersey)*

In *Veazey v. Doremus*, New Jersey rejected the *lex loci delicti* approach in favor of the more flexible “governmental-interest analysis” pursuant to which the law of the state with the greatest interest in governing the specific issue in the underlying litigation is applied.<sup>400</sup> The first step in a governmental interest analysis is to determine whether a conflict exists between the law of the interested states on the specific issue. Here, by hypothesis, New Jersey recognizes liability for tortious interference with expectation of inheritance, and the other interested state does not. If the plaintiff is domiciled in the non-tort, non-forum state, that state does not have an “interest” in applying its own law. If the defendant is domiciled in New Jersey, even though the plaintiff is not from New Jersey, New Jersey may nevertheless have an interest in deterring such conduct wherever it occurs and whoever is injured. Hence, either this is a “false conflict,” as only New Jersey is interested (so New Jersey law applies),<sup>401</sup> or it is an “unprovided-for case,” and the court is likely

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McDonnell Douglas Corp., 450 N.E.2d 581, 585 (Mass. 1983)).

400. *Veazey v. Doremus*, 510 A.2d 1187, 1189-90 (N.J. 1986).

401. In the orthodox version of “interest analysis,” a “false conflict” describes a situation in which “upon interpretation, only one state’s law is discovered actually to apply to the case.” David P. Currie, *Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles*, 52 U. CHI. L. REV. 271, 275 (1985) (book review). See also James R. Pielemeier, *Choice of Law for Multistate Defamation—The State of Affairs as Internet Defamation Beckons*, 35 ARIZ. ST. L.J. 55, 68-69 (2003) (“Professor Currie’s approach provides that if, after such an inquiry, the court finds that only one state has an interest in the application of its laws (characterized today as a ‘false conflict’) . . .”). However, this term is widely misused in the New Jersey cases. Specifically, it is misused to describe a “no conflict” case, when the laws of the interested states are substantively identical. “Nothing has been presented indicating that the laws of Pennsylvania and New Jersey diverge or are at variance on a material issue in this case. We are thus presented with a false conflict.” *Curtis T. Bedwell & Sons, Inc. v. Geppert Bros., Inc.*, 655 A.2d 483, 484 (N.J. Super. Ct. App. Div. 1995). See also *Diamond Shamrock Chemicals Co. v. Aetna Caus. & Sur. Co.*,

to apply forum (New Jersey) law in effect by default, if both parties are domiciled in the non-tort state. (Perhaps the plaintiff sued in New Jersey solely in the hopes of obtaining favorable substantive tort law.)

However, if the plaintiff is domiciled in New Jersey, which recognizes the tort, but the defendant is domiciled in a non-tort state, an actual or “true conflict” exists. Hence, the next step is to identify the governmental policies underlying the law of each state and how those policies are affected by each state’s contact with the litigation and the parties. If a state’s contacts are not related to the policies underlying its law, then that state does not have an “interest” of the appropriate kind in having its law apply. In the situation just described (New Jersey plaintiff, non-tort state defendant), each party would be protected by his or her own local law, resulting in a “true conflict.” The governmental policy underlying the law of a tort state is presumably to provide complete relief to an injured plaintiff (beyond what the probate system permits), deter interference, and punish tortfeasors. The policies underlying non-recognition typically include protecting defendants from liability for highly speculative harms, and protecting the integrity of the probate system. If the interference took place in New Jersey, New Jersey would have an interest in deterring such conduct, in addition to its interest in fully compensating its domiciliary.

If the donor’s will was probated in New Jersey,<sup>402</sup> the non-tort state’s interest in ensuring the integrity of its probate system would not apply, and this might be analyzed as a “false conflict.” New Jersey law would then apply. If the donor’s will was probated in the non-tort state, however, the conflict would remain, as recognition of the tort in New Jersey would very likely be construed as a collateral attack on the non-tort state’s probate decree. If the conduct also took place in the non-tort state, New Jersey might concede that the non-tort state had a greater interest in the application of its own law. If the conduct took place in New Jersey, and the plaintiff was domiciled there, however, it seems likely New Jersey would apply its own law. Thus, among states recognizing the tort, New Jersey seems least likely to apply the law of another state.

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609 A.2d 440, 466 (N.J. Super. Ct. App. Div. 1992) (“[W]e find alternatively that the issue presents a ‘false conflict,’ because application of New Jersey law would yield the same result”).

402. The donor must be dead for the tort to lie in New Jersey. *Casternovia v. Casternovia*, 197 A.2d 406, 409 (N.J. Super. Ct. 1964).

4. *Hybrid Approach of Governmental Interest Analysis and Restatement (Second) (Pennsylvania)*

Pennsylvania applies a hybrid of “governmental interest analysis” and the “most significant relationship” analysis of Restatement (Second) of Conflict of Laws Section 145.<sup>403</sup> One state court has glossed it this way: “In short, the Pennsylvania choice of law standard for actions sounding in tort is: contacts plus state interest.”<sup>404</sup>

Historically, Pennsylvania has applied the substantive law of another state when, although the defendants were based in Pennsylvania, Pennsylvania’s “interest . . . is clearly eclipsed by the numerous contacts between [the other state] and the present cause of action.”<sup>405</sup> In one case, those “contacts” included plaintiff’s out-of-state domicile and the fact that the relationship between the parties was “centered” in the other state.<sup>406</sup> In that situation, the other state “has a compelling interest in seeing that its citizens are compensated for injuries which occurred within its borders, allegedly as a result of the [Pennsylvania domiciliaries’] business there.”<sup>407</sup> In another case, the Pennsylvania court applied Delaware law where the corporate defendant was incorporated and had its principal place of business in Delaware, the individual defendant was domiciled and practiced professionally in Delaware rather than Pennsylvania, and the underlying conduct giving rise to the claim took place in Delaware, notwithstanding the plaintiffs’ domiciles in Pennsylvania.<sup>408</sup> These cases suggest that Pennsylvania might apply non-tort state law, and deny recovery even to a Pennsylvania plaintiff, if a defendant was domiciled in a non-tort state and the conduct giving rise to the claim took place there. This outcome seems especially likely if the non-tort state was also the probate state, and that state had expressed an interest in maintaining the integrity of its probate system against the tort (as opposed to having no reported cases addressing the tort at all).

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403. See *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 802-06 (Pa. 1964), and *McSwain v. McSwain*, 215 A.2d 677, 682 (Pa. 1966), as applied in *Giovanetti v. Johns-Manville Corp.*, 539 A.2d 871, 873 (Pa. Super. Ct. 1988), *abrogated on unrelated grounds*, *Cleveland v. Johns-Manville Corp.*, 690 A.2d 1146, 1150 (Pa. 1997), and *Normann v. Johns-Manville Corp.*, 593 A.2d 890, 893 (Pa. Super. Ct. 1991).

404. *In re Thorotrast Cases*, 26 Phila. Co. Rptr. 479, 517 (Pa. Ct. Com. Pl. 1994).

405. *Giovanetti*, 539 A.2d at 873 (applying New Jersey law).

406. *Id.*

407. *Id.*

408. *Troxel v. A.I. DuPont Inst.*, 19 Pa. D. & C.4th 423, 427-28 (Pa. Ct. Com. Pl. 1993) (applying Delaware law to medical malpractice claim).

### 5. Summary

As these brief analyses demonstrate, it is no more a foregone conclusion that a tort state will apply its own law and recognize the tort, than that a non-tort state will do so and dismiss a tort claim. Nearly the entire panoply of modern tort choice-of-law approaches is reflected in the First, Second, and Third Circuits, requiring a detailed choice-of-law analysis for each case, examining each state with which relevant contacts exist as a candidate for having its law applied.

#### *D. Tortious Interference Claims Against Estate-Planning Lawyers in Non-Tort States*

Furthermore, it is not just non-tort state *clients* and beneficiaries who need to worry about being accused of tortious interference by an unhappy relative domiciled in a tort state. Attorneys need to be careful, too. Two recent cases vividly demonstrate the risks faced by an attorney in a non-tort state accused of tortious interference by a tort state plaintiff in a tort state court.<sup>409</sup> In each case, a relative of an estate-planning client brought suit alleging tortious interference with expectation of inheritance in his or her home state, a tort state, against the testator's out-of-state estate planning attorney (admitted and practicing in a non-tort state). In both cases, the attorneys argued against the exercise of personal jurisdiction over them, and lost; in both cases, motions to dismiss for failure to state a claim were denied. In both cases, attorneys found themselves in a foreign forum, defending a claim not recognized in their own state.<sup>410</sup>

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409. In fact, in the second case, *Arena v. McShane*, No. 02-07639, 2003 U.S. Dist. LEXIS 7778 (E.D. Pa. Apr. 17, 2003), the district court probably concluded wrongly that New Jersey is not a tort state. See the discussion of *Casternovia v. Casternovia*, 197 A.2d 406 (N.J. Super. Ct. App. Div. 1964), *supra* Part III.C.1. However, for purposes of our analysis in this Part, we will treat this determination as correct. While the Maine court did not explicitly reach this issue, in 2002 it might have fairly concluded that Connecticut does not recognize the tort, although in 2003 the Second Circuit stated otherwise. See the discussion of *DiMaria v. Silvester*, 89 F. Supp. 2d 195 (D. Conn. 1999), and *Devlin v. United States*, 352 F.3d 525 (2d Cir. 2003), *supra* Part III.B.

410. The commentators have been anticipating such suits for some years. See Fassold, *supra* note 9, at 31; *Fifth and Eleventh Circuit Survey*, *supra* note 1, at 124-26 ("It seems, however, likely that disappointed beneficiaries will continue to name estate-planning attorneys among the defendants in tort suits, and one such attorney may soon be found liable.").

The first case, *Smith v. Brannan*, involved a Connecticut attorney sued in Maine.<sup>411</sup> Kaye [sic] Jex, a Connecticut estate planning attorney, was sued, together with a Maine attorney, James Brannan, for tortious interference relating to the estate of Richard Smith.<sup>412</sup> Smith was initially a Connecticut domiciliary, who married a Maine domiciliary and moved to Maine after his marriage.<sup>413</sup>

The substantive allegations of the complaint related to events that took place after the move, including telephone calls and faxed communications between Maine and Connecticut.<sup>414</sup> Jex herself only spent one weekend a year in Maine,<sup>415</sup> and the documents purportedly resulting from the interference (an amendment to a will that provided for the wife from an unfunded marital trust, rather than the residuary trust) were drafted by the Maine lawyer and executed in Maine (though the original instruments were executed in Connecticut).<sup>416</sup>

Jex unsuccessfully challenged the jurisdiction of the Maine court over her.<sup>417</sup> The court found that personal jurisdiction was proper on the basis that “Jex, as a non-resident attorney, participated in the development of an estate plan for a Maine resident that was to be interpreted under Maine law via communication originating in Maine,”<sup>418</sup> thereby satisfying Maine’s “long-arm” statute.<sup>419</sup> This exercise also satisfied constitutional due process requirements, notwithstanding her lack of presence in Maine, because

the test to be applied does not depend on physical presence, but whether a non-resident has purposefully, by some act, availed herself of the privilege of conducting activities here thereby invoking the benefits and protection of our laws . . . or has created a continuing obligation between herself and a resident here.<sup>420</sup>

The court found that her alleged role in drafting the amendment, and her status as Richard’s “long time estate planning attorney” demonstrated that Jex

did avail herself of the privileges of conducting activities in Maine by endeavoring to practice law here. That is to say, she gave legal advice to a Maine resident concerning

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411. *Smith v. Brannan*, No. CIV. A. CV-01-058, 2002 WL 1974069, at \*1-3 (Me. Super. Ct. June 14, 2002).

412. *Id.* at \*1-2.

413. *Id.* at \*3.

414. *Id.*

415. *Id.*

416. *Id.* at \*2-3.

417. *Id.* at \*5-7.

418. *Id.* at \*5.

419. ME. REV. STAT. ANN. tit. 14 § 704-A(2)(A), (B) (2003).

420. *Brannan*, 2002 WL 1974069, at \*5 (internal citations omitted).

his estate which was to be administered here and interpreted under Maine law. . . . [S]ubstantive legal work for a Maine resident that would affect a Maine estate, a Maine heir, and the distribution of some property located here . . . created an ongoing obligation to this client, his estate, and his heirs. . . . [T]he court concludes that . . . Jex could reasonably have anticipated litigation in Maine over her role in preparing Richard's estate plan.<sup>421</sup>

Jex's attempt to obtain dismissal for failure to state a claim was unsuccessful. The Maine court simply recited the elements of tortious interference as identified in *Morrill*,<sup>422</sup> and found that all were satisfied by Priscilla's allegations:

[A]n expectancy interest in her husband's estate, reliance by Richard on Jex's misleading advice which was intentionally communicated to him to benefit others, that she, Priscilla, could reasonably have expected the \$3,000 monthly annuity but for this interference, and the loss of that annuity because of Jex's interference.<sup>423</sup>

Finally, Jex's mistaken analogy to malpractice was disposed of equally easily. While Jex was correct that she owed no professional obligation to Priscilla, a non-client, the court held this was "simply inapplicable" because "Priscilla's claim is based on the distinct tort of intentional interference with an expectancy interest."<sup>424</sup>

As a final note, we may wonder why Jex did not raise the choice of law issue—that she, a Connecticut domiciliary, may be found liable in Maine for conduct in Connecticut that is not tortious in Connecticut. As discussed above, Maine is a Restatement (Second) state for tort choice of law,<sup>425</sup> and would apply Section 146, utilizing the "local law of the state where the injury occurred . . . unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties."<sup>426</sup> The court's personal jurisdiction discussion makes plain that Maine is not only the state where the injury occurred (both the testator and the plaintiff were domiciled there), but surely has a more significant relationship than Connecticut "to the occurrence and the parties."

The second case, *Arena v. McShane*, involved a New Jersey attorney sued in Pennsylvania.<sup>427</sup> The children of the testator, all Pennsylvania

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421. *Id.* at \*6.

422. *Marill v. Marill*, 712 A.2d 1039, 1041-42 (1998), discussed *supra* Part III.A.1.e.

423. *Brannan*, 2002 WL 1974069, at \*8.

424. *Id.*

425. *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 934 (Me. 1982).

426. *Id.*

427. *Arena v. McShane*, No. 02-07639, 2003 U.S. Dist. LEXIS 7778, at \*1 (Apr. 17, 2003).

domiciliaries, sued J. Patrick McShane and his firm, their father's New Jersey estate planning attorneys, in federal court for tortious interference.<sup>428</sup> The will in question left the bulk of the estate to another of the attorneys' clients.<sup>429</sup> In response to the defendants' Rule 12(b)(2) motion, the federal district court held that personal jurisdiction in Pennsylvania over the New Jersey attorneys was properly based on the following contacts:

- (1) Defendants directed phone calls and mailed documents to Decedent in Pennsylvania during preparation of the will;
- (2) Defendants knew that a substantial portion of Decedent's property was located in Pennsylvania; and
- (3) by preparing the will, Defendants created a continuing obligation with Decedent, such that they should reasonably expect to be haled into court in Pennsylvania regarding the will.<sup>430</sup>

Although "[t]he legal services were rendered from Defendants' New Jersey office [and] [t]he Decedent met with Defendants in New Jersey Decedent's will was probated in Pennsylvania and distributes property located in that state,"<sup>431</sup> and the court found "that Plaintiffs have alleged sufficient contacts to show that Defendants purposefully availed themselves of the laws of Pennsylvania."<sup>432</sup>

Next, in response to the defendants' Rule 12(b)(3) motion, the court relatively summarily and probably inevitably concluded that venue was also proper in the Eastern District of Pennsylvania, because "a substantial part of the events giving rise to this litigation took place in the Eastern District," specifically:

During the preparation of Decedent's will, Defendants directed letters and phone calls to this district. Moreover, Decedent's will was probated in the Eastern District of Pennsylvania. Second, a substantial portion of the property that is the subject of this litigation lies within this district. Much of the property distributed by Decedent's will, including real property, is located in the city of Philadelphia.<sup>433</sup>

Third, the court concluded that Pennsylvania substantive law applied to this "true conflict" situation,<sup>434</sup> because Pennsylvania has "a greater interest

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428. *Id.* at \*1-2.

429. *Id.* at \*1.

430. *Id.* at \*9-10.

431. *Id.* at \*19.

432. *Id.* at \*10.

433. *Id.* at \*15.

434. See *supra* notes 204-14 and accompanying text, for an explanation of why there was probably *no* conflict here, as New Jersey also recognizes the tort, and, indeed, has done so for longer and probably

in seeing its law applied.”<sup>435</sup> The basis for this determination is the by-now-familiar comparison of New Jersey and Pennsylvania “contacts”: defendants’ domicile, practice, and conduct (including rendition of legal services) in and from New Jersey, on the one hand; and the estate, including Pennsylvania real property, being probated in Pennsylvania, on the other.<sup>436</sup> Finally, the federal court applied the elements as articulated in *Cardenas*,<sup>437</sup> and concluded that the pleading was adequate under Rule 12(b)(6).<sup>438</sup>

Taken together, the lessons of *Smith v. Brannan* and *Arena v. McShane* are clear: attorneys in non-tort states who write wills for tort state testators that distribute tort state property ignore the tort law and choice of law approaches taken by neighboring states at their peril. Not only clients, but attorneys themselves, may be found liable under the tort law of another state for conduct that took place at home, notwithstanding any privity barrier to malpractice suits.<sup>439</sup>

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in a more permissive form than Pennsylvania.

435. *Arena*, 2003 U.S. Dist. LEXIS 7778, at \*18.

436. *Id.* at \*19-20.

437. *Id.* at \*20-21.

438. *Id.* at \*21 (“[T]he Court finds that Plaintiffs have pleaded sufficient facts to make out a claim for intentional interference with an inheritance. Regarding the first element, Plaintiffs allege that, during his lifetime, Decedent ‘expressed an intention to change his will and to leave his assets . . . either outright to his children, or in the alternative, in a trust, with the remainder to his children.’ Secondly, the Plaintiffs claim that Defendants exerted undue influence over Decedent, through their confidential relationship with him, to prevent him from changing the will. Third, Decedent’s will was never changed. Finally, Plaintiffs allege that, but for Defendants’ actions, Decedent would have changed the will to benefit Plaintiffs. Thus, Plaintiffs have pleaded a set of facts under which they could be entitled to relief.”) (internal citations omitted).

439. Ultimately, however, the defendants prevailed in a motion for summary judgment based on issue preclusion (collateral estoppel). *Arena v. McShane*, No. Civ. A. 02-7639, 2004 WL 1925048 (E.D. Pa. Aug. 30, 2004). The issue not permitted to be re-litigated after an adverse result in probate court was whether the testator was of a weakened mental state making him vulnerable to undue influence. *Id.* at \*3-4. The states of the First, Second, and Third Circuits impose variable privity requirements. See *Mozzochi v. Beck*, 529 A.2d 171, 175 (Conn. 1987) (permitting intended third-party beneficiary of a will to sue estate-planning attorney for negligence); *Homeowners’ Assistance Corp. v. Merrimack Mortgage Co.*, No. CV-99-182, 2000 WL 33679263 (Me. Super. Ct. Jan. 24, 2000) (citing *Nevin v. Union Trust Co.*, 726 A.2d 694, 701 (Me. 1999)) (recognizing that will beneficiaries do not have standing to sue estate planning attorneys for malpractice because they are not the client); *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994) (holding that privity required unless reliance by plaintiff is known to attorney). For a useful discussion of the erosion of the privity requirement, see Steven K. Mignogna, *Representing Estate and Trust Beneficiaries and Fiduciaries: Study Materials*, SG012 ALI-ABA 109, 148-151 (July 26-27, 2001).

*E. Summary*

As this review of the choice-of-law approaches of the states of the First, Second, and Third Circuits has been designed to demonstrate, the fact that a state does not recognize the tort does *not* mean that state's court may not, under proper circumstances, adjudicate a claim under it. Should a tort state domiciliary file a claim against a non-tort-state domiciliary in the defendant's home state, alleging tortious interference based on conduct that occurred in the plaintiff's domicile, it seems unlikely that any *other* state's law would apply than that of the plaintiff's home state. If the defendant would be likely to litigate the issue of personal jurisdiction outside his domicile, the plaintiff may be well advised to sue in the defendant's domicile and avoid the issue, and then argue for the application of the substantive law of plaintiff's domicile (and hope to avoid the public policy exception).

By the same token, of course, the tort choice of law principles of a state that recognizes the tort might require it to apply the law of a state that does not, and dismiss the tortious interference claim. Thus, defendants sued in tort states also need to be aware of the choice of law issues. Again, subject to the limitations of the public policy exception, it seems likely that each of the tort states would apply the substantive law of a non-tort state and dismiss the claim if one or both of the parties were domiciled in the non-tort state (especially if the plaintiff is not a tort state domiciliary, and so suffered the injury outside the state), the acts constituting the interference took place there (hence, application of forum law could not serve a deterrent function), and the donor's estate was probated in a non-tort state (which, therefore, has an interest in not disturbing its own probate decree directly or indirectly).

In other words, if the "Vacation Home" in our hypothetical is located in a non-tort state, where the would-be plaintiff is domiciled, where the purported interference occurred, and where the donor died, a plaintiff who tried to obtain favorable law by suing in the tort state where the defendant is domiciled (thereby also ensuring personal jurisdiction) should face dismissal, because a court in any of the tort states of the First, Second, and Third Circuits, should apply the substantive law of the (now non-tort) Vacation State. In such a situation, of course, the obligation to plead and prove the applicability of foreign law typically rests on the defendant (and his counsel—another malpractice pitfall).<sup>440</sup>

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440. In general, the obligation to plead and prove foreign law rests on the party seeking to rely on it.

This analysis contains two lessons for the practitioner. First, attorneys in tort and non-tort states alike need to be familiar with tortious interference with expectation of inheritance. If a client is a beneficiary (or intestate heir) who may be accused of tortious interference, it is not adequate to research only whether the client is domiciled in a tort state. If the case has a multi-state dimension—potential out-of-state plaintiffs, or out-of-state events involving the client and other potential beneficiaries—the attorney needs to be aware of whether the applicable choice-of-law principles in *any* of the possible fora would validate the tort. Neither attorney nor client can safely assume that the decedent's state of domicile at death (where the primary probate proceeding will occur) is the only possible source of substantive law.

Second, if the client is a “disappointed heir,” the attorney must research both the substantive law and the choice of law principles of any state in which a civil suit might be maintained against one who has injured the client. If the client lacks standing to challenge the probate proceeding (for example, because the client is neither an intestate heir nor named in any prior or existing will), a tort suit may be the client's only possible form of relief. A lawyer who does not explore the possibility of a tort suit—notwithstanding whether the will is being probated in a tort state—has not done all she can on behalf of her client.<sup>441</sup>

#### VII. THE “PROBATE EXCEPTION” TO DIVERSITY JURISDICTION: A FINAL NOTE ABOUT FORUM SELECTION

Once the plaintiff has performed a proper choice of law analysis and determined in which state to sue, a further decision remains—state or federal court. Ordinarily, tort claims between diverse parties that also satisfy the

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*See* UNIF. INTERSTATE AND INT'L PROCEDURE ACT § 4.01, 13 U.L.A. 394 (1986). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 (1971). The consequences of failing to do so in a timely manner may be dismissal, *Walton v. Arabian American Oil Co.*, 233 F.2d 541, 546 (2d Cir. 1956), a presumption that foreign law is identical to forum law, *Louknitsky v. Louknitsky*, 266 P.2d 910, 911 (Cal. Ct. App. 1954), or “acquiescence” in application of forum law, *Leary v. Gledhill*, 84 A.2d 725 (N.J. 1951).

441. The Article does not address the situation of the practitioner in the tort state in the same detail because I believe attorneys are likelier to err by failing to consider that their own state's choice of law principles may make an unfamiliar tort available, than by failing to consider that local choice of law will make it *unavailable*. The author thanks Prof. Ira Bloom, Albany Law School, for bringing to my attention the importance of making attorneys (and law students) in non-tort states aware of the possible availability of the tort under proper circumstances. Certainly, however, any attorney representing a defendant in a tortious interference suit before a court in a tort state should make sure that the forum's choice of law does not require or permit the application of another (non-tort) state's substantive law, and warrant dismissal of the claim.

statutory amount in controversy may be litigated in either state or federal court.<sup>442</sup> Thus, we might expect that tortious interference with expectation of inheritance suits, between citizens of different states for loss of an expectancy exceeding \$75,000, could unproblematically be heard in federal court under diversity jurisdiction.<sup>443</sup> However, under the so-called “probate exception,” this is not necessarily so.

The leading twentieth-century United States Supreme Court case reaffirming and clarifying the probate exception is *Markham v. Allen*,<sup>444</sup> in which the Court held that:

[A] federal court [may not] probate a will or administer an estate . . . [but it may] entertain suits ‘in favor of creditors, legatees, and heirs’ and other claimants against a decedent’s estate “to establish their claims” so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.<sup>445</sup>

Hence, the federal court may neither probate a will, administer an estate, nor hear any other claim that amounts to an improper interference with the probate process. The precise scope of such interference has been variously interpreted by the Circuits.<sup>446</sup> In any event, if tortious interference with expectation of inheritance is covered by the probate exception, federal jurisdiction is lacking; if the tort falls outside it, diversity jurisdiction is available in an otherwise-proper case.

Our task is greatly simplified by the fact that, in general, in those states that recognize the tort, diversity jurisdiction is also available. This is so because the criteria used by federal courts to determine whether a particular claim is covered by the probate exception are closely related to the considerations advanced by state courts in deciding whether to recognize the tort at all.<sup>447</sup>

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442. See 28 U.S.C. § 1332(a) (2002); 28 U.S.C. §§ 1441, 1446(a) (2000).

443. See 28 U.S.C. § 1332(a) (2002); 28 U.S.C. §§ 1441, 1446(a) (2000).

444. *Markham v. Allen*, 326 U.S. 490 (1946).

445. *Id.* at 494 (quoting *Waterman v. Canal-Louisiana Bank Co.*, 215 U.S. 33, 43 (1909)).

446. See *Mangieri v. Mangieri*, 226 F.3d 1, 2-3 (1st Cir. 2000); *Dulce v. Dulce*, 233 F.3d 143, 145 (2d Cir. 2000); *Moore v. Graybeal*, 843 F.2d 706, 709-10 (3d Cir. 1988).

447. *But see Dragan v. Miller*, 679 F.2d 712, 717 (7th Cir. 1982) (giving a very carefully-argued opinion by Judge Richard Posner, affirming the federal district court’s dismissal of a post-probate tort action, and explaining why the probate exception might bar a tortious interference case in Illinois, even though Illinois has long recognized the tort). *Dragan* was recently followed in *Storm v. Storm*, 328 F.3d 941, 945 (7th Cir. 2003), in which the Seventh Circuit affirmed the federal district court’s dismissal of a tortious interference case for lack of subject matter jurisdiction. In dismissing, the Seventh Circuit explicitly stated that although

More precisely, lower courts often interpret *Markham* to mean that if a matter is allocated by state law exclusively to state probate courts, the probate exception applies.<sup>448</sup> *Devisavit vel non*—the fundamental will validity issue—and the distribution of estate assets are both clearly in this category. For example, in *Mangieri v. Mangieri*,<sup>449</sup> the plaintiff sought relief from the federal district court under the Massachusetts omitted-child statute, including ordering the executor to pay him a share of the estate. The First Circuit affirmed the Massachusetts District Court’s dismissal of the claim under the probate exception, stating:

First, appellant’s claim is within the jurisdiction of the Massachusetts Probate Court. Second . . . the relief he requests would require the district court to set aside the ruling of the probate court . . . and order [the] executor, to distribute the estate . . . [T]his would improperly interfere with a probate proceeding currently pending before the Massachusetts State Probate Court.<sup>450</sup>

Hence, if the state court interprets tortious interference as either an attack on a probated will, an attempt to set up an alternate will, or a tool to redistribute estate assets, the state court will deny access to state courts of general jurisdiction for the tort, and the probate exception would therefore apply and bar the claim from federal court as well. This is what happened in *Moore v. Graybeal*, discussed *supra* at Part IV.B. There, the federal district court dismissed the case for lack of subject matter jurisdiction, and later the superior court did the same. In the federal court, the probate exception was being applied; in the superior court, the exclusive jurisdiction of the chancery court was the issue. When the federal district court’s dismissal was appealed, the Third Circuit rejected the tort because, as a practical matter, a damage award would “revoke” the bequests to the tort defendants, and a plaintiff’s recovery (of estate assets, although from the defendants) would in effect constitute the

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wrongful interference with an inheritance expectancy is a recognized tort in Indiana; such an action may be brought in a court of general jurisdiction, provided a will contest is unavailable to supply an adequate remedy. But as we have just observed, mere labels—whether an action is styled as a tort action or will contest—are not decisive in our probate-exception analysis.

*Id.* The Ninth Circuit recently followed this approach and reversed a judgment in favor of Vickie Lynn Marshall (a/k/a “Anna Nicole Smith”). *In re Marshall*, 392 F.3d 1118 (9th Cir. 2004). However, the Third Circuit has specifically held that Pennsylvania tort claims are *not* barred by the probate exception. *Golden v. Golden*, 382 F.3d 348, 364-366 (3d Cir. 2004).

448. *See, e.g.*, *Barash v. Siler*, 69 Fed. Appx. 506, 508 (2d Cir. 2003) (stating the probate exception applies to matters “cognizable only by the probate court”).

449. *Mangieri*, 226 F.3d at 2.

450. *Id.* at 3.

probate of a non-probated will in the plaintiff's favor.<sup>451</sup> While the federal district court dismissed the suit for lack of subject matter jurisdiction (in effect applying the probate exception),<sup>452</sup> the Third Circuit analysis addressed the viability of the tort and the jurisdictional issue simultaneously.<sup>453</sup>

If, by contrast, the state court understands the tort as not constituting a direct or even collateral attack on the probate decree, but rather as an ordinary action at law for damages, the state court is likely to permit the tort, and the federal court in its turn, to make the federal forum available. As a result, in the context of tortious interference with expectation of inheritance, it is hardly an oversimplification to say that recognition of the tort and application of the probate exception collapse into a single analysis, with inevitably opposite outcomes. If the tort is recognized, the probate exception does *not* apply (and the federal forum is available); if the tort is not recognized, the same reasons would lead a federal court to decline jurisdiction.

Thus, we can generalize and predict as follows:

(1) If a federal suit is filed in a state where the applicable law recognizes the tort, the probate exception will not apply. *Hegarty v. Hegarty* is an example.<sup>454</sup> In *Hegarty*, the federal district court specifically held that it had subject matter jurisdiction over the tort suit.<sup>455</sup> Although the court's reference to diversity is brief and somewhat obscure,<sup>456</sup> the court does make it clear that because the plaintiff is not seeking an accounting, which it calls "a matter for the probate court," the district court has jurisdiction and denies a motion to dismiss for lack thereof.<sup>457</sup> The District Court for the Eastern District of Pennsylvania has reached the same result in *dicta*.<sup>458</sup>

(2) If a federal diversity suit is filed where the tort is not recognized under applicable state law, the federal district court can dismiss under Rule 12(b)(6),

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451. *Moore*, 843 F.2d at 710.

452. *Moore v. Graybeal*, 670 F. Supp. 130, 134 (D. Del. 1987).

453. *Moore*, 843 F.2d at 706.

454. *Hegarty v. Hegarty*, 46 F. Supp. 319 (D. Mass. 1942). This case is discussed *supra* Part III.A.2.b.

455. The plaintiff was a citizen of the District of Columbia, and the defendants were citizens of Massachusetts. *Id.*

456. The court states, "the ground that the proper diversity does not exist being waived," although lack of subject matter jurisdiction is not a waivable defect (and wasn't at the time of *Hegarty*). *Id.* at 320. See, e.g., *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908); FED. R. CIV. P. 12(h)(3).

457. *Hegarty*, 46 F. Supp. at 320.

458. See *Qureshi v. Ex'rs of Manzoor H. Qureshi's Estate*, No. Civ. A. 04-03869, 2004 WL 2897944, at \*3 (E.D. Pa. Dec. 13, 2004). This case was decided after this Article went to press.

and need not address the probate exception issue at all. This is what happened in the Connecticut case of *DiMaria v. Silvester*.<sup>459</sup>

(3) If the federal court must predict state law in the absence of a binding opinion from a state court of last resort, the court will either recognize the tort and take jurisdiction, as implicitly happened in the Pennsylvania case of *Arena v. McShane*,<sup>460</sup> or deny jurisdiction and the tort at the same time, as happened both in the Delaware case of *Moore v. Graybeal*,<sup>461</sup> and in a Pennsylvania case, *Golden v. Cook*,<sup>462</sup> in which the federal district court dismissed a claim for tortious interference for lack of subject matter jurisdiction. Unfortunately, the opinion setting out the analysis of “plaintiffs’ claims of undue influence and tortious interference with inheritance” as “a ‘will contest,’ [that] do[es] not fall within this court’s limited *inter partes* jurisdiction” is not available online.<sup>463</sup>

#### VIII. CONCLUSION

The approaches taken to tortious interference with expectation of inheritance in the states and jurisdictions of the First, Second, and Third Circuits—recognition under the Restatement (Second) of Torts Section 774B, with a living donor, with a dead donor, requiring “continuous” interference, restricting the tort to prevention of execution of a will favoring the plaintiff, non-recognition, silence—together with the equally wide array of tort choice of law approaches taken in the same states and jurisdictions—the Restatement (Second) of Conflict of Laws Sections 6 and 145, “choice-influencing considerations,” “governmental interest analysis,” the *Neumeier* rules, and hybrid approaches—combine to present a dizzying array of opportunities and challenges to parties and practitioners alike. As the expansion of the tort continually erodes the probate court’s exclusive jurisdiction over the

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459. *DiMaria v. Silvester*, 89 F. Supp. 2d 195, 196 (D. Conn. 1999), discussed *infra* Part III.B. Arguably this case was not decided correctly, as *Devlin v. United States*, 352 F.3d 525, 544 (2d Cir. 2003), at least implies. However, it is still useful as an example, because if applicable state law does not recognize the tort, the grant of the Rule 12(b)(6) motion would be proper. If a state court of last resort had explicitly declined to recognize the tort on the basis that recognition would impermissibly interfere with the probate court, a Rule 12(b)(1) dismissal from federal court would also be proper.

460. *Arena v. McShane*, No. 02-07639, 2003 U.S. Dist. LEXIS 7778 (E.D. Pa. Apr. 17, 2003), discussed *supra* Part III.C.2.

461. *Moore v. Graybeal*, 670 F. Supp. 130 (D. Del. 1987), discussed *supra* Part IV.B.

462. *Golden v. Cook*, 293 F. Supp. 2d 546, 553 n.1 (W.D. Pa. 2003).

463. *Id.* “As a result, that action was dismissed for lack of subject matter jurisdiction on March 24, 2003. See Opinion and Order of March 24, 2003 (Doc. No. 52) in Civil Action No. 01-576.” *Id.*

disposition of estate assets and the remedies available to parties interested in those assets, an awareness of state-by-state variation in substantive tort law, as well as tort choice of law, becomes absolutely essential, both for adequately understanding what law will apply to provide a remedy for a particular injury, and for adequately representing the interests of clients who have suffered (or are alleged to have inflicted) those very injuries.