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A New Hope: Tortious Interference with an Expected Inheritance in Rhode Island

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INTRODUCTION

An extension of actions for interference with contractual relations, tortious interference with an expected inheritance, creates liability for a tortfeasor who intentionally prevents another from receiving an inheritance, at-death benefit, or lifetime gift. It is rooted in the concept that causes of action such as undue influence and fraud, typically brought in the probate courts, may be insufficient to provide a disinherited victim with a remedy, and premised on the maxim that every wrong should have a remedy.[1]

Tortious interference with an expected inheritance or gift, though by no means a recently developed cause of action, has gained traction since its adoption by the *Restatement (Second) of*

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1. *See* Nemeth v. Banhalmi, 425 N.E.2d 1187, 1190 (Ill. App. Ct. 1981); Wellin v. Wellin, 135 F. Supp. 3d 502, 516–18 (D.S.C. 2015); *see also* R.I. CONST. art. I, § 5 ("Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character.").

Torts in 1979,[2] and has received attention since the highly publicized 2006 United States Supreme Court decision in *Marshall v. Marshall*, perhaps better known as the Anna Nicole Smith litigation.[3] Currently, about half of the states acknowledge the tort.[4] Many of these states adopt the definition provided by the *Restatement (Second) of Torts* § 774B (1979):

> 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.[5]

However, many of the states that recognize the tort only allow a claim of tortious interference where an alternate remedy at law (be it through the states' probate code or otherwise) is unavailable or would not provide the injured party with adequate relief.[6] Thus, in those states tortious interference serves as a surrogate claim in situations where a victim is unable to pursue a will contest or action against an executor for recovery of wrongfully diverted assets.[7]

Though the Rhode Island Supreme Court has yet to weigh in, the tort was recently considered by the Rhode Island Superior Court in *Americans United for Life v. Legion of Christ of North America, Inc.*, and determined to be a viable cause of action in Rhode Island, albeit with the requirement that plaintiffs first exhaust available alternative remedies, such as a will challenge in probate court.[8] This decision breaks new ground in Rhode Island jurisprudence, creating a deterrent for wrongful conduct and, consequently, providing greater protections to vulnerable members of the Rhode Island populace.

This Article will provide a comprehensive overview of tortious

2. 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, 84–85 (2003).

3. *See* 547 U.S. 293 (2006).

4. *See infra* Part II.

5. RESTATEMENT (SECOND) OF TORTS § 774B (AM. LAW INST. 1979).

6. *See infra* Parts III, IV.

7. *See id.*

8. No. PC-2016-2900, 2017 WL 119569, at *8–9 (R.I. Super. Ct. Jan. 4, 2017).

interference with an expected inheritance. Part I discusses the genesis and development of tortious or wrongful interference with an expected inheritance. Part II surveys various states' adoption and rejection of the tort. Part III highlights differences in states' approaches to the torts requirements as well as damages available to victims, and discusses practical considerations, including exhaustion of remedies and when parties may initiate the tort action. Part IV discusses the Rhode Island Superior Court's decision in *Americans United*, whether the tort would be recognized by the Rhode Island Supreme Court, and provides arguments in favor of rejecting the so-called exhaustion requirement as an unnecessary and potentially impossible prerequisite to maintaining a tortious interference claim in superior court.

I. GENESIS AND DEVELOPMENT OF TORTIOUS INTERFERENCE WITH AN EXPECTED INHERITANCE

A. *Background*

A claim of tortious interference with an expected inheritance or gift provides one with the opportunity to recover against a tortfeasor for the wrongful deprivation of an expected inheritance, benefit under a will, at-death benefit, or inter vivos gift outside of probate court.[9] The tort developed as a natural extension of other common law commercial and non-commercial "interference" torts such as interference with contract, interference with prospective economic advantage, interference with prospective employment or business relations, and interference with gift.[10] All of these torts are based on wrongful interference with an expectancy, and all involve 1) economic loss without physical harm to person or property; 2) a claim that is not based on an existing and enforceable right or an existing and enforceable contract; and 3) a probable prospect of economic gain.[11]

Tortious interference is rooted in the concept that traditional

9. Irene D. Johnson, *Tortious Interference with Expectancy of Inheritance or Gift—Suggestions for Resort to the Tort*, 39 U. TOL. L. REV. 769, 770 (2008).

10. *See, e.g.*, DAN B. DOBBS, HORNBOOK ON THE LAW OF TORTS § 42.1 (2d ed. 2000).

11. *See id.*; Allen v. Hall, 974 P.2d 199, 202 (Or. 1999) (en banc).

causes of action such as undue influence and fraud, often brought in probate court in response to a petition to probate a will, may be insufficient to provide a disinherited victim with a remedy, and premised on the maxim that every wrong should have a remedy.[12] Diane J. Klein, Professor at University of La Verne College of Law, and nationally recognized contributor to tortious interference scholarship, explains that "[t]he 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."[13]

When might probate proceedings lack the ability to remedy wrongful attempts to frustrate a testator's intentions? A tortfeasor might unduly influence a testator to replace the name of one beneficiary with that of the tortfeasor in a will or trust.[14] However, even where a will contest on grounds of undue influence is successful and a later executed will is denied probate, there is no guarantee that the testator's intended disposition will take the contested will's place.[15] And even if the probate court declined to probate the affected provision of the will, it would not restore the gift or penalize the tortfeasor.[16] Indeed, "[i]f the tortfeasor were a residuary beneficiary, he might still benefit."[17]

Also, "[t]he tortfeasor may use undue influence or fraud to induce [a] donor to make inter vivos transfers that deplete the estate . . . . [Where] 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."[18] And, in this situation, the personal representative may attempt to impede the victim's efforts to restore wrongfully transferred assets.[19] Practically

12. *See* Nemeth v. Banhalmi, 425 N.E.2d 1187, (Ill. App. Ct. 1981); Wellin v. Wellin, 135 F. Supp. 3d 502 (D. S.C. 2015).

13. Diane J. Klein, *A Disappointed Yankee in Connecticut (or Nearby) Probate Court: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the First, Second, and Third Circuits*, 66 U. PITT. L. REV. 235, 247 (2004).

14. *Id.* at 248.

15. *See id.* at n.31.

16. *Id.* at 248.

17. *Id.*

18. *Id.*

19. *See, e.g.*, *id.* at n.32 (quoting Alvin E. Evans, *Torts to Expectancies in Decedents' Estates*, 93 U. PA. L. REV. 187, 203–04 (1944)) ("Probate may be

speaking:

> [D]isappointed 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, a will contest simply does not offer the disappointed person a way to obtain the intended legacy, and may actually prevent it.[20]

Tortious interference is an in personam claim which may result in a judgment against the wrongdoer to be paid from personal assets, rather than from the testator's probate estate, whereas a will contest is an action in rem which "determines what will happen to the assets in the testator's probate estate."[21] Because prejudgment interest, attorneys' fees, and punitive damages (in addition to compensatory damages) are available in tort actions, an action alleging tortious interference threatens to penalize wrongdoers.[22] Therefore, unlike will contests which, some argue, have no deterrent effect, tortious interference serves as a powerful deterrent to those who would otherwise engage in tortious conduct.[23] To fill the vacuum left from inadequate probate procedures, over the decades courts have recognized the need to extend the common-law claim for tortious interference with a business relation or contract to the context of inheritance law.[24]

B. *Development of the Tort*

Though not officially dubbed tortious interference with an expectation of inheritance until the *Restatement (Second) of Torts* in 1979, the concept of obtaining redress for such tortious conduct outside of probate court traces its roots back to the nineteenth century.[25] As early as 1855, the Supreme Court of Louisiana

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.").

20. *Id.* at 239.

21. Johnson, *supra* note 9, at 772.

22. *Id.* at 774.

23. *See id.*

24. *See infra* Part III.

25. This section addresses the development tort but does not focus on which states have expressly adopted it. For a discussion of the states that

recognized that relief could be granted in a case alleging wrongful interference in preventing a testator from creating a will.[26] In *Kelly v. Kelly*, the decedent's attending physician had written a will for him, which established the decedent's wife as his sole beneficiary.[27] The required number of witnesses had been sent for, but left before they witnessed the will.[28] After the decedent's death, his widow filed suit against the decedent's brother and his mother, claiming that they prevented the witnesses from signing the will by the use of threats and violence.[29] The court dismissed the widow's case, citing a lack of evidence that threats and violence were actually used, but nonetheless held that "[a]ctions of this kind were admissible under the rules of the civil law . . . ."[30]

Less than twenty years later, in 1874, the Connecticut Supreme Court decided *Dowd v. Tucker*.[31] In *Dowd*, the decedent made a will giving all of her property to her nephew.[32] About two weeks prior to her death, the decedent expressed her desire to bequeath her interest in a house to her niece.[33] The niece prepared a codicil for the decedent's signature.[34] Before the decedent signed the codicil, however, she asked to see her nephew first so she could inform him about the property transfer and receive his consent.[35] In response, the nephew told the decedent that she did not need to sign the codicil because she was weak, and that he would deed the property to the niece as the decedent wanted.[36] After the death of the decedent, the niece demanded that the nephew deed the decedent's interest in the property to her, but the nephew refused.[37] The Supreme Court of Errors characterized the nephew's actions as fraudulent.[38] He understood that the decedent's intention was to bequeath her

have expressly adopted the tort, see *infra* Part II.

26. *See* Kelly v. Kelly, 10 La. Ann. 622, 622–23 (1855).
27. *Id.* at 623.
28. *Id.*
29. *Id.* at 622.
30. *Id.*
31. 41 Conn. 197 (1874).
32. *Id.* at 204.
33. *Id.* at 203–04.
34. *Id.* at 202.
35. *Id.* at 203–04.
36. *Id.* at 205–06.
37. *Id.* at 204.
38. *Id.* at 203.

interest in the property to her niece, and deceptively promised to carry out her intention by deeding the property to the niece once he received it from the decedent's estate.[39] The court agreed with counsel for the niece that the nephew was a constructive trustee of the property and that he was "bound in equity and good conscience to make the conveyance."[40]

Courts in the early twentieth century also recognized a need to remedy tortious interference with an expected inheritance beyond the confines of a will contest in probate court. In 1907, the Massachusetts Supreme Judicial Court decided *Lewis v. Corbin*.[41] There, the plaintiff alleged that the defendant, the executor and residuary legatee, induced the testatrix to execute an invalid codicil giving a sum of $5,000 to the plaintiff's father.[42] Unbeknownst to both the testatrix and the defendant, the plaintiff's father had died before the codicil was executed.[43] The plaintiff sued the defendant, and the Supreme Judicial Court stated that while no action would lie during the life of the testatrix, if "the fraud [was] operative up to the time of [the testatrix's] death . . . the fraud directly and proximately caused the plaintiff's loss of his legacy" and the action would lie.[44] However, the Court granted the defendant's demurrer since "the pleading [was] defective in not averring facts which exclude[d] the possibility that the testatrix changed her purpose in regard to this legacy, and which show[ed] that the fraud continued operative to the time of her death . . . ."[45]

In *Barron v. Stuart*, the Arkansas Supreme Court recognized the concept underpinning tortious interference and imposed a constructive trust on the property that was the subject of the interference.[46] The testator's son induced the testator to leave all of his property to his wife, in his wife's presence, promising that she would divide it equally among the testator's children and

39. *Id.* at 203–04.
40. *Id.* at 206.
41. 81 N.E. 248 (Mass. 1907).
42. *Id.* at 249.
43. *Id.*
44. *Id.* at 250.
45. *Id.* This requirement under Massachusetts law that the operative fraud "continue" until a testator's death is explored in greater detail in Part III, *infra*.
46. 207 S.W. 22, 25 (Ark. 1918).

grandchildren.[47] After the testator died, his widow refused to deed any of the testator's timberlands to the testator's daughters or divide up the testator's personal property equally between the children.[48] The testator's daughters and grandchildren brought suit in equity.[49] The court found that the testator's wife was held as a constructive trustee for the intended beneficiaries since she was guilty of fraud by acquiescence.[50]

In *Creek v. Laski*, the Michigan Supreme Court found tort liability for destruction of a will, thereby defeating its terms.[51] The defendant executrix destroyed a will because of her dissatisfaction with its terms and four years later attempted to have the destroyed will allowed at probate.[52] At that hearing, the plaintiff learned that the will bequeathed $2,000 to her, and she became a party to the proceeding.[53] The probate court denied the claimed bequest because the plaintiff only had one witness testify to it, and the governing statute required two witnesses.[54] The plaintiff thereafter brought suit in Michigan Superior Court; she alleged malicious and fraudulent destruction of the will, which prevented her from proving the gift and therefore defeating her legacy.[55] The defendant argued that the probate court decision was res judicata of the plaintiff's right to recover damages from the executrix.[56] The court disagreed holding that Michigan probate courts have "no authority to invade the province of common-law courts to award damages for torts, whether in connection with wills or otherwise."[57]

It bears noting the significance of the court's decision in *Creek* in recognizing the limited function of the probate courts.[58] Merely because an action concerns the execution of or, in that case, the destruction of a will does not confine tort victims to the probate

47. *Id.* at 24–25.
48. *Id.* at 23.
49. *Id.* at 22.
50. *Id.* at 25.
51. 227 N.W. 817, 818–19 (Mich. 1929).
52. *Id.* at 818.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 819.
57. *Id.*
58. *See id.*

court forum.[59] As *Creek* recognized, where an action sounds in tort, it is the common-law courts that enjoy jurisdiction, ergo the need for a cause of action to remedy victims of wrongful interference with their inheritances.[60]

In *Thomas v. Briggs*, the plaintiff's aunt prepared and signed a will eight days before her death, leaving her residuary estate in equal shares to the plaintiff and the aunt's husband, the defendant.[61] After the will was prepared, the aunt asked the defendant to have the will witnessed and finished, and the defendant promised to do so, but never did.[62] Thus, the plaintiff's aunt died intestate.[63] The court held that in a constructive trust case such as this, "[i]f one party obtains the legal title to property, . . . by fraud[,] . . . violation of confidence[,] or . . . in any other unconscientious manner, . . . equity . . . impress[es] a constructive trust upon the property in favor of the one who is in good conscience entitled to it."[64] The court continued:

> [W]hen an heir or devisee in a will prevents the testator from providing for one for whom he would have provided but for the interference of the heir or devisee, such heir or devisee will be deemed a trustee, by operation of law, of the property, real or personal, received by him from the testator's estate, to the amount or extent that the defrauded party would have received had not the intention of the deceased been interfered with.[65]

The defendant's interference prevented the decedent from providing for the plaintiff, as she would have done, but for the interference.[66] Therefore, a constructive trust for the plaintiff resulted.[67]

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59. *See id.*

60. *See id.*; *see also infra* Part IV (discussing differences between probate court proceedings and actions in superior court when alleging tortious interference with an expected inheritance).

61. 189 N.E. 389, 390 (Ind. Ct. App. 1934) (en banc).

62. *Id.* at 391.

63. *Id.* at 389, 391.

64. *Id.* at 392 (quoting JOHN NORTON POMEROY, JR., POMEROY'S EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES: A TREATISE OF EQUITY JURISPRUDENCE § 155 (3d ed. 1905)).

65. *Id.* (quoting Ransdel v. Moore, 53 N.E. 767, 771 (Ind. 1899)).

66. *Id.*

67. *Id.* at 393.

Thomas is illustrative of situations in which, as cautioned by Diane Klein, probate courts fail by their own standards.[68] The will, which contained legitimate bequests the testator expected to be probated, was never formally executed, and was thereby invalid.[69] No probate proceeding, will challenge, or otherwise could vindicate the plaintiff's rights.[70] Tortious interference, however, which does not rely upon the probate or revocation of a will, could fill the vacuum left by the probate court and impose damages against the tortfeasor's assets in the amount of money that the plaintiff would have received but for the interference, thereby making the plaintiff whole.[71]

Approximately two years after *Thomas*, the North Carolina Supreme Court recognized tortious interference in *Bohannon v. Wachovia Bank & Trust Co.*[72] There, the plaintiff alleged that his grandmother and aunt had by false representations changed his grandfather's "fixed intention" to leave a large share of his estate to the plaintiff.[73] Denying the defendants' motion to dismiss, the court held that the plaintiff's allegations supported a cause of action.[74] It reasoned that "[i]f the plaintiff can recover against the defendant for the malicious and wrongful interference with the making of a contract, we see no good reason why he cannot recover for the malicious and wrongful interference with the making of a will."[75] The court therefore extended the common law claim of tortious interference with a contract to the context of inheritance cases:

> Would not a man have the right to receive gifts or insurance or the like, if they were in process of being perfected, and would have come to him but for malicious and fraudulent interference? A bare possibility may not be within the reason for this position. But where an intending donor, or testator, or member of a benefit

68. *See id.*; Klein, *supra* note 13, at 247.
69. *See Thomas*, 189 N.E. at 391.
70. *See id.* at 393.
71. *See, e.g.*, *In re* Estate of Ellis, 923 N.E.2d 237, 241 (Ill. 2009) ("The 'widely recognized' tort does not contest the validity of the will; it is a personal action directed at an individual tortfeasor.").
72. 188 S.E. 390, 394 (N.C. 1936).
73. *Id.* at 393.
74. *Id.* at 394.
75. *Id.*

> society, has actually taken steps toward perfecting the gift, or devise, or benefit, so that if let alone the right of the donee, devisee, or beneficiary will cease to be inchoate and become perfect, we are of the opinion that there is such a status that an action will lie, if it is maliciously and fraudulently destroyed, and the benefit diverted to the person so acting, thus occasioning loss to the person who would have received it.[76]

In 1939, § 870 of the *Restatement (First) of Torts* foretold the official recognition of the tort, providing that "[a] person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm if it results."[77] The *Restatement* further elaborated that "[t]he rule also applies to allow recovery where the plaintiff has been prevented from receiving a gift from a third person."[78] Finally, in 1979, after decades of jurisprudence on the subject, § 774B of the *Restatement (Second) of Torts* formally acknowledged tortious interference as a cause of action.[79] 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."[80]

Since 1979, many states have recognized tortious interference.[81] In 2006, the United States Supreme Court identified tortious interference as a "widely recognized tort,"[82] and, while studies vary and commentators disagree, it has been estimated that about half of the states have case law recognizing

76. *Id.*

77. RESTATEMENT (FIRST) OF TORTS § 870 (AM. LAW INST. 1939).

78. *Id.* § 870 cmt. b.

79. RESTATEMENT (SECOND) OF TORTS § 774B (AM. LAW INST. 1979).

80. *Id.* The most recent American Law Reports 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 . . . ." Sonja A. Soehnel, Annotation, *Liability in Damages for Interference with Expected Inheritance or Gift*, 22 A.L.R. 4th 1229, § 2 (1983).

81. *See infra* Part II.

82. Marshall v. Marshall, 547 U.S. 293, 312 (2006) (citing King v. Acker, 725 S.W.2d 750, 754 (Tex. App. 1987)).

the tort.[83]

However, it bears noting that tortious interference with an expected inheritance is not without its critics. Some legal scholars worry that tortious interference is redundant to will contests, for it creates a "rival legal regime" for addressing the same problems and invites litigation, since tort actions are governed by less stringent procedures.[84] For example, while a will contest is subject to an onerous standard of proof, tort actions may be proved merely by a preponderance of the evidence.[85] Another concern about the tort is that it corrodes inheritance law, which is founded on the principle that property owners have the freedom to dispose of their property as they please, and that the American justice system should not question the wisdom of such dispositions, nor rewrite estate plans posthumously.[86] Since inheritance law centers on effectuating the intentions of the testator, it does not provide a would-be-beneficiary with redress for a third party's tortious interference with the expected inheritance.[87] On the other hand, critics complain that tortious interference focuses not on the testator, but on the allegedly injured would-be-beneficiary, thereby undermining the organizing principle of inheritance law.[88]

Recognizing the potential overlap between tortious interference and will contests, many states have adopted a requirement that litigants first pursue probate court remedies before gaining entrance to non-probate courts. This "exhaustion"

83. *See* Devlin v. United States, 352 F.3d 525, 540 (2d Cir. 2003) (noting most states that decided the issue have recognized tortious interference with expected inheritance as valid cause of action); John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 361 (2013) (reporting that tortious interference with expected inheritance has now been accepted in twenty-one states); Klein, *supra* note 13, at 240 n.10 ("[J]ust fewer than half of the states recognize it, while about a quarter have no reported cases addressing it.").

84. *See, e.g.*, Goldberg & Sitkoff, *supra* note 83, at 338–39.

85. Johnson, *supra* note 9, at 773.

86. *See, e.g.*, 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, 270 (2002) ("The tort remedy permits a court of general jurisdiction to render judgments that redistribute estate assets and undermine the finality of probated wills, albeit in substance if not in form.").

87. *See* Johnson, *supra* note 11, at 772.

88. *See, e.g.*, Klein, *supra* note 86, at 271–72.

requirement will be discussed in detail in Parts III and IV.

II. STATES ADOPTING AND REJECTING THE TORT

Commentators disagree on the number of states that have recognized tortious interference.[89] The divergence arises from the variety of answers to a basic question: What does it mean for a state to have "recognized" the tort? Responses range from acknowledgment of tortious interference by the lower courts in one state,[90] to recognition by an appellate court in another,[91] to speculation by a federal court deciding state law in yet another.[92]

89. *Compare* Goldberg & Sitkoff, *supra* note 83, at 361–62 (distinguishing among states where the "court of last resort has recognized the tort," states where "an intermediate appellate court has recognized it," and states where "the viability of the tort is an open question") *and* James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Traps*, ARIZ. ATT'Y, Jan. 2000, at 26 n.2 (compiling cases and acknowledging that states have recognized the tort "to varying degrees"), *with* Rachel A. Orr, *Intentional Interference with an Expected Inheritance: The Only Valid Expectancy for Arkansas Heirs is to Expect Nothing*, 64 ARK. L. REV. 747, 750 (2011) ("[Tortious interference] is now recognized in twenty-five jurisdictions throughout the country."); Jared S. Renfroe, *Does Tennessee Need* Another *Tort? The Disappointed Heir in Tennessee and Tortious Interference with Expectancy of Inheritance or Gift*, 77 TENN. L. REV. 385, 393 (2010) ("Almost a majority of the states recognize the tort."); Diane J. Klein, *"Go West, Disappointed Heir": Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Pacific States*, 13 LEWIS & CLARK L. REV. 209, 210 (2009) ("Twenty-five of the forty-two states that have considered [tortious interference] have validated it."); *and* Johnson, *supra* note 9, at 774 ("[A]bout half of all jurisdictions do permit actions based on the tort.").

90. *See* Renfroe, *supra* note 89, at 393, 394 n.89 (including Connecticut as a state "recogniz[ing] the tort as a cause of action" based upon two Connecticut Superior Court decisions, but acknowledging that a third Connecticut Superior Court decision states that Connecticut had not recognized tortious interference); *see also* Klein, *supra* note 89, at 210 n.3 (same).

91. *See* Renfroe, *supra* note 89, at 393, 394 n.94 (including Indiana as a state "recogniz[ing] the tort as a cause of action" based upon a decision by Indiana's Court of Appeals, its second-highest court); *see also* Klein, *supra* note 89, at 210 n.3 (citing decision by Indiana's Court of Appeals, its second-highest court, in support of proposition that Indiana is a state that has "validated" tortious interference).

92. *See, e.g.*, Renfroe, *supra* note 89, at 395 n.108 (quoting Umsted v. Umsted, 446 F.3d 17, 22 (1st Cir. 2006)) ("We find that Rhode Island would adopt the majority position that a cause of action for tortious interference with an expectancy of inheritance . . . would not lie where an adequate statutory remedy is available but has not been pursued.").

Employing such broad definitions encourages analysis of the wide variety of approaches to tortious interference. However, a broad definition can also distort the landscape by inflating the number of states whose courts have taken the step of formally recognizing the tort.[93] In order to avoid the aforementioned problem, this Article employs explicit recognition by the highest court in the state as its criteria. This distinction is made, not to avoid analysis of other states' examination of the tort, but to appropriately distinguish between those states whose pronouncements on tortious interference are binding law in their respective jurisdictions and those states whose examination of the tort remains merely advisory. Moreover, this Article will look closely at whether the tort still exists in states where the highest courts' subsequent decisions have meaningfully modified their tortious interference jurisprudence.

A. *States Definitively Recognizing Tortious Interference*

Ten states have definitively recognized tortious interference through a decision in their court of last resort:[94] Florida,[95] Georgia,[96] Illinois,[97] Iowa,[98] Maine,[99] Massachusetts,[100] North

93. Klein, *supra* note 13, at 252 ("Strictly speaking . . . 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.").

94. In setting the number of states that have adopted tortious interference at ten, this Article reaches a different conclusion even from commentators who distinguish between states that have adopted tortious interference by decisions of their highest court and states where the tort has merely been acknowledged by lower courts. *See, e.g.*, Goldberg & Sitkoff, *supra* note 83, at 361 ("In *eleven* states, the court of last resort has recognized the tort . . . ." (emphasis added)). This distinction lies in the narrow criteria for adoption employed in this Article, requiring a decision by a state's court of last resort without any subsequent decision modifying the prior holding in a meaningful way. Specifically, the authors disagree about whether Kentucky still recognizes tortious interference.

95. DeWitt v. Duce, 408 So. 2d 216, 218 (Fla. 1981) ("[A] cause of action for wrongful interference with a testamentary expectancy has been recognized in this state . . . ."); *see also* Klein, *supra* note 2, at 109–21 (discussing Florida's "extremely well-developed body of law" on tortious interference).

96. Mitchell v. Langley, 85 S.E. 1050, 1053 (Ga. 1915) ("[W]here an intending donor, or testator, or member of a benefit society, has actually taken steps toward perfecting the gift, or devise, or benefit, so that if let alone the right of the donee, devisee, or beneficiary will cease to be inchoate and become perfect, we are of the opinion that there is such a status that an

action will lie, if it is maliciously and fraudulently destroyed, and the benefit diverted to the person so acting, thus occasioning loss to the person who would have received it."); *see also* Metro Atlanta Task Force for the Homeless, Inc. v. Ichthus Cmty. Tr., 780 S.E.2d 311, 319 (Ga. 2015) ("Georgia's appellate courts have recognized a cause of action for interference with an economic expectancy in the form of a gift within the context of receiving an inheritance or otherwise receiving a benefit upon the death of another . . . ."); Morgan v. Morgan, 347 S.E.2d 595, 595–96 (Ga. 1985) (reiterating *Mitchell* holding); Renfroe, *supra* note 89, at 130 n.11 (citing *Mitchell* as recognizing tort); Klein, *supra* note 2, at 121 ("Georgia was one of the very first states to recognize the tort.").

97. *In re* Estate of Ellis, 923 N.E.2d 237, 241 (Ill. 2009) (acknowledging tort and describing its elements); Goldberg & Sitkoff, *supra* note 83, at 361 & n.175 (citing *In re Estate of Ellis* as recognizing tort); *but see* Robinson v. First State Bank of Monticello, 454 N.E.2d 288, 294 (Ill. 1983) ("In this case, where a will has been admitted to probate and where the plaintiffs have engaged an attorney to determine whether they should file a will contest, have decided not to contest the will, have entered into a settlement agreement for $125,000 (agreeing to release the other parties to the agreement including defendant . . . from any and all claims and causes of action arising from any will, codicil or other undertaking by the parties), and have allowed the statutorily prescribed period in which to contest the will to expire (thereby establishing the validity of the will), we will not recognize a tort action for intentional interference with inheritance."); Jason L. Hortenstine, *The Tortious Loss of Expectancies, a Lost Opportunity for Deterrence, and the Light at the End of the Tunnel*, 37 S. ILL. U. L.J. 741, 741 (2013) ("In Illinois, courts recognize the tort as a last recourse, not as a separate course of action."). For purposes of this Article, it is apparent that the state's highest court has, at minimum, recognized the tort. *See In re Estate of Ellis*, 923 N.E.2d at 241; *Robinson*, 454 N.E.2d at 293–94.

98. Frohwein v. Haesemeyer, 264 N.W.2d 792, 795 (Iowa 1978) ("[W]e are persuaded that an independent cause of action for the wrongful interference with a bequest does exist, recognizing as we do the difficulties attendant to recovery in such an action."); *see also* Huffey v. Lea, 491 N.W.2d 518, 520 (Iowa 1992) (citing *Frohwein* as recognizing tort); Goldberg & Sitkoff, *supra* note 83, at 361 & n.175 (citing both *Huffey* and *Frohwein* as recognizing tort).

99. Cyr v. Cote, 396 A.2d 1013, 1018 (Me. 1979) ("[U]nder appropriate circumstances Maine recognizes an action for the wrongful interference with an expected legacy or gift under a will."); Klein, *supra* note 2, at 253 ("Maine first recognized the tort in the 1979 case of *Cyr v. Cote*."); *see also* Plimpton v. Gerrard, 668 A.2d 882, 885 (Me. 1995) (citing *Cyr* as recognizing tort); DesMarais v. Desjardins, 664 A.2d 840, 843 (Me. 1995) (same); Harmon v. Harmon, 404 A.2d 1020, 1022 (Me. 1979) (same).

100. Lewis v. Corbin, 81 N.E. 248, 250 (Mass. 1907) (acknowledging that defendant's fraudulent conduct in inducing testatrix to execute codicil to her will, and thereby depriving plaintiff of legacy under testatrix's will, constituted "actionable wrong"); *see also* Labonte v. Giordano, 687 N.E.2d 1253, 1255 (Mass. 1997) ("[W]e have long recognized a cause of action for tortious interference with the expectancy of receiving a gift in certain limited

Carolina,[101] Ohio,[102] Oregon,[103] and West Virginia.[104] In each of these states, (1) the highest court has definitively recognized tortious interference, in some cases nearly a century ago; and (2) those decisions remain binding authority on which lower courts in those jurisdictions still rely. However, this is a two-part

conditions."); Monach v. Koslowski, 78 N.E.2d 4, 7 (Mass. 1948) (recognizing a sufficient cause of action for tortious interference with expected inheritance); Klein, *supra* note 13, at 264 ("Massachusetts was one of the first states to recognize the tort . . . .").

101. Bohannon v. Wachovia Bank & Tr. Co., 188 S.E. 390, 394 (N.C. 1936) ("If the plaintiff can recover against the defendant for the malicious and wrongful interference with the making of a contract, we see no good reason why he cannot recover for the malicious and wrongful interference with the making of a will."); Goldberg & Sitkoff, *supra* note 83, at 356–57, 366 (discussing North Carolina's recognition of tortious interference with expected inheritance and later acknowledging *Bohannan* as "perhaps the first case formally to recognize" the tort); Klein, *supra* note 86, at 273 ("North Carolina was one of the first states in the entire United States to recognize [the] tort."); *see also* Dulin v. Bailey, 90 S.E. 689, 690 (N.C. 1916) (allowing plaintiff to proceed with tort action against individuals who destroyed subsequent will that would have left plaintiff a legacy in testator's estate in order to probate prior will); *but see* Holt v. Holt, 61 S.E.2d 448, 451 (N.C. 1950) ("[A] child has no standing at law or in equity either before or after the death of his parent to attack a conveyance by the parent as being without consideration, or in deprivation of his right of inheritance.").

102. Firestone v. Galbreath, 616 N.E.2d 202, 203 (Ohio 1993) (citing Morton v. Petitt, 177 N.E. 591, 592–93 (Ohio 1931)) (responding in affirmative to certified question from United States Court of Appeals for the Sixth Circuit as to whether Ohio recognizes tortious interference with expectancy of inheritance); *see also* Goldberg & Sitkoff, *supra* note 83, at 361 & n.175 (citing *Firestone* as recognizing tort).

103. Allen v. Hall, 974 P.2d 199, 206 (Or. 1999) (en banc) ("[T]here is no need, in the case before us, to decide in the abstract whether to recognize a separate and distinct claim for intentional interference with prospective inheritance in this state. We hold that the complaint in the present case states a claim under a reasonable extension of the scope of the tort of intentional interference with economic relations."); *see also* Goldberg & Sitkoff, *supra* note 83, at 361 & n.175 (citing *Allen* as recognizing tort); Klein, *supra* note 89, at 214–15 (quoting *Allen*, 974 P.2d at 206) ("[T]he Oregon Supreme Court expressly validated a cause of action for interference with expectation of inheritance, albeit not as 'a separate and distinct claim,' but rather 'under a reasonable extension of the scope of the tort of intentional interference with economic relations.'").

104. Barone v. Barone, 294 S.E.2d 260, 264 (W. Va. 1982) ("We find tortious interference with a testamentary bequest to be a tort in West Virginia."); Klein, *supra* note 13, at 282 ("West Virginia recognizes the tort and permits broad access to it."); *see also* Kessel v. Leavitt, 511 S.E.2d 720, 763 (W. Va. 1998) (citing *Barone* as recognizing tort); Calacino v. McCutcheon, 356 S.E.2d 23, 25–26 (W. Va. 1987) (same).

requirement for a reason: While more than ten states' highest courts have examined the question of whether to adopt tortious interference, the tort has not always survived as a viable cause of action in the years that followed those initial decisions. For example, in Kentucky,[105] Idaho,[106] and Delaware,[107] the court of last resort appeared to favor recognition of tortious interference, but later cases strongly suggest that those earlier decisions are no longer good law.

From the foregoing analysis, it is apparent that only a few states recognize, in decisions that are binding authority within their jurisdiction, a cause of action for tortious interference. It is useful to distinguish and separately note these states, because their decisions on tortious interference should ring with greater force in any analysis of the tort. Cases from those jurisdictions represent seasoned authority on the subject of tortious interference. Several of these states have recognized the tort for

105. *See* Allen v. Lovell's Adm'x, 197 S.W.2d 424, 426–27 (Ky. 1946) (recognizing a tort action for wrongful destruction of a will); *but see* Simmons v. Simmons, No. 2012-CA-000383-MR, 2013 WL 3369421, at *23 (Ky. Ct. App. July 5, 2013) ("We agree that while Kentucky has never overtly recognized and adopted this cause of action, neither has it been rejected.").

106. *See* Carter v. Carter, 146 P.3d 639, 647 (Idaho 2006) (adopting trial court's analysis of tortious interference in its review on appeal and appearing to treat the tort as a viable cause of action); *but see* Losser v. Bradstreet, 183 P.3d 758, 764 (Idaho 2008) (discussing tortious interference in a manner indicating the tort has not yet been recognized in Idaho, and thereafter stating that it would assume, "*without deciding*, that this Court would recognize the tort of interference with inheritance") (emphasis added); *see also* Goldberg & Sitkoff, *supra* note 83, at 361 n.176.

107. *See* Chambers v. Kane, 424 A.2d 311, 316 (Del. Ch. 1980) (acknowledging the potential for, but "pass[ing] no judgment on whether or not 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"), *aff'd in pertinent part by* 437 A.2d 163, 164 (Del. 1981) ("[T]o the extent that plaintiff seeks an independent or personal judgment against her brother on the basis of the allegations in the complaint, we are satisfied that the Vice Chancellor made the correct ruling and, to that extent, the judgment will be affirmed."); *but see* Moore v. Graybeal, 550 A.2d 35, 35 (Del. 1988) (order) ("We agree with the Superior Court, and the federal courts which have considered the issue, that appellants' 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 [decedent]. Such an attack is clearly precluded by Delaware law."); Klein, *supra* note 2, at 286–91.

many years:[108] Florida, with its "extremely well-developed body of law" on tortious interference,[109] has cases dating back over fifty years,[110] and Maine, with cases dating back at least thirty-eight years, boasts a whopping nine Supreme Judicial Court decisions concerning the tort.[111] However, even those states' bodies of case law on tortious interference are relatively young compared to North Carolina (over eighty years),[112] Georgia (over one hundred years),[113] and Massachusetts (over one hundred and ten years).[114] In short, while the ten states whose highest courts have definitively recognized the tort are not the sum total of authority on tortious interference, their decisions carry considerable weight in this Article's examination of the tort.

B. *States Acknowledging Without Explicitly Adopting the Tort*

Another seventeen states, along with the District of Columbia, have not been silent on tortious interference: California,[115] Connecticut,[116] Delaware,[117] Idaho,[118] Indiana,[119]

108. *Accord* Orr, *supra* note 89, at 750 ("The tort of intentional interference with an expected inheritance has a history that spans more than one hundred years in the United States court system."); *but see* Goldberg & Sitkoff, *supra* note 83, at 355 ("As late as 1979, there was little recognition in American law of wrongful interference with inheritance as a tort.").

109. Klein, *supra* note 2, at 109.

110. *See Allen*, 197 S.W.2d at 424.

111. Klein, *supra* note 13, at 253.

112. *See* Bohannon v. Wachovia Bank & Trust Co., 188 S.E. 390, 394 (N.C. 1936).

113. *See* Mitchell v. Langley, 85 S.E. 1050, 1053 (Ga. 1915).

114. *See* Lewis v. Corbin, 81 N.E. 248, 250 (Mass. 1907).

115. *See* Beckwith v. Dahl, 141 Cal. Rptr. 3d 142, 155–57 (Cal. Ct. App. 2012) (recognizing intentional interference with expectation of inheritance as a valid cause of action); *but see In re* Estate of Trevillian, Nos. B187871, B188103, 2008 WL 175933, at *2 (Cal. Ct. App. Jan. 22, 2008) ("The tort of interference with the right to inherit has not been recognized in California."); Klein, *supra* note 89, at 220–28 (including California in analysis of "Pacific states [that] have declined to recognize the tort").

116. *See* Bria v. Saumell, No. 26 84 56, 1990 WL 271047, at *2 (Conn. Super. Ct. May 29, 1990) (indicating that "[t]here is authority for the proposition that the plaintiffs have the right to maintain an action for damages") (citing *Liability for Damages for Interference with Expected Inheritance or Gift*, 22 A.L.R 4th 1229, §§ 4, 6(a)); *but see* Troy v. Folger, No. CV 970161947S, 1998 WL 252355, at *1–2 (Conn. Super. Ct. May 8, 1998) (granting the defendant's motion to dismiss a count for "interference with prospective advantage" premised upon the defendant's interference with the plaintiffs' expectation of an inheritance from their father); *see also* Klein,

Kentucky,[120] Louisiana,[121] Michigan,[122] Minnesota,[123]

supra note 13, at 271–73. Federal courts have offered similarly contradictory opinions on whether Connecticut recognizes tortious interference. *Compare* Devlin v. United States, 352 F.3d 525, 542 (2d Cir. 2003) ("Connecticut follows the majority of jurisdictions . . . in recognizing the tort of interference with an inheritance."), *with* DiMaria v. Silvester, 89 F. Supp. 2d 195, 196 n.2 (D. Conn. 1999) (concluding that "Connecticut does not recognize a cause of action for the intentional interference with an inheritance").

117. *See* Klein, *supra* note 13, at 286–91; *see also* Chambers v. Kane, 424 A.2d 311, 316 (Del. Ch. 1980), *aff'd in pertinent part by* 437 A.2d at 164; *but see* Moore v. Graybeal, 550 A.2d 35, 35 (Del. 1988) (order).

118. *See* Diane J. Klein, *River Deep, Mountain High, Heir Disappointed: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Mountain States*, 45 IDAHO L. REV. 1, 7–8 (2008–2009) ("The Idaho Supreme Court has addressed tortious interference with expectation of inheritance twice in just the past few years. While the first case seems clearly to recognize it, the second casts some doubt on that holding."); Goldberg & Sitkoff, *supra* note 83, at 361 n.176; *see also* Carter v. Carter, 146 P.3d 639, 647 (Idaho 2006); *but see* Losser v. Bradstreet, 183 P.3d 758, 764 (Idaho 2008).

119. *See* Minton v. Sackett, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996) (adopting tortious interference with the limitation that parties are prohibited from bringing the tort "where the remedy of a will contest is available and would provide the injured party with adequate relief"); *see also* Carlson v. Warren, 878 N.E.2d 844, 854 (Ind. Ct. App. 2007) ("To prevail on a claim of tortious interference with an inheritance, [the plaintiffs] must show that the [defendants] intentionally prevented them, by using fraud or other tortious means, from receiving an inheritance from [the decedent] that they otherwise would have received.").

120. Allen v. Lovell's Adm'x, 197 S.W.2d 424, 426–27 (Ky. 1946); Simmons v. Simmons, No. 2012-CA-000383-MR, 2013 WL 3369421, at *23 (Ky. Ct. App. July 5, 2013).

121. Kelly v. Kelly, 10 La. Ann. 622, 622 (1855) (acknowledging possibility of claim very similar to tortious interference that would permit a plaintiff to obtain damages from defendants, where defendants allegedly "prevented [decedent] by their threats and violence from instituting [plaintiff as decedent's] universal legatee"); *see also* Klein, *supra* note 2, at 105–09 ("No Louisiana state court in the past century and a half has *explicitly* addressed whether to recognize the tort of intentional interference with expectation of inheritance as such[.]") (emphasis added). McGregor v. McGregor, 101 F. Supp. 848 (D. Colo. 1951), a federal case, is also occasionally cited as a case establishing that Louisiana recognizes tortious interference. *See* Goldberg & Sitkoff, *supra* note 83, at 362 n.185 (stating that while *McGregor* "fail[s] to state whether [it is] applying Colorado or Louisiana law," the case does declare that "courts generally approve of the tort"); *but see* Klein, *supra* note 2, at 108 (discussing the same, but concluding "[i]t is more logical to assume that Louisiana law is being applied throughout").

122. *See* Estate of Doyle v. Doyle, 442 N.W.2d 642, 643 (Mich. Ct. App. 1989) (acknowledging that plaintiff had standing to bring claims against defendants who allegedly, through undue influence, interfered with the

Missouri,[124] New Jersey,[125] New Mexico,[126] Pennsylvania,[127]

decedent's testamentary plan to divide her estate equally between her two children: the plaintiff and one of the defendants) (citing Harmon v. Harmon, 404 A.2d 1020 (Me. 1979)); RESTATEMENT (SECOND) OF TORTS § 774B (AM. LAW INST. 1979); *Liability in Damages for Interference with Expected Inheritance or Gift*, 22 A.L.R. 4th 1229).

123. *See* Botcher v. Botcher, No. CX-00-1287, 2001 WL 96147, at *6 (Minn. Ct. App. Feb. 6, 2001) (observing that creating new torts is a function of the highest court and further declining to recognize Tortious Interference where the remedies available to the appellant under the probate code were "adequate to protect any interest he has in [the decedent's] estate").

124. *See* Hammons v. Eisert, 745 S.W.2d 253, 256–58 (Mo. Ct. App. 1988) (examining authority concerning tortious interference and ultimately recognizing the tort by acknowledging that a trust beneficiary has a valid cause of action against a tortfeasor who induces a settlor to revoke the trust, and in so doing, diverts trust funds and prevents the beneficiary, "from receiving that which he would otherwise have received"); *see also* Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 452 (Mo. Ct. App. 2004) ("Actions for tortious interference with expectancy of inheritance or gift under § 774B were first recognized as viable in Missouri in *Hammons v. Eisert*, 745 S.W.2d 253 (Mo. Ct. App. 1988).").

125. *See* Garruto v. Cannici, 936 A.2d 1015, 1018 (N.J. Super. Ct. App. Div. 2007) ("[A]lthough an independent cause of action for tortious interference with an expected inheritance may be recognized in other circumstances, it is barred when, as here, plaintiffs have failed to pursue their adequate remedy in probate proceedings of which they received timely notice."); *see also* Casternovia v. Casternovia, 197 A.2d 406, 409 (N.J. Super. Ct. App. Div. 1964) (acknowledging that at that time, there was "no reported decision in [New Jersey] wherein damages were sought to be recovered in a tort action for malicious interference with an expected gift" but opening door to possibility of cause of action); Klein, *supra* note 13, at 273–74 ("A single New Jersey appellate case appears to recognize the tort, in dicta, although not if the donor is still alive.").

126. *See* Doughty v. Morris, 871 P.2d 380, 383 (N.M. Ct. App. 1994) ("Today, we extend the line of New Mexico cases acknowledging tortious interference causes of action to include a cause of action against those who intentionally and tortiously interfere with an expected inheritance."); *see also* Peralta v. Peralta, 131 P.3d 81, 82 (N.M. Ct. App. 2005); Klein, *supra* note 119, at 11 ("Although the Supreme Court of New Mexico has yet to address the tort, three New Mexico Court of Appeals cases have recognized it and begun to develop a state jurisprudence on the tort.").

127. *See* Cardenas v. Schober, 783 A.2d 317, 325 (Pa. Super. Ct. 2001) (asserting that Pennsylvania permits an action for tortious interference) (citing Marshall v. De Haven, 58 A. 141, 142 (Pa. 1904) (concluding that no cause of action lay where plaintiff failed to alleged that purported tortfeasor "was to, or did, use any fraud, misrepresentation or undue influence; that he was successful in preventing any change [to the will]; that but for him the testator would have changed his will, or that if the testator had done so what he would have given to the plaintiff")); *see also* McNeil v. Jordan, 814 A.2d 234, 238 (Pa. Super. Ct. 2002) (acknowledging tortious interference in a

Rhode Island,[128] Texas,[129] Wisconsin,[130] and the District of Columbia[131] offer lower court and appellate court decisions examining and even outright embracing the tort, and decisions from courts of last resort that simply discuss the tort while declining to explicitly adopt it. The temptation may be to draw expansive conclusions about the state of tortious interference from the decisions in these jurisdictions, but it is a messy landscape that does not lend itself to neatly packaged principles of law. As will be addressed in Part III, there are distinctions even among courts in the same state as to the proper approach to tortious interference. These lingering disagreements have a troubling result in jurisdictions without a decision by the highest court: many aspects of the tort, including the elements of tortious

manner similar to *Cardenas*), *rev'd on other grounds*, 894 A.2d 1260, 1262 (Pa. 2006) (discussing pre-complaint discovery procedures and, notably, not rejecting tortious interference); Klein, *supra* note 13, at 275 (describing the sole Pennsylvania cases to recognize the tort as lower court cases).

128. *See* Ams. United for Life v. The Legion of Christ of N. Am., Inc., C.A. No. PC-2016-2900, slip op. at 23 (R.I. Super. Ct. Jan. 4, 2017) (holding that "tortious interference with expectation of inheritance is a cognizable claim under Rhode Island law"). The United States Court of Appeals for the First Circuit has also projected that the Rhode Island Supreme Court will recognize the tort. *See* Umsted v. Umsted, 446 F.3d 17, 22 (1st Cir. 2006) ("We find that Rhode Island would adopt the majority position that a cause of action for tortious interference with an expectancy of inheritance, if it lies at all, would not lie where an adequate statutory remedy is available but has not been pursued."); Klein, *supra* note 13, at 292–93.

129. *Compare* King v. Acker, 725 S.W.2d 750, 754 (Tex. App. 1987) ("We hold that a cause of action for tortious interference with inheritance rights exists in Texas."), *with* Anderson v. Archer, 490 S.W.3d 175, 177 (Tex. App. 2016) (observing that neither the Texas Supreme Court nor the state legislature has recognized the tort, and therefore declining to recognize the tort at the intermediate appellate level). *See also* Klein, *supra* note 2, at 97 ("Texas appellate courts recognize the tort . . . although the Texas Supreme Court has yet to address it.").

130. *See* Harris v. Kritzik, 480 N.W.2d 514, 518 (Wis. Ct. App. 1992) (adopting *Restatement* formulation of tortious interference and concluding that the complaint failed "to state a basis for which relief can be granted for intentional or malicious interference with [an] expected inheritance").

131. *See In re* Ingersoll Trust, 950 A.2d 672, 699–700 (D.C. 2008) (analyzing tortious interference claim without deciding whether D.C. recognizes the tort and concluding that claimant failed to "satisfy[y] her burden as to all of the elements of that tort"); *see also In re* Estate of Reilly, 933 A.2d 830, 834 (D.C. 2007) (recounting without comment lower court decision, which held that "the District of Columbia does not recognize the tort of intentional interference with inheritance").

interference, courts with jurisdiction over the cause of action, and whether probate remedies must be exhausted before pursing it, remain open questions. Accordingly, while this Article will draw from the foregoing body of law, it will do so with great caution.

C. *States Declining to Recognize the Tort*

With tortious interference on their dockets, the highest courts in nine states have declined to recognize tortious interference: Alabama,[132] Arkansas,[133] Kansas,[134] Maryland,[135] Montana,[136]

132. *See Ex parte* Batchelor, 803 So. 2d 515, 515 (Ala. 2001) (following rehearing, withdrawing earlier opinion recognizing tortious interference). In a case predating *Batchelor*, the Alabama Supreme Court had analyzed tortious interference and noted the court had "not addressed the proposed cause of action" before, but it concluded that the plaintiffs failed to state a claim sufficient to survive a motion to dismiss. Holt v. First Nat. Bank of Mobile, 418 So. 2d 77, 79 (Ala. 1982). *See also* Klein, *supra* note 2, at 131 ("As matters currently stand . . . the tort is not recognized, although it has substantial support from Alabama's highest court.").

133. *See* Jackson v. Kelly, 44 S.W.3d 328, 328 (Ark. 2001) ("We decline to recognize the tort in this case because the appellant's remedy in probate court would have been adequate had she prevailed in her will contest."); *see also* Fenton v. Pearson, No. CA03-1122, 2004 WL 2101994, at *2 (Ark. Ct. App. Sept. 22, 2004) (acknowledging that Arkansas "has yet to decide" whether to adopt tortious interference, but determining that "even if the cause of action were recognized, appellant could not prove an essential element" thereof); Orr, *supra* note 89, at 747 ("To date, the Arkansas legislature and Arkansas courts have not seen fit to recognize the tort of intentional interference with an expected inheritance.").

134. *See* Axe v. Wilson, 96 P.2d 880, 888 (Kan. 1939) (concluding that the plaintiff's action for damages, premised on "malicious interference with her alleged right of inheritance," would negate the effect of the operative will—just as in a will contest—and as a result, holding that "remedy to obtain the particular relief sought does not lie in an action for damages, but in her action to contest the will"); *but see* Miller v. Woodmen Acc. & Life Ins. Co., 961 P.2d 71 (Kan. Ct. App. 1998) (unpublished) ("[N]o such tort has been previously recognized, [but] this cause of action has not been precluded when the claimant has no other method by which to recover damages for undue influence.").

135. Anderson v. Meadowcroft, 661 A.2d 726, 728 (Md. 1995) (observing that Maryland has "not yet considered expanding the tort to apply to interference with gifts or bequests" and ultimately electing not to opine on whether to "embrace" tortious interference because plaintiff failed to adequately allege underlying tortious conduct of undue influence); Geduldig v. Posner, 743 A.2d 247, 256 (Md. Ct. Spec. App. 1999) (observing that the "Court of Appeals neither accepted nor rejected the tort and expressly stated that it did not need to decide that issue because the complaint did not adequately allege undue influence, the underlying alleged misconduct," and

Nebraska,[137] New York,[138] South Carolina,[139] Tennessee,[140] and Virginia.[141] In addition, the intermediate appellate courts in Washington[142] and Hawaii[143] have declined to recognize the tort.

concluding that while circumstances may exist under which the Court of Appeals would recognize tortious interference, no such circumstances existed on the facts presented); *see also* Klein, *supra* note 86, at 284–91 ("Although the Maryland courts seem[] sympathetic to the tort in principle, none has yet encountered a factual situation warranting relief, and all have so far declined to recognize it.") (footnote omitted).

136. Hauck v. Seright, 964 P.2d 749, 753 (Mont. 1998) (discussing tortious interference and concluding that the facts as presented did not require the court to "address whether tortious interference with an expectancy will be recognized as a cause of action in Montana."); *see* Klein, *supra* note 119, at 18 (discussing Montana's decision to decline recognition of the tort).

137. Litherland v. Jurgens, 869 N.W.2d 92, 96 (Neb. 2015) (declining to adopt the tort of intentional interference with an inheritance, noting that claimant had adequate probate remedies).

138. Vogt v. Witmeyer, 665 N.E.2d 189, 190 (N.Y. 1996) ("New York, however, has not recognized a right of action for tortious interference with prospective inheritance[.]") (citing Hutchins v. Hutchins, 7 Hill 104, 110 (N.Y. Sup. Ct. 1845)); O'Sullivan v. Hallock, 101 A.D.3d 1313, 1314 (N.Y. App. Div. 2012) ("New York does not recognize a cause of action for tortious interference with prospective inheritance[.]"); *see* Goldberg & Sitkoff, *supra* note 83, at 355–56 (discussing *Hutchins* and New York's dismissal of tort claim); *see also* Klein, *supra* note 13, at 282 (stating the New York has "explicitly rejected the tort").

139. Malloy v. Thompson, 762 S.E.2d 690, 692 (S.C. 2014) ("[T]his opinion must not be understood as either adopting or rejecting the tort of intentional interference with inheritance."); Douglass ex rel. Louthian v. Boyce, 542 S.E.2d 715, 717 (S.C. 2001) ("We have not adopted the tort of intentional interference with inheritance[.]"); *see* Klein, *supra* note 86, at 291 (observing that South Carolina does not recognize tortious interference).

140. Stewart v. Sewell, 215 S.W.3d 815, 827 (Tenn. 2007) (observing that Tennessee does not recognize tortious interference); *see generally* Fell v. Rambo, 36 S.W.3d 837, 850 (Tenn. Ct. App. 2000) ("We decline to use this case to determine whether Tennessee should adopt the tort of interference with inheritance or gift."); Renfroe, *supra* note 89, at 386–406.

141. Economopoulos v. Kolaitis, 528 S.E.2d 714, 720 (Va. 2000) ("We also agree with the trial court that a cause of action for 'tortious interference with inheritance' is not recognized in Virginia."); Carter v. Wyczalkowski, 79 Va. Cir. 599 (2009) (citing *Economopoulos*, 528 S.E.2d at 720) ("Virginia does not recognize a cause of action for tortious interference with an inheritance."); Klein, *supra* note 86, at 292 (observing that Virginia "does not recognize a cause of action for tortious interference with inheritance.").

142. *In re* Estate of Hendrix, 134 Wash. App. 1007 (2006) (declining to recognize tortious interference on the facts presented); Hadley v. Cowan, 804 P.2d 1271, 1274, 1276 (Wash. Ct. App. 1991) (discussing interference claims but acknowledging they were barred by res judicata following settlement in a preceding will contest); *see* Klein, *supra* note 89, at 228–31 ("[I]n 2006, the

Notably, these cases do not, for the most part, represent wholesale rejection of tortious interference. Instead, they have "declined to recognize the tort on the facts presented rather than categorically rejecting it . . . ."[144] Unfortunately, this has left commentators and courts in disagreement as to the appropriate treatment of these cases.[145] For instance, the United States Court of Appeals for the First Circuit highlighted an Arkansas Supreme Court case in support of its conclusion that most courts addressing tortious interference have declined to recognize the tort where the claimant failed to first pursue an adequate probate remedy.[146] One is left to wonder whether it is fair to say that Arkansas actually *recognizes* tortious interference based on its decision in *Jackson v. Kelly*, or whether the case simply indicates that Arkansas has not, in fact, adopted the tort—rendering its pronouncements on the prerequisites for suit little better than dicta.[147] Broad pronouncements about the nature of tortious interference can blur these issues.

Not every state requires a magnifying glass to discern its intentions with respect to tortious interference. Three states employ comparably strong language in rejecting tortious interference: Nebraska,[148] New York,[149] and Virginia.[150]

Washington Court of Appeals explicitly declined to recognize the tort[.]").

143. Goldberg & Sitkoff, *supra* note 83, at 362 n.185 (citing Foo v. Foo, 65 P.3d 182 (Haw. Ct. App. 2003)) (stating that, in an opinion that was "not precedential under Hawaii Rule of Appellate Procedure 35[,]" the court declined to recognize tortious interference because probate remedies were available); see Klein, *supra* note 89, at 228 (describing *Foo* as "express[ing] the Hawaii Court of Appeals' antipathy towards recognizing a tort claim arising from the alleged depletion of the assets of a marital trust").

144. Goldberg & Sitkoff, *supra* note 83, at 362 (citing, *inter alia*, *Ex parte Bachelor*, 803 So.2d 515 (Ala. 2001); Jackson v. Kelly, 44 S.W.3d 328, 331–34 (Ark. 2001); Anderson v. Meadowcroft, 661 A.2d 726, 728 (Md. 1995); and Hauck v. Seright, 964 P.2d 749, 753 (Mont. 1998)). *See also* Axe v. Wilson, 96 P.2d 880, 881 (Kan. 1939).

145. *See, e.g.*, Umsted v. Umsted, 446 F.3d 17, 21 (1st Cir. 2006) (citations omitted).

146. *Id.*

147. *See* 44 S.W.3d 328 (Ark. 2001).

148. Litherland v. Jurgens, 869 N.W.2d 92, 97 (Neb. 2015) (noting that the Nebraska Supreme Court had already "expressed strong disapproval of the tort in Manon v. Orr, 856 N.W.2d 106, 111 (Neb. 2014)").

149. Vogt v. Witmeyer, 665 N.E.2d 189, 190 (N.Y. 1996) (stating that New York does not recognize tortious interference); Hutchins v. Hutchins, 7 Hill 104, 110 (N.Y. Sup. Ct. 1845) ("[The] plaintiff had no interest in the property

Moreover, New York possesses an alternative remedy to tortious interference: it "has a very well-developed jurisprudence relating to . . . the imposition of a constructive trust . . . ."[151] Though this equitable remedy may be an imperfect solution to the problems that the tort is aimed at solving,[152] its availability may be one reason why New York remains one of the few jurisdictions that has consistently declined to recognize tortious interference.[153] Virginia's most recent decision on the tort, by contrast, offers little insight into the Virginia Supreme Court's reasons for declining to recognize tortious interference.[154] Still, Virginia has at least addressed the tort and opined on its viability as a cause of action. Many states have yet to offer any insight into their approach to the tort.

D. *States That Have Not Yet Spoken on the Tort*

In particular, twelve states offer little on the subject of tortious interference. Alaska,[155] Arizona,[156] Colorado,[157]

of which he says he has been deprived by the fraudulent interference of the defendant, beyond a mere naked possibility; an interest which might, indeed, influence his hopes and expectations, but which is altogether *too shadowy and evanescent to be dealt with by courts of law*.") (emphasis added).

150. Economopoulos v. Kolaitis, 528 S.E.2d 714, 720 (Va. 2000) ("[A] cause of action for 'tortious interference with inheritance' is not recognized in Virginia.").

151. Klein, *supra* note 13, at 282.

152. *Id.* at 239–40 (noting that a constructive trust will not "fully compensate certain potential tort plaintiffs or deter certain tort defendants[,]" given that it is imposed on the party in actual possession of estate assets, it is subject to equitable defenses, and it does not enable parties to obtain certain types of damages).

153. *See* Goldberg & Sitkoff, *supra* note 83, at 365 (suggesting that the "equitable remedy of constructive trust" may offer "adequate relief" to disappointed beneficiaries who are not afforded a full recovery through a will contest).

154. *See Economopoulos*, 528 S.E.2d at 720; *see also* Klein, *supra* note 86, at 292–93.

155. Klein, *supra* note 89, at 214 ("Alaska has no reported cases addressing [Tortious Interference]."); Renfroe, *supra* note 89, at 396 (stating that Alaska has "never considered whether to adopt the tort").

156. Fassold, *supra* note 89, at 31 ("Arizona has not yet recognized a claim for tortious interference with expectancy of inheritance."); Klein, *supra* note 119, at 19 ("Arizona has a reported opinion merely mentioning the tort[.]"); *see also* Coonley & Coonley v. Turck, 844 P.2d 1177, 1180 (Ariz. Ct. App. 1993) (quoting a letter written by an attorney threatening malpractice related to tortious interference).

Mississippi,[158] Nevada,[159] New Hampshire,[160] North Dakota,[161] Oklahoma,[162] South Dakota,[163] Utah,[164] Vermont,[165] and Wyoming[166] have either no cases that mention the tort or only

157. Klein, *supra* note 119, at 4 ("[N]o state court [in Colorado] has yet granted a recovery" based on tortious interference). Some commentators cite Peffer v. Bennett, 523 F.2d 1323 (10th Cir. 1975) and McGregor v. McGregor, 101 F. Supp. 848 (D. Colo. 1951), *aff'd*, 201 F.2d 528 (10th Cir. 1953) for the proposition that Colorado recognizes tortious interference. *See, e.g.*, Fassold, *supra* note 89, at 26 n.2, 30 n.34; Renfroe, *supra* note 89, at 393, 397 n.88. However, at best, *Peffer* contains a federal court's projection about how a Colorado state court *may* address the tort. *See Peffer*, 523 F.2d at 1325. At worst, *Peffer* parrots the ambiguous holding of *McGregor*, in which it was not clear whether Colorado or Louisiana law was being applied. *See* Klein, *supra* note 2, at 108. Indeed, the authors agree with Diane Klein's conclusion that *McGregor* applied Louisiana law, not Colorado law. *Id.*

158. Klein, *supra* note 2, at 126–27.

159. Goldberg & Sitkoff, *supra* note 83, at 362, n.184; Klein, *supra* note 119, at 20 ("Nevada has no reported cases even mentioning tortious interference with expectation of inheritance.").

160. Klein, *supra* note 119, at 40; Klein, *supra* note 13, at 291–92.

161. Klein, *supra* note 119, at 40.

162. *See id*. at 38; *see also* Fox v. Kramer (*In re* Estate of Estes), 983 P.2d 438, 442 n.2 (Okla. 1999) ("Because the suit was not one in tort, we need not address the issue of whether Oklahoma recognizes a tort for wrongful interference of an inheritance as urged by [plaintiff]."); Miller v. Johnson, 307 P.3d 387, 389 (Okla. Civ. App. 2013) ("We interpret *Estes* to mean Oklahoma has never recognized wrongful interference with inheritance as a cognizable tort, and our examination of the law does not indicate otherwise.").

163. Goldberg & Sitkoff, *supra* note 83, at 362, n.184; Thomas E. Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. REV. 175, 214–15 (2015) ("The nascent tort known as tortious interference with an expectancy has not to date been recognized or considered for recognition in South Dakota, either legislatively or by judicial fiat.").

164. Goldberg & Sitkoff, *supra* note 83, at 362, n.184; Klein, *supra* note 119, at 19. The only case connected to Utah even mentioning the tort is Tarbet v. Miller, No. 2:05-CV-00635 PGC, 2006 WL 1982747, at *3–4 (D. Utah July 13, 2006). However, *Tarbet* says nothing about whether Utah would recognize tortious interference, and only discusses whether the allegations related to that cause of action "provide the particularity required by Rule 9(b)" of the Federal Rules of Civil Procedure. *Tarbet*, 2006 WL 1982747, at *3–4.

165. Goldberg & Sitkoff, *supra* note 83, at 362, n.184; Klein, *supra* note 13, at 293.

166. Goldberg & Sitkoff, *supra* note 83, at 362, n.184; *see* Klein, *supra* note 119, at 20; *see also* Estate of McLean ex rel Hall v. Benson, 71 P.3d 750, 750–54 (Wyo. 2003) (dismissing appeal from order admitting will to probate while civil litigation remained pending, where civil litigation included allegations of tortious interference).

offer references to tortious interference in passing.[167] This is surprising given the publication of § 774B in 1979, nearly forty years ago.[168] It may be that these states have not yet been faced with a set of facts that could give rise to a tortious interference claim. Certainly, even some of the states that have declined to recognize the tort have done so, again, based on the facts in front of them, while avoiding rejection of the tort itself.[169] Nevertheless, in time, states that have not yet spoken on the subject could alter the existing landscape of the tort significantly. That landscape, and the great deal of variety that characterizes it, will be the focus of the next section of this Article.

III. DIFFERENCES AMONG STATES ADOPTING THE TORT

A. *Noteworthy Variations*

While there are a multitude of differences in how states approach tortious interference, right down to the label used for the tort,[170] there are several variations that merit further consideration. In particular, many courts require claimants to exhaust their probate remedies prior to bringing a claim for tortious interference; at least one state has identified an extra "element" to the tort; some jurisdictions limit the types of damages available to successful litigants; and still others have made

167. *See* Estate of McLean ex rel Hall v. Benson, 71 P.3d 750, 752 (Wy. 2003) (indicates that complaint contained count for intentional interference with an expected inheritance without further discussion thereof).

168. *See* Goldberg & Sitkoff, *supra* note 83, at 360.

169. *Id.* at 362.

170. *See, e.g.*, Ams. United for Life v. The Legion of Christ of N. Am., Inc., C.A. No. PC-2016-2900, slip op. at 11 n.6 (R.I. Super. Ct. Jan. 4, 2017) ("For purposes of clarity, although this tort is referred to in slightly different ways throughout the jurisdictions that recognize it, the Court will refer to the tort as 'tortious interference with expectation of inheritance.' Other iterations include 'tortious interference with inheritance' or 'tortious interference with expectancy of inheritance.'"); Firestone v. Galbreath, 616 N.E.2d 202, 203 (Ohio 1993) ("With regard to certified question No. 1, the federal court order uses the language, 'with expectancy *or* inheritance.' The briefs of the parties present different versions of this phrase: Petitioners . . . state, 'with expectancy *of* inheritance'; respondents . . . use the language, 'with expectancy *of an* inheritance'; [another] respondent . . . states, 'with *an expected* inheritance'; and [other] respondents . . . track the language of the federal court order to-wit, 'with expectancy *or* inheritance'") (emphasis and alterations in original).

pronouncements on the proper court to bring such claims. This Article will focus on these critical points of tension among the courts that have addressed and/or adopted tortious interference because they offer insights into the policy rationale underlying the creation of the tort and the wrongs sought to be addressed by its adoption.

B. *Elements of Tortious Interference*

Many courts look to the *Restatement* formulation of tortious interference in developing and establishing the elements of the cause of action.[171] The *Restatement* formulation can be understood to contain at least five elements: "(1) the existence of an expectancy; (2) defendant's intentional interference with the expectancy; (3) conduct that is tortious in itself, such as fraud, duress, or undue influence; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages."[172] In comparison, Florida sets out four elements of the tort that combine the "intentional interference" and "independently tortious" aspects of the *Restatement* formulation into a single element: "(1) the existence of an expectancy; (2) intentional interference with the expectancy through tortious conduct; (3) causation; and (4) damages."[173] Notably, Oregon's own adoption of the tort contemplates an extension of an existing tort, the tort of intentional interference with economic relations.[174] As a result, the elements are the same although the

171. *In re* Estate of Ellis, 923 N.E.2d 237, 241 (Ill. 2009) (citing, *inter alia*, RESTATEMENT (SECOND) OF TORTS § 744B(e) (AM. LAW INST. 1979); *Firestone*, 616 N.E.2d at 203 (adopting tortious interference and declaring "[w]e find particularly instructive Restatement of the Law 2d, Torts (1979) 58, Section 774B[.]"); *accord* Huffey v. Lea, 491 N.W.2d 518, 520 (Iowa 1992); Fell v. Rambo, 36 S.W.3d 837, 849 (Tenn. Ct. App. 2000)*; see also* Renfroe, *supra* note 89, at 132.

172. *Firestone*, 616 N.E.2d at 203; *see also* Fassold, *supra* note 89, at 27 (describing the five elements of tortious interference as set out by the *Restatement*).

173. Whalen v. Prosser, 719 So. 2d 2, 5 (Fla. Dist. Ct. App. 1998) (citing Davison v. Feuerherd, 391 So. 2d 799 (Fla. Dist. Ct. App. 1980); Nita Ledford, *Intentional Interference with Inheritance*, 30 REAL PROP. PROB. & TR. J. 325, 327 (1995); *see also* Henry v. Jones, 202 So. 3d 129, 132–33 (Fla. Dist. Ct. App. 2016) (identifying the same four elements of tortious interference); Klein, *supra* note 2, at 110.

174. Allen v. Hall, 974 P.2d 199, 202 (Or. 1999).

economic relation at issue stems from a noncommercial relationship: "(1) the existence of a professional or business relationship (which could include, *e.g.*, a contract or a prospective economic advantage); (2) intentional interference with that relationship or advantage; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and the harm to the relationship or prospective advantage; and (6) damages."[175] The difference between Oregon's version of the elements of the tort appears to derive from the requirement that a claimant independently establish (a) the existence of a *relationship* or *advantage*, rather than expectancy; and (b) the tortfeasor's status as a *third party* to that relationship or advantage.[176] Again, these two elements are fused into one in the traditional *Restatement* formulation: because a claimant need only show his or her expectancy, there is no need to make a showing of a relationship with the donor or testator, coupled with a need to separately show that the tortfeasor was a stranger to that relationship.[177]

Nevertheless, each of the foregoing versions of tortious interference boil down to the same essential elements: interference, through tortious conduct, that causes damages to the claimant. Whether the interference is with an "expectancy" itself or with a relationship giving rise to the expectancy alters the

175. *Id.* at 202.

176. *Id.* The requirement that a tortfeasor be a third party to the relationship at issue in this tort is commonly understood to be a requirement in the analogous tort of interference with contractual relations. *See, e.g.*, Cromeens, Holloman, Sibert, Inc v. AB Volvo, 349 F.3d 376, 397 (7th Cir. 2003) ("A party may not be charged with tortious interference with respect to its own contract."); *see also* A. Michael Ferrill & James K. Spivey, *Clearing the Sylvania Hurdle: Developments in Business Torts and Dealer Termination*, 11 ANTITRUST 5, 5 (Fall 1996) ("As a general proposition, a party to a contract is legally incapable of tortiously interfering with its own contracts.") (citations ommited). Some courts and commentators speculate that this limitation springs from concerns about tort concepts "encroaching" onto disputes that are more properly resolved by contract principles. *See* Carvel Corp. v. Noonan, 350 F.3d 6, 15 (2d Cir. 2003) (discussing "third party" requirement under Georgia law); Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131, 136 (1999); Mark P. Gergen, *Tortious Interference: How It is Engulfing Commercial Law, Why This is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1197, 1219–20 (1996).

177. *Allen*, 974 P.2d at 202.

elements slightly, but ultimately does not translate into significant differences in analyses.[178] For example, in *Allen v. Hall*, the seminal case recognizing tortious interference in Oregon, the Supreme Court of Oregon applied the elements of tortious interference with economic relations to a tortious interference claim, concluding succinctly that:

> Plaintiffs have alleged facts that satisfy the first element of the tort, *viz.*, the existence of a prospective economic advantage in the form of a prospective inheritance. They have also alleged the second and third elements, *viz.*, an intentional interference by a third party: They have alleged that, after learning that [the testator] intended to change his will, [the tortfeasor]—a third party—took steps to prevent that eventuality . . . .[179]

In other words, the plaintiffs in *Allen* essentially had to prove the same elements as they would be required to do in a *Restatement*-derived tortious interference claim, with the exception that the requisite showing was broken down into six elements, rather than five.[180]

The most significant departure from the elements of § 774B comes from Massachusetts, where tortious interference contains an element of "continuous interference":

> The defendant must intentionally interfere with the plaintiff's expectancy in an unlawful way. The plaintiff must have a legally protected interest. The plaintiff must show that the defendant's interference acted *continuously* on the donor until the time the expectancy would have been realized.[181]

178. *Id.* (describing the "*very close analogy* that exists between an expectancy of inheritance and those other interests to which this court already has extended the protections of the tort of intentional interference with prospective economic advantage") (emphasis added); *see also* Barone v. Barone, 294 S.E.2d 260, 264 (Va. 1982) (describing tortious interference as "analogous to tortious interference with business interests . . . or tortious interference with contractual relations").

179. *Allen*, 974 P.2d at 204.

180. *Compare id.* at 204 *with* Firestone v. Galbreath, 616 N.E.2d 202, 203 (Ohio 1993); *see also* Fassold, *supra* note 89, at 27 (describing the five elements of tortious interference as set out by the *Restatement*).

181. Labonte v. Giordano, 687 N.E.2d 1253, 1255 (Mass. 1997) (emphasis

It is apparent that the first two requirements echo the *Restatement* formulation: intentional interference that is itself unlawful[182] and an expectancy that constitutes a legally protected interest.[183] Unique, then, is Massachusetts's requirement of the interference acting "continuously" on the donor until his or her death—a requirement that has existed nearly as long as the tort itself in that state.[184] As early as 1907, in the pivotal case recognizing tortious interference in Massachusetts, *Lewis v. Corbin*, the Supreme Judicial Court indicated that tortious interference must operate "up to the time of [the testator's] death" in order to establish an "actionable wrong."[185] Specifically, it held that the pleading at issue was "defective" because it failed to make factual allegations that would "exclude the possibility that the testatrix changed her purpose in regard to [the] legacy [at issue], and which show that the fraud continued operative to the time of

added) (citations omitted) (footnotes omitted).

182. *See, e.g.*, *Firestone*, 616 N.E.2d at 203 (including "intentional interference" and "conduct by the defendant involving the interference which is tortious" and citing *Restatement*); *In re* Estate of Ellis, 923 N.E.2d 237, 241 (Ill. 2009) (same).

183. *See, e.g.*, *Firestone*, 616 N.E.2d at 203 (including "expectancy" as element and citing *Restatement*); *In re Estate of Ellis*, 923 N.E.2d at 241 (same). With respect to the meaning of "legally protected interest," Massachusetts courts have opined that this element can be understood to refer to the types of expected inheritances and bequests that normally qualify as expectancies under the *Restatement* formulation. *See, e.g.*, Coyne v. Nascimento, 937 N.E.2d 522 (2010) (unpublished memorandum and order pursuant to Rule 1:28) ("[T]he injury to the plaintiff occurs upon the relevant donor's death, the moment at which the plaintiff's expected inheritance *becomes a legally protected interest*[.]") (emphasis added); O'Regan v. Migell, 63 N.E.3d 63 (2016) (unpublished memorandum and order pursuant to Rule 1:28) ("[The claimant's] expectation of inheriting under [the testator's] will qualified as a legally-protected interest."). At least one commentator's analysis of the tort indicates that perhaps "legally protected interest" was a rationale for early courts' failure to adopt tortious interference—i.e., a "mere expectancy," by contrast, was not protectable—such that Massachusetts's formulation of the tort could derive from those early court decisions. *See* Renfroe, *supra* note 89, at 133.

184. Klein, *supra* note 13, at 264–65 ("Massachusetts has applied a distinctive understanding of the tort, requiring specific allegations and proof that the wrongful conduct of the defendant acted 'continuously' upon the donor until the legacy would be 'realized' (i.e., the donor's death)."); *see also* Lewis v. Corbin, 81 N.E. 248, 250 (Mass. 1907).

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

her death, and thus caused the loss to the plaintiff."[186]

Several decades later, in *Labonte v. Giordano*, the Supreme Judicial Court expounded upon its rationale for the requirement that such interference be "continuous."[187] In essence, the court explained, the condition could help to demonstrate that a tortfeasor's conduct caused the plaintiff's damage; that the donor had "no opportunity . . . to overcome the defendant's interference" before his or her death; and that the cause of action had properly accrued since condition in fact required the donor to have passed away.[188] It is fair to say that the first two reasons appear simply to state that the "continuous interference" requirement supports a claimant's case for causation in attempting to show tortious interference.[189] The third "function" of the continuous interference requirement offers more insight into the Massachusetts iteration of tortious interference because it shows that the cause of action only arises at the time of a donor's death, because "any such expectancy would only be realized *at that time*."[190] Put differently, Massachusetts places the availability of tortious interference squarely in the time after a donor's death, and not before.[191] As will be discussed, other states have limited the availability of tortious interference to actions after the death of a donor using different methods; it appears only Massachusetts has taken the step to include this requirement in the very elements of the tort.[192]

186. *Id.*
187. Labonte v. Giordano, 687 N.E.2d 1253, 1255 (Mass. 1997).
188. *Id.*
189. Indeed, the Supreme Judicial Court directly states that requiring continuous interference serves the function of showing "that the defendant's interference was the *legal cause* of damage to the plaintiff." *Id.* (emphasis added). Moreover, the suggestion that a showing of "continuous interference" demonstrates that the donor had "no opportunity" to overcome any such interference also goes directly to the issue of causation—i.e. was a donor's disposition of property due to interference, or was he or she able to overcome such interference before her death? *Id.* In this way, the first two "functions" cited by the Supreme Judicial Court for this requirement appear to be duplicative.
190. *Id.* (emphasis added).
191. *Id.*
192. Klein, *supra* note 13, at 264–65.

C. *Adequate Probate Remedies and Collateral Attack*

Arguably the most significant difference among jurisdictions that have adopted tortious interference is how each state answers the question of whether a claimant may proceed despite the existence of "adequate" probate remedies or whether those remedies must be exhausted before bringing a cause of action in tort.[193] More often than not, courts that have addressed tortious interference require litigants to exhaust probate remedies or otherwise prohibit them from proceeding with the tort action if adequate probate remedies exist.[194] Otherwise, the logic goes, the tort action would constitute an impermissible "collateral attack" on a probate proceeding.[195] For example, if a will contest is available to litigants attempting to initiate a tortious interference claim, and "a successful contest would provide complete relief," courts have held that proceeding on the tort is not "warranted."[196] Only a few take the position that a tortious interference claimant can proceed even if there are presumably adequate probate

193. *See* Plimpton v. Gerrard, 668 A.2d 882, 886 (Me. 1995) (describing "a rule, adopted in several jurisdictions, which requires plaintiffs to exhaust probate remedies before pursuing actions for tortious interference with an expected legacy, provided that the probate remedies are adequate to compensate them for their damages"); *see also* DeWitt v. Duce, 408 So. 2d 216, 221 (Fla. 1981); Robinson v. First State Bank of Monticello, 454 N.E. 2d 288, 293–94 (Ill. 1983); Allen v. Lovell's Adm'x, 197 S.W.2d 424, 427 (Ky. 1946); *Labonte*, 687 N.E.2d at 1256; Johnson v. Stevenson, 152 S.E.2d 214, 217 (N.C. 1967); Firestone v. Galbreath, 616 N.E.2d 202, 203 (Ohio 1993); Renfroe, *supra* note 89, at 140–41; Orr, *supra* note 89, at 751 ("Many jurisdictions . . . have refused to provide relief under the tort because the plaintiff had standing to contest the decedent's will in the probate court and failed to do so.").

194. *See* Umsted v. Umsted, 446 F.3d 17, 22 (1st Cir. 2006) (recognizing as the "majority position that a cause of action for tortious interference with an expectancy of inheritance, if it lies at all, would not lie where an adequate statutory remedy is available but has not been pursued"); *see also* Fassold, *supra* note 89, at 28 ("Most states that have considered the issue have held that a claim for tortious interference with expectancy of inheritance may only be brought where conventional probate relief would be inadequate."); Johnson, *supra* note 9, at 774; Hortenstine, *supra* note 97, at 742 (identifying Illinois as a state where "all remedies via will contest must be exhausted" prior to bringing a Tortious Interference claim).

195. *DeWitt*, 408 So. 2d at 218 (citing cases); *see also* Fassold, *supra* note 89, at 31; Johnson, *supra* note 9, at 775–76.

196. *See* Fassold, *supra* note 89, at 29 (citing *In re* Estate of Hoover, 513 N.E.2d 991, 992 (Ill. App. 1987)).

remedies for the underlying "wrong."[197] To better understand the difference in approach, it is helpful to begin with one of the first decisions to explore at length the rationale for requiring litigants to exhaust their probate remedies: the Supreme Court of Florida's decision of *DeWitt v. Duce*.[198]

In *DeWitt*, the United States Court of Appeals for the Fifth Circuit[199] certified the following question to the Supreme Court of Florida:

> Does Florida law, statutory or otherwise, preclude plaintiffs from proving the essential elements of their claim for tortious interference with an inheritance where the alleged wrongfully procured will has been probated in a Florida court and plaintiffs had notice of the probate proceeding and an opportunity to contest the validity of the will therein but chose not to do so?[200]

The facts of the case were straightforward: Arthur Welch died testate in 1975, and his will was admitted to probate in Florida.[201] Thereafter, Plaintiffs Evelyn G. DeWitt and Mabel M. DeWitt filed a Petition for Revocation of Probate of Welch's will.[202] Ultimately, however, the plaintiffs decided to dismiss their Petition, opting instead to take pursuant to the disposition in Welch's will.[203] Yet less than three years later, the plaintiffs initiated suit against Welch's housekeeper, Estelle Duce, in federal court, bringing a claim for tortious interference.[204] Their complaint alleged that Duce, along with two others, had unduly influenced Welch, and that the defendant's undue influence caused Welch to replace his prior will with another will that

197. *See Plimpton*, 668 A.2d at 887; Barone v. Barone, 294 S.E.2d 260, 264 (Va. 1982).

198. 408 So.2d at 218.

199. By the time that the *DeWitt* decision was issued, Florida came within the newly created Eleventh Circuit, which is why the decision refers to the "former Fifth Circuit"; when the question was originally certified to the Supreme Court of Florida, the relevant Court of Appeals was still the United States Court of Appeals for the Fifth Circuit. *See History of the Federal Judiciary*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/landmark_21.html, (last visited Apr. 4, 2017).

200. *DeWitt*, 408 So.2d at 217.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

disfavored the plaintiffs.[205]

The federal district court dismissed the plaintiffs' complaint, finding that pursuant to Florida Statutes § 733.103(2),[206] plaintiffs' action was precluded because in essence, they would be "relitigating issues of undue influence and testamentary capacity, and thus prevent[] proof of elements vital to a claim of tortious interference."[207] After the plaintiffs appealed, the Fifth Circuit certified the issue to the Supreme Court of Florida.[208]

The Supreme Court of Florida acknowledged that tortious interference had been recognized before by courts in the state, but noted it had never before reached the issue of whether proceeding with the tort would be a "collateral attack" on a preexisting probate court decision.[209] The court surveyed a number of decisions on the subject and drew the conclusion that "[c]ases which allow the action for tortious interference with a testamentary expectancy are predicated on the inadequacy of probate remedies."[210] In other words, the problem of collateral attack only arose to the extent that a litigant possessed an adequate remedy in the probate proceedings and, regardless, pursued an action for tortious interference.[211] The plaintiffs in *DeWitt*, the court concluded, had an adequate remedy in the probate proceedings because Welch's previous will, favoring the plaintiffs, existed.[212] Accordingly, a will contest could have theoretically made the plaintiffs whole.[213] The *DeWitt* court identified the possibility for the converse situation to arise, noting language from W. Bowe & D. Parker's treatise, *Page On Wills*, which stated:

> Probate can strike from the will something that is in it as

205. *Id.*
206. "In any collateral action or proceeding relating to devised property, the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence; and of the fact that the will was unrevoked on the testator's death." FLA. STAT. ANN. § 733.103(2) (Westlaw through 2017 Reg. Sess.).
207. *DeWitt*, 408 So.2d at 218.
208. *Id.* at 217–18.
209. *Id.* at 218.
210. *Id.* at 219.
211. *See id.*
212. *Id.* at 220.
213. *Id.*

> a result of fraud but cannot add to the will a provision that is not there nor can the probate court bring into being a will which the testator was prevented from making and executing by fraud.[214]

The foregoing exemplifies the circumstances under which courts have been willing to recognize tortious interference. After all, probate remedies are hardly adequate where a will contest would never enable a litigant to probate a favorable will because, for instance, such a will never existed. The Supreme Court of Florida's reasoning in *DeWitt* has been echoed by other courts in the time since.

The decision of *Plimpton v. Gerrard* by the Maine Supreme Judicial Court stands in sharp contrast to the preceding authority.[215] Again, the underlying facts are relatively simple. Axel and Flossie Plimpton had one child, Bernard Plimpton.[216] However, the senior Plimptons left the bulk of their estate to Martin Gerrard, a man who "established a relationship with the Plimptons when they were elderly and in poor health."[217] Bernard Plimpton, the plaintiff, brought suit against Martin Gerrard for tortious interference with an expected inheritance.[218] In holding that the plaintiff had standing to pursue this claim, the Maine Supreme Judicial Court set itself apart from *DeWitt* and other decisions concerning the existence of adequate probate remedies, stating:

> The 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 for Bernard's claim of undue influence in the inter vivos transfer (though the Probate Court action could only be filed by the personal representative). The very concept of concurrent jurisdiction is inconsistent

214. *Id.* at 219 n.7 (quoting W. BOWE & D. PARKER, PAGE ON WILLS, § 14.8 at 706–07 (1960) (footnote omitted)).
215. 668 A.2d 882 (Me. 1995).
216. *Id.* at 884.
217. *Id.*
218. *Id.*

with a preference for one jurisdiction over another.[219]

The Maine Supreme Judicial Court, in so holding, emphasized the concept of concurrent jurisdiction in determining that the plaintiff did not need to first exhaust his potential probate remedies to bring a tortious interference claim.[220] Indeed, the differing remedies available to the plaintiff in a civil case versus a probate action were highlighted by the court in *Plimpton* and are worthy of discussion in their own right.[221]

D. *Damages and Adequacy of Remedies*

Tortious interference offers an opportunity for litigants to recover directly from a bad actor, rather than from an estate.[222] However, the source of a claimant's recovery is not the only difference between recovering in a civil action as compared to a probate action. A party successful in a civil case can receive more than just that to which he or she was entitled in a will contest.[223] Specifically, courts have acknowledged that in pursuing a claim for tortious interference, it becomes possible for parties to obtain compensatory damages, attorneys' fees, emotional distress damages, and even punitive damages.[224] This distinction from

219. *Id.* at 887.
220. *See id.*
221. *Id.*
222. Klein, *supra* note 86, at 265 ("As a legal claim in personam against the interfering tortfeasor, the costs of prosecuting and defending the action—and paying a judgment, if the action is successful—are borne by the parties, not the estate. In contrast to a will contest or a probate claim, the tort defendant must answer."); *see also* Johnson, *supra* note 9, at 772; Hortenstine, *supra* note 97, at 756 (describing the tort claim as "an in personam judgment . . . brought against a tortfeasor").
223. *See also* Johnson, *supra* note 9, at 772; Hortenstine, *supra* note 97, at 741–42.
224. Huffey v. Lea, 491 N.W.2d 518, 521 (Iowa 1992); *see also* Orr, *supra* note 89, at 751, 777–78; *see also* Fassold, *supra* note 89, at 26 (acknowledging that tortious interference "permits the recovery of punitive damages and attorneys' fees, which a will contest normally does not"); Renfroe, *supra* note 89, at 391–92 (describing remedies available in tortious interference actions and including "damages . . . [equal to] the value that the plaintiff lost as a result of the defendant's tortious interference[;] . . . [c]onsequential damages[;]" and, in "some jurisdictions . . . punitive damages, and . . . damages for emotional distress"); *but see* DeWitt v. Duce, 408 So. 2d 216, 220 n.11 (Fla. 1981); *In re* Estate of Hoover, 513 N.E.2d 991, 992 (Ill. App. Ct. 1987).

what a litigant may recover in a will contest is important because, as commentators have noted, without the existence of tortious interference, the realities of litigating a will contest may enable tortfeasors to reap the benefits of their bad acts, consequence-free.[225]

Consider this: if a testator executes a will benefiting two heirs, and one heir later convinces the testator to change the will in his favor using fraud, at the testator's death, the malfeasant heir can only benefit.[226] The original will still benefits both heirs, so even if the later will is voided through a will contest because it was procured by fraud, the bad actor can still take under the will.[227] Worse still, the bad actor's attorneys' fees will generally be paid by the estate.[228] Arguably, then, the tortfeasor risks nothing by engaging in tortious conduct that interferes with a third party's expected inheritance.[229]

Nevertheless, the opportunities to provide additional remedies and to deter bad actors from attempting to benefit from their tortious acts, are still not always enough to push courts to find a litigant's probate relief inadequate.[230] For example, on more than one occasion, courts have dismissed the availability of punitive damages as a method of demonstrating that probate

225. Fassold, *supra* note 89, at 26 (citing Curtis E. Shirley, *Tortious Interference with an Expectancy*, 41 RES GESTAE 16 (Oct. 1997)); *see also* Johnson, *supra* note 9, at 770 (describing a similar example); Hortenstine, *supra* note 97, at 741–42 (identifying the different remedies available in a will contest versus tort litigation).

226. Fassold, *supra* note 89, at 26.

227. *Id.*

228. *Id.*; *see also* Orr, *supra* note 89, at 779.

229. *See* Fassold, *supra* note 89, at 26; *see also* Hortenstine, *supra* note 97, at 742 (noting that "if one thinks they can tortiously interfere with another's expectancy, so as to procure a benefit for themselves, they have nothing to lose by 'going for it'").

230. *See, e.g.*, DeWitt v. Duce, 408 So.2d 216, 220 n.11 (Fla. 1981) ("For purposes of adequacy of relief *we do not consider punitive damages as a valid expectation*. Adequacy is predicated on what the probate court can give as compared to what the plaintiff reasonably expected from the testator prior to interference. Additionally, we can find no case authority allowing punitive damages in this type of action.") (emphasis added)*; see also* Fassold, *supra* note 89, at 29 (acknowledging that the "unavailability [of punitive damages] does not itself constitute inadequate relief, such that a contestant would be permitted automatically to bring a tort action in which such damages are sought"); Johnson, *supra* note 9, at 774 ("Commentators have noted that the probate system has virtually no deterrent effect.") (footnote omitted).

court cannot afford adequate relief.[231] This is not necessarily the case with attorneys' fees: interestingly, a recent Massachusetts Superior Court decision suggests that attorneys' fees, which are generally not available in probate court, may offer an alternative basis for pursuing relief in a separate tort action.[232] In *Hadayia v. Kay*, the Superior Court recounted plaintiffs' successful will contest against the defendants in probate court.[233] In that action, plaintiffs had shown that the late Jane Naimey, who originally executed a will in 1986 favoring the plaintiffs, executed a new will in 1991 favoring the defendants, a family that "gained overall control of all of Jane's financial and personal affairs" in a matter of weeks following the first meeting between the defendants and Jane.[234] The probate court found that the 1991 will was the product of undue influence and fraud, ordered the defendants to reimburse Jane's estate, and, eventually, allowed the plaintiffs to probate the 1986 will.[235]

The questions in the superior court became (1) whether to grant the plaintiffs summary judgment on their claim against the defendants for tortious interference, based upon the probate court's findings, and (2) to what damages were plaintiffs entitled.[236] In response to the first question, the superior court held that the facts found by the probate court "clearly include[d] each of the[] elements" of tortious interference as established in Massachusetts.[237] To the latter, the *Hadayia* decision recognized that although the American rule traditionally precluded recovery

231. Johnson, *supra* note 9, at 774; *see also* Firestone v. Galbreath, 895 F. Supp. 917, 926 (S.D. Ohio 1995); Maxwell v. Sw. Nat'l Bank, 593 F. Supp. 250, 253 (D. Kan. 1984); Jackson v. Kelly, 44 S.W.3d 328, 333 (Ark. 2001); *In re* Estate of Hoover, 513 N.E.2d 991, 992 (Ill. Ct. App. 1987).

232. Hadayia v. Kay, No. C.A. 97-01110, 1999 Mass. Super. LEXIS 489 (Mass. Super. Ct. Dec. 1, 1999) (permitting plaintiffs to pursue tort action to recover attorneys' fees following successful probate court action concerning "wrongfully procured" will).

233. *Id.* at *9.

234. *Id.* at *2, 4–5.

235. *Id.* at *9–10.

236. *Id.* at *15–21.

237. *Id.* at *14–15 (citing Labonte v. Giordano, 687 N.E.2d 1253, 1254–55 (Mass. 1997)) ("[T]he plaintiffs must prove three elements: that they had a legally protected interest; that the defendants intentionally interfered with the plaintiffs' expectancy in an unlawful way, such as by duress, fraud, or undue influence; and that the defendants' interference acted continuously on the donor until the time the expectancy would have been realized.").

of attorneys' fees, an exception was available for cases of tortious interference "requiring the victim of the tort to sue or defend against a third party in order to protect his rights."[238] It remains to be seen whether, unlike punitive damages, the recovery of attorneys' fees will be viewed by other courts in a similar way: as a way to pursue tortious interference despite the existence of an available will contest. At least a few courts have allowed for the award of attorneys' fees and costs as part of ensuring that litigants are afforded a *complete* recovery—perhaps the better rule.[239]

E. *Inter Vivos Conveyances and Tortious Interference Before a Testator's Death*

Last, courts remain divided over the application of tortious interference where there have been challenges to inter vivos conveyances or to testamentary bequests drafted and set out in estate planning documents before the death of a testator. As to the latter, Maine appears to be the only state that has permitted so called "pre-death" actions to proceed.[240] Specifically, in *Harmon v. Harmon*, the plaintiff claimed that his brother and sister-in-law had, "by fraud and undue influence induced the [p]laintiff's mother . . . while she was 87 years old and in ill health, to transfer to the [d]efendants valuable property."[241] These transfers had the practical effect of disinheriting the plaintiff.[242] The Maine Supreme Judicial Court held that the plaintiff, as an "expectant legatee," could proceed with his tortious interference claim because the tort was meant to protect his interest in an "expectation, and not the certainty," of a future benefit under a will.[243] The *Harmon* court held that the injury was "complete" once the wrongful conduct occurred, and the problem was then only one of valuation.[244] At present, Maine is

238. *Id.* at *20 (quoting M.F. Roach Co. v. Town of Provincetown, 247 N.E.2d 377, 378 (Mass. 1969)).

239. *See* Peffer v. Bennett, 523 F.2d 1323, 1324–26 (10th Cir. 1975); Huffey v. Lea, 491 N.W.2d 518, 522 (Iowa 1992); King v. Acker, 725 S.W.2d 750, 756 (Tex. Ct. App. 1987); *see also* Hortenstine, *supra* note 97, at 759–60.

240. Harmon v. Harmon, 404 A.2d 1020, 1024–25 (Me. 1979).

241. *Id.* at 1021.

242. *Id.*

243. *Id.* at 1021–22.

244. *Id.* at 1023.

the only state that has gone this far in its recognition of tortious interference, and other courts have explicitly rejected such application.[245]

Despite Maine standing alone as the sole jurisdiction to allow the tort under such circumstances, other states, such as Georgia, have made tortious interference available with respect to inter vivos conveyances.[246] In particular, courts note that inter vivos conveyances could specifically result in a will contest being deemed inadequate, since even a litigant's success in a will contest would not necessarily extend to the return of such inter vivos transfers.[247] For example, even in *DeWitt*, wherein the Supreme

245. *See, e.g.*, Whalen v. Prosser, 719 So.2d 2, 3 (Fla. Dist. Ct. App. 1998) (affirming dismissal of action for tortious interference where claim was "filed by a nonfamily member prior to the death of the testator under circumstances that do not suggest that a remedy subsequent to death will be unavailable or inadequate"); Labonte v. Giordano, 687 N.E.2d 1253, 1256 (Mass. 1997) (declaring the court to be "unpersuaded by the conclusions in the *Harmon* opinion and declin[ing] to recognize a new cause of action" for tortious interference where a donor is still alive, but granting leave to amend her complaint because of the donor's death during the pendency of the plaintiff's appeal); *see also* Fassold, *supra* note 89, at 28; Renfroe, *supra* note 89, at 391: *but see* Carlton v. Carlton, 575 So. 2d 239, 241 (Fla. Dist. Ct. App. 1991) ("It is our opinion that when there is an allegation that the testator had a fixed intention to make a bequest in favor of the plaintiff and there existed a strong probability that this intention would have been carried out but for the wrongful acts of the defendant there exists a cause of action.").

246. *See* Metro Atlanta Task Force for the Homeless, Inc. v. Ichthus Cmty. Tr., 780 S.E.2d 311, 319–20 (Ga. 2015) (recognizing a cause of action for "tortious interference with a gift")*; see also* Fassold, *supra* note 89, at 29 (noting that courts have permitted plaintiffs to bring tortious interference claims "in conjunction with a will contest" based on a decedent's inter vivos transfers induced by a tortfeasor) (citing Estate of Jeziorski, 516 N.E.2d 422, 426 (Ill. App. Ct. 1987)); Johnson, *supra* note 9, at 777–78 (discussing cases that involved deprivation of "of a true *inter vivos* gift" before the major decision in Marshall v. Marshall (*In re* Marshall), 275 B.R. 5 (Bankr. C.D. Cal. 2002)).

247. *See* Orr, *supra* note 89, at 764–65 (describing "alleged wrongful lifetime transfers that remove property from a decedent's probate estate" as a circumstance in which probate relief would be inadequate). The Supreme Court of Illinois similarly described the situation as follows:

> [A] will contest would not have provided sufficient relief to [plaintiff/appellant] because it would not have extended to the alleged *inter vivos* transfers of property. [Plaintiff/Appellant] alleged that [tortfeasor] depleted [donor's] estate by inducing her to transfer assets worth more than $ 1 million to him prior to her death. In a successful will contest, [plaintiff/appellant] could have recovered *only assets that were part of the estate upon [donor's] death* but could not

Court of Florida rejected the application of tortious interference, it noted that: "[i]f defendant's tortious conduct had caused the testator to make an inter vivos conveyance to defendant of assets that would otherwise have been part of the estate, setting aside the will would be inappropriate redress and consequently a tort action is properly allowed."[248]

In conclusion, while Maine is admittedly alone on the "frontier" of tortious interference jurisprudence in allowing the tort action to proceed prior to the death of a testator,[249] decisions concerning inter vivos conveyances lay the groundwork for the concept that the wrongful conduct may occur prior to the testator's death and that the harm may be "complete" prior to probating the relevant will. Practical considerations of the benefits of proceeding in tort before, rather than after, the testator dies may ultimately convince other courts to join Maine in its flexible approach.

IV. RHODE ISLAND AND TORTIOUS INTERFEERENCE WITH AN EXPECTED INHERITANCE

A. Americans United for Life v. Legion of Christ of North America, Inc.

In a ground breaking decision, the Rhode Island Superior Court recently acknowledged the viability of Tortious Interference in Rhode Island in the case of *Americans United for Life v. Legion of Christ of North America, Inc.*[250] The decision followed the court's previous dismissal of a case brought against the Legion of Christ by Mary Lou Dauray, the niece of the decedent (Gabrielle Mee) whom the Legion allegedly defrauded and unduly influenced

have reached the assets transferred during her lifetime.
In re Estate of Ellis, 923 N.E.2d 237, 243 (Ill. 2009) (emphasis added).

248. DeWitt v. Duce, 408 So. 2d 216, 219 (Fla. 1981) (citing Hegarty v. Hegarty, 52 F. Supp. 296 (D. Mass. 1943)); Cyr v. Cote, 396 A.2d 1013 (Me. 1979)); *see also* Johnson, *supra* note 9, at 781 (providing example of an expectancy "[r]educed or [d]efeated by a [t]ortiously [i]nduced [*i*]*nter* [*v*]*ivos* [d]iminution of the [t]estator's [p]robate [e]state," i.e. pre-death inter vivos conveyances).

249. *Harmon*, 404 A.2d at 1021; *but see Carlton*, 575 So. 2d at 241 (indicating that Florida may offer recognition under certain limited circumstances).

250. Ams. United for Life v. The Legion of Christ of N. Am., Inc., C.A. No. PC-2016-2900, slip op. at 13, 15–16 (R.I. Super. Ct. Jan. 4, 2017).

to give it her vast fortune.[251] Both the case brought by Dauray and the case brought by Americans United for Life (Americans United) alleged the same facts, explained below.

Throughout her lifetime, Mrs. Gabrielle Mee was a devout, pious, and conservative Catholic.[252] In 1950 she wed Timothy Mee.[253] The two donated generously and copiously to religious and secular charities throughout their thirty-five year marriage.[254] In 1989, a few years after Mr. Mee's death, Mrs. Mee was introduced to Father Marcial Maciel, the founder of the Legion of Christ, a Catholic order comprised of priests and seminarians.[255] Shortly thereafter, Mrs. Mee made a gift of $1,000,000 to the Legion.[256] Mrs. Mee quickly became the Legion's devoted disciple.[257] Father Maciel, whom Mrs. Mee came to view as a saint, wrote to her frequently, encouraging her to make further gifts, and telling her how proud Mr. Mee would be of her for donating to the Legion.[258] At Father Maciel's personal invitation, Mrs. Mee traveled abroad with him on official Legion business.[259] Father Maciel also included Mrs. Mee specifically in his prayers at mass and fast-tracked her to the status of "consecrated woman" in Regnum Christi, a reclusive and cloistered subsidiary order of the Legion.[260] After moving into a Regnum Christi facility in Smithfield, Rhode Island, Mrs. Mee's contact with family and friends was monitored, controlled, and in many instances prevented.[261] Her access to news media was also obstructed at times.[262]

Meanwhile, at the urging of Father Maciel and other Legion

251. Dauray v. Estate of Mee, Nos. PB 10-1195, PB 11-2640, PB 11-2757, 2012 R.I. Super. LEXIS 141, at *1 (R.I. Super. Ct. Sept. 7, 2012).
252. *Ams. United for Life*, slip op. at 2; *Dauray*, 2012 R.I. Super. LEXIS 141, at *2.
253. *Dauray*, 2012 R.I. Super. LEXIS 141, at *3.
254. *See id*. at *3–4.
255. *Ams. United for Life*, slip op. at 5.
256. *Id.*
257. *Dauray*, 2012 R.I. Super. LEXIS 141, at *6–7.
258. *Id.* at *33–34, 43.
259. *Id.* at *33.
260. *Id*. at *21, 26; *Ams. United for Life*, slip op. at 5.
261. *Dauray*, 2012 R.I. Super. LEXIS 141, at *23, 27; *Ams. United for Life*, slip op. at 5.
262. *Dauray*, 2012 R.I. Super. LEXIS 141, at *23, 27; *Ams. United for Life*, slip op. at 5–6.

priests, Mrs. Mee continued to gift $60,000,000 of her fortune, through lifetime gifts, trusts, and testamentary instruments, to the Legion: in 1991, Mrs. Mee made a gift of $3,000,000 to the Legion and created a will, leaving ninety percent of her assets to the Legion and ten percent to Americans United.[263] In 1995, Mrs. Mee executed a codicil to her 1991 will which revoked her gift to Americans United and made the Legion sole beneficiary.[264]

In 1996, the Legion offered to pledge Mrs. Mee's assets to negotiate a $25 million loan from Fleet Bank (now Bank of America) to purchase a seminary facility in Thornwood, New York (the Thornwood Loan).[265] In 2000, counsel for the Legion drafted, and Mrs. Mee executed, a broad power of attorney in favor of Father Bannon, effectively giving the Legion full control over Mrs. Mee's finances, and a new will, leaving all of Mrs. Mee's assets to the Legion and appointing Father Bannon as the executor of her estate.[266] And in March 2001, the Legion and Mrs. Mee together brought suit against Fleet, after it refused to terminate Mrs. Mee's Revocable Trust and distribute the principal from that trust and Mr. Mee's Charitable Foundation to the Legion in order to discharge the Thornwood Loan.[267] The case was eventually settled, and Mrs. Mee's Revocable Trust was liquidated to pay the Thornwood Loan.[268]

Americans United alleged that Mrs. Mee was insulated from information that her beloved spiritual advisor, Father Maciel, was a fraud and inveterate criminal, and "led a sordid life," which most certainly would have impacted her continued giving.[269] Despite maintaining an image as a celibate and saintly priest, Father Maciel "was, among other things, a serial sexual abuser"; he had engaged in relationships with several women, fathered children, two of whom he is alleged to have molested, and sexually abused teenaged seminarians.[270]

263. *Dauray*, 2012 R.I. Super. LEXIS 141, at *2, 5–6; *Ams. United for Life*, slip op. at 3.
264. *Dauray*, 2012 R.I. Super. LEXIS 141, at *8; *Ams. United for Life*, slip op. at 3.
265. *Dauray*, 2012 R.I. Super. LEXIS 141, at *37.
266. *Id.* at *9, 23, 27.
267. *Id.* at *9–10.
268. *Id.*
269. *Ams. United for Life*, slip op. at 6.
270. *Id.*; *see Dauray*, 2012 R.I. Super. LEXIS 141, at *10–12.

In 1997, the Hartford Courant published an article describing some of Father Maciel's actions, including "misuse of prescription drugs, financial impropriety, and other allegations."[271] Per the article, "nine men accused Father Maciel of sexually abusing them from the 1940s to 1960s."[272] Americans United alleged that Legion officials covered up the scandal and kept this information from Mrs. Mee.[273]

Americans United claimed that by 2006, high-ranking Legion officials knew about Father Maciel's relationships, children, and sexual abuse and made a pact to protect Father Maciel and keep the information secret.[274] It further alleged that the information was kept from Mrs. Mee even when, later in 2006, the Vatican issued a Communiqué inviting Father Maciel "to a reserved life of penitence and prayer, relinquishing any form of public ministry."[275]

Mrs. Mee died on May 16, 2008, at the age of ninety-six.[276] The Legion publicly acknowledged that Father Maciel had a daughter in February 2009, nine months after Mrs. Mee's death and more than a year after Father Maciel's death.[277] In May 2010, the Vatican released a "scathing report regarding [Father Maciel's] gross misconduct."[278]

Americans United received notice of its interest in Mrs. Mee's estate in December 2013.[279] It thereafter moved to intervene in litigation brought by Ms. Dauray, after the case had been dismissed on summary judgment for lack of standing and appealed to the Rhode Island Supreme Court.[280] The Supreme Court denied Americans United's appeal.[281] About one month after the Executor closed Mrs. Mee's Estate, Americans United

271. *Dauray*, 2012 R.I. Super. LEXIS 141, at *8 (citation omitted).
272. *Id.*
273. *See Ams. United for Life*, slip op. at 6, 8–9.
274. Complaint ¶ 68, Ams. United for Life v. The Legion of Christ of N. Am., Inc., C.A. No. PC-2016-2900 (R.I. Super. Ct. June 22, 2016).
275. *Dauray*, 2012 R.I. Super. LEXIS 141, at *10–11.
276. *Id.* at *16.
277. *See* Complaint ¶¶ 90–116, Ams. United for Life v. The Legion of Christ of N. Am., Inc., C.A. No. PC-2016-2900 (R.I. Super. Ct. June 22, 2016).
278. *Ams. United for Life*, slip op. at 6.
279. *Id.* at 20.
280. *Id.*; *see Dauray*, 2012 R.I. Super. LEXIS 141, at *38
281. *Ams. United for Life*, slip op. at 20.

petitioned to reopen, alleging that the Legion was guilty of unduly influencing and defrauding Mrs. Mee.[282] The probate court denied the petition and the superior court affirmed on appeal.[283]

Americans United then brought a separate and independent action against the Legion, alleging fraud, undue influence, tortious interference, civil conspiracy, and sought a constructive trust.[284] Americans United claimed that Father Maciel and other Legion officials systematically preyed upon Mrs. Mee, taking advantage of her piety to manipulate her and strip her of her fortune.[285] Americans United further claimed that Mrs. Mee never learned the truth about Father Maciel or the Legion of Christ before her death on May 16, 2008, and that she never would have gifted to the Legion had she known about Father Maciel's gross misconduct.[286]

The Legion of Christ moved to dismiss Americans United's suit.[287] Much of the briefing and oral argument was dedicated to Americans United's claim of tortious interference, an area that the court labeled "thought-provoking."[288] In deciding the Legion's motion, the court first considered whether recognition of the tort constituted creation of a new cause of action, which can only occur in extreme circumstances absent a legislative remedy, or whether it constituted mere extension of the existing common-law cause of action, tortious interference with contractual relations.[289] Americans United argued that many other jurisdictions had extended the cause of action for tortious interference with contract rights or business relations to cover tortious interference with an inheritance or gift,[290] and that Rhode Island has long recognized a cause of action for tortious interference with contract rights or other business relations.[291] The court agreed and further cited

282. *Id.*
283. *Id.*
284. *Id.* at 2, 7.
285. *See id.* at 6.
286. Complaint ¶¶ 87–89, Ams. United for Life v. The Legion of Christ of N. Am., Inc., C.A. No. PC-2016-2900 (R.I. Super. Ct. June 22, 2016); *see Ams. United for Life*, slip op. at 6.
287. *Ams. United for Life*, slip op. at 1–2.
288. *Id.* at 11.
289. *Id.*
290. *Id.* at 13; *see, e.g.*, Allen v. Hall, 974 P.2d 199, 202, 206 (Or. 1999); Cyr v. Cote, 396 A.2d 1013, 1018 (Me. 1979).
291. *Ams. United for Life*, slip op. at 13–14; *see, e.g.*, Jolicoeur Furniture

Comment a of § 774B of the *Restatement (Second) of Torts*, which provides that "tortious interference with expectation of inheritance 'represents an extension to a type of noncontractual relation of the principle found in the liability for intentional interference with prospective contracts stated in § 766B.'"[292]

In response to the Legion of Christ's argument that recognition of tortious interference would interfere with Rhode Island's "comprehensive statutory scheme designed to secure the expeditious and conclusive settlement of estates and quieting of titles,"[293] the court held that "[a] tort claim does not become a will contest simply because it arises out of the facts relating to the making or unmaking of a will."[294] On the contrary, the court explained:

> A successful tort action results in a judgment against the defendant for money damages, not a determination of the validity of a particular will or other testamentary result. The legal differences between a will contest and the tort are far-reaching. The tort, an action at law, allows compensatory and punitive damages.[295]

The focus in an action alleging tortious interference is on the plaintiff's injury, rather than the testator's intent. Moreover, while a probate proceeding is an in rem proceeding which "determines what will happen to the assets in the testator's probate estate," a tort action can result in a judgment against an individual, "to be paid from that individual's personal assets."[296] Thus, the court held, a claim for tortious interference is distinct from a will contest and does not interfere with the expeditious and conclusive settlement of estates and quieting of titles.[297]

The court next considered the Legion of Christ's argument that such an action "would not lie where an adequate statutory

Co. v. Baldelli, 653 A.2d 740, 751–52 (R.I. 1995); Belliveau Building Corp. v. O'Coin, 763 A.2d 622, 624, 626–27 (R.I. 2000).

292. *Ams. United for Life*, slip op. at 15 (citing RESTATEMENT (SECOND) OF TORTS § 774B (AM. LAW INST. 1979)).

293. *Id.* at 16 (quoting Umsted v. Umsted, 446 F.3d 17, 21 (1st Cir. 2006)).

294. *Id.* at 16 (quoting Allen v. Hall, 974 P.2d 199, 204 (Or. 1999)).

295. *Id.* (quoting Munn v. Briggs, 185 Cal. App. 4th 578, 586–87 (2010)).

296. *Id.*

297. *Id.* at 16.

remedy is available but has not been pursued."[298] While the court agreed that no claim for tortious interference would lie where there is an adequate alternate statutory remedy, it found that the circumstances presented in *Umsted v. Umsted*[299] and *Henry v. Sheffield*,[300] both of which dismissed claims for the plaintiffs' failure to pursue adequate statutory remedies, were inapplicable to Americans United for two reasons.[301] First, Americans United's motion to intervene in the *Dauray* litigation and its petition to reopen Mrs. Mee's estate were denied.[302] Thus, Americans United *did*, however unsuccessfully, pursue a remedy.[303] Furthermore, under Rhode Island General Laws § 33-18-17, allowing a "person legally interested in the estate of a deceased person . . . to recover any property, personal or real . . . [that] should be recovered for the benefit of the estate," which could have been pursued against the Legion of Christ in superior court, did not provide Americans United with an adequate remedy, as Americans United was not "legally interested," and, even if it were such action, if successful, would ultimately enrich the estate, of which the Legion of Christ was the sole beneficiary.[304] Second, the court determined that Americans United sufficiently pled the elements of tortious interference, though it left "for another day a discussion of the precise elements required to prove a claim of tortious interference with expectation of inheritance."[305]

B. *The Future of the Tort in Rhode Island*

1. Viability

The Rhode Island Superior Court's recognition of tortious interference with an expected inheritance sets a new legal precedent in Rhode Island. Whether the Rhode Island Supreme

298. *Id.* at 17 (quoting Henry v. Sheffield, 856 F. Supp. 2d 345, 350 (D. R.I. 2012)).
299. 446 F.3d 17, 22 (1st Cir. 2006).
300. 856 F. Supp. 2d 345, 350 (D. R.I. 2012).
301. *Ams. United for Life*, slip op. at 19–21.
302. *Id.* at 20.
303. *See id.*
304. *Id.* at 18 (quoting Umsted v. Umsted, 446 F.3d 17, 23 (1st Cir. 2006)).
305. *Id.* at 22.

Court will agree with the superior court's decision remains to be seen. However, there are several arguments that support recognition of the tort in Rhode Island.

As explained in Part II, *supra*, many other jurisdictions that have considered tortious interference have extended the cause of action for tortious interference with contract rights or business relations to cover tortious interference with an inheritance or gift.[306] Rhode Island has long recognized a cause of action for tortious interference with contract rights or other business relations.[307] Both tortious interference with an expected inheritance and other tortious interference claims involve: 1) economic loss without physical harm to person or property; 2) a claim that is not based on an existing and enforceable right or an existing and enforceable contract; and 3) a probable prospect of economic gain.[308] Thus, Rhode Island already recognizes liability for similar tortious conduct.[309] Moreover, Rhode Island courts frequently look to the *Restatement* in determining the scope and applicability of tort law in the State, which officially recognized the tort in 1979.[310] Thus, if history is any indicator, other Rhode

306. *See, e.g.*, Allen v. Hall, 974 P.2d 199, 204 (Or. 1999); Cyr v. Cote, 396 A.2d 1013, 1018 (Me. 1979).

307. *See, e.g.*, Belliveau Building Corp. v. O'Coin, 763 A.2d 622, 624 (R.I. 2000); Jolicoeur Furniture Co. v. Baldelli, 653 A.2d 740, 753 (R.I. 1995).

308. Allen, 974 P.2d at 202; DAN B. DOBBS, THE LAW OF TORTS § 450 (2000).

309. Simply extending the concept of tortious interference to cover situations in which a tortfeasor impermissibly interferes with a right to inherit does not usurp the powers of the General Assembly. Rhode Island courts have previously extended existing causes of action to new contexts. *See*, *e.g.*, Central Falls Sch. Dist. Bd. of Trs. v. Central Falls Teachers Union, C.A. No. PC 2014-6275, 2015 R.I. Super. LEXIS 110, at *25 (R.I. Super. Ct. Aug. 28, 2015) (extending the principle that public employers cannot divest themselves of statutory duties to the educational context); Bibeault v. Hanover Ins. Co., 417 A.2d 313, 317, 319 (R.I. 1980) (With "the absence of a legislative intent to the contrary" the Rhode Island Supreme Court extended the well-established duty of an insurer in the context of liability insurance to act reasonably and in good faith in settling third-party claims against insureds to the context of an "insurer's bad faith refusal to settle an insurance claim . . . .").

310. *See*, *e.g.*, Gushlaw v. Milner, 42 A.3d 1245, 1257–58 (R.I. 2012) (relying upon the RESTATEMENT (SECOND) OF TORTS § 315); Volpe v. Gallagher, 821 A.2d 699, 706 (R.I. 2003) (relying upon the RESTATEMENT (SECOND) OF TORTS § 318); Clift v. Narragansett TV L.P., 688 A.2d 805, 810 (R.I. 1996) (relying upon the RESTATEMENT (SECOND) OF TORTS § 455); Shire Corp. v. R.I.

Island judges will likely agree with the *Americans United* court.

As the *Americans United* court pointed out, recognition of tortious interference does not undermine Rhode Island's policy of "expeditious and conclusive settlement of estates and quieting of titles" as it is an in personam action, completely distinct from a will contest or an action under Rhode Island General Laws § 33-18-17 to recover assets for the benefit of the estate.[311] It seeks damages from the defendant, rather than to revoke probate of a will or otherwise interfere with probate assets. As the United States Court of Appeals for the Third Circuit has explained, "[d]espite its entwinement with probate, a cause of action for tortious interference with inheritance is one brought in personam. It is no different from any other tort—the plaintiff is asserting that some tortious action on the part of the defendant has caused him or her damage."[312]

The Court of Appeal of California, Fourth Appellate District, explained that "[t]he legal differences between a will contest and [tortious interference] are far-reaching."[313] Indeed, "[u]nlike

Dep't of Transp., C.A. No. PB 09-5686, 2012 R.I. Super. LEXIS 32, at *89 (R.I. Super. Ct. Mar. 2, 2012) (relying upon the RESTATEMENT (SECOND) OF TORTS § 766, 766A which concerns tortious interference with a business relationship).

311. Ams. United for Life v. The Legion of Christ of N. Am., Inc., C.A. No. PC-2016-2900, slip op. at 16 (R.I. Super. Ct. Jan. 4, 2017) (quoting Umsted v. Umsted, 446 F.3d 17, 21 (1st Cir. 2006)); *see* Munn v. Briggs, 185 Cal. App. 4th 578, 586 (Cal. App. 2010) (whereas a probate proceeding determines what will happen to the testator's probate estate, a tort action can result in a judgment against the defendant personally).

312. Golden v. Golden, 382 F.3d 348, 364 (3d Cir. 2004); *see also* Marshall v. Marshall, 547 U.S. 296, 312 (2006) (probate exception inapplicable to plaintiff's claim of tortious interference, as plaintiff was "seek[ing] an in personam judgment . . . not the probate or annulment of a will"); Bouchard v. Bouchard, 382 A.2d 810, 814 (R.I. 1978) (explaining that in rem jurisdiction is jurisdiction over the thing, while in personam jurisdiction is jurisdiction over the person); *Munn*, 185 Cal. App. 4th at 586 (whereas a probate proceeding determines what will happen to the testator's probate estate, a tort action can result in a judgment against the defendant personally); Burt v. Rhode Island Hosp. Tr., C.A. No. PC/02-2243, 2006 R.I. Super. LEXIS 91, at *26 (R.I. Super. Ct. Jul. 26, 2006) ("[T]he damages remedy sought is entirely distinct from the probate res, and the plaintiffs' suit is, therefore, cognizable in the Superior Court.").

313. *Munn*, 185 Cal. App. 4th at 586 (quotations omitted) (Tortious interference "is not a testator-centered remedy . . . the tort represents a fundamental and significant shift of focus away from the testator and onto the wronged would-be-beneficiary.") (emphasis added); *accord In re* Estate of

probate proceedings, which seek to carry out the intent of the testator with respect to the distribution of the testator's estate, a tort action for interference with an expected inheritance endeavors to restore the plaintiff with the benefit arguably lost because of the defendant's tortious conduct."[314] Moreover, the fact that a plaintiff's damages may be measured, in part, by the amount of the *inheritance* they would have received, but for the interference "does not convert [its] tort claims into an action to probate a will or administer an estate."[315] In fact, courts can grant relief, without "challenging the [probate court's] determinations of estate value and testamentary document validity, enforceability and distributive scheme."[316] Thus, litigation of a claim for tortious interference would not hamper the probate process or the settlement of estates.

2. Exhaustion Requirement

The *Americans United* court, following *Umsted* and *Henry*,[317] found that "a claim for tortious interference with expectation of inheritance is unavailable when an adequate statutory remedy was available but not pursued."[318] This "exhaustion" requirement appears to be a reconciliation of two competing interests: 1) preventing attempts to circumvent the probate court statutes and 2) assuring a plaintiff an avenue to redress damages caused by tortious conduct. However, in Rhode Island, such a requirement

Ellis, 923 N.E.2d. 237, 240 (Ill. 2009) ("A tort action for intentional interference with inheritance is distinct from a petition to contest the validity of a will, in several important respects."); Cyr v. Cote, 396 A.2d 1013, 1017 (Me. 1979) ("[W]e find the distinction between a will case and the instant suit significant and . . . conclude that such differences entitled plaintiffs to a jury trial. . . .").

314. *Munn*, 185 Cal. App. 4th at 586 (internal quotation marks omitted).

315. Wellin v. Wellin, No. 2:14-cv-4-67-DCN, 2015 U.S. Dist. LEXIS 19488, at *30 (D. S.C. Feb. 12, 2015).

316. *Golden*, 382 F.3d at 364; *see also Munn*, 185 Cal. App. 4th at 586 ("A successful tort action results in a judgment against the defendant for money damages, not a determination of the validity of a particular will or testamentary result.") (internal quotation marks omitted).

317. Umsted v. Umsted, 446 F.3d 17, 22 (1st Cir. 2006); Henry v. Sheffield, 856 F. Supp. 2d 345, 350 (D. R.I. 2012).

318. Ams. United for Life v. The Legion of Christ of N. Am., Inc., C.A. No. PC-2016-2900, slip op. at 19 (R.I. Super. Ct. Jan. 4. 2017) (citing *Umsted*, 446 F.3d at 22).

is burdensome, highly impractical, and potentially impossible to satisfy.

First, adoption of the probate exhaustion requirement would, in many cases, limit victims to the probate court forum, contravening well-settled case law that tortious interference may be entertained by non-probate courts, based on a logical reading of federal authority construing the federal probate exception.[319] In *Marshall v. Marshall* (the Anna Nicole Smith litigation), the decedent's widow brought a claim against the decedent's son alleging that the son had tortiously interfered with a gift she expected to receive from the decedent.[320] The decedent's son moved to dismiss for lack of subject matter jurisdiction claiming that the widow's claim could only be tried in the Texas probate court system.[321] The son's motion was granted and the decedent's widow appealed.[322] On appeal, the United States Supreme Court noted that many federal courts, citing the probate exception, had incorrectly abstained from adjudicating matters that extend "well beyond probate of a will or administration of a decedent's estate," including an executor's breach of fiduciary duty.[323] While the probate exception does prevent federal courts from disposing of property in the custody of a state probate court, "it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction."[324] Importantly, the Court stated that "[s]tate probate courts possess no 'special proficiency . . . in handling [such] issues."[325]

319. The probate exception has been defined to mean that "a federal court has no jurisdiction to probate a will or administer an estate," hence the "exception" to federal court jurisdiction. Markham v. Allen, 326 U.S. 490, 494 (1946).

320. Marshall v. Marshall, 547 U.S. 296, 300–01 (2006).

321. *Id.*

322. *Id.* at 304.

323. *Id.* at 311.

324. *Id.* at 312.

325. *Id.* at 312 (citing Ankenbrandt v. Richards, 504 U.S. 689, 704 (1992)). The *Marshall* Court also classified tortious interference as a transitory action. *Id.* at 313–14. Rhode Island courts have held that a transitory action:

> [I]s one that can be brought in any venue where the defendant can be personally served with process. *Transitory* actions are universally founded on the supposed violation of rights which, in contemplation of the law, have no locality. Thus, a *transitory* action exists as opposed to a local action, which is one that can be brought only in

Though the probate exception is a federal doctrine affecting federal courts, the Rhode Island Superior Court in *Burt v. Rhode Island Hospital Trust* compared the doctrine to the jurisdiction of Rhode Island probate courts.[326] In *Burt*, the plaintiffs filed a breach of fiduciary duty claim against the co-executors of the decedent's estate in superior court while estate proceedings in probate court were ongoing.[327] The *Burt* court found that the plaintiffs' claim "d[id] not involve the administration of an estate, the probate of a will, or any other *purely probate matter*."[328] Significantly, the plaintiffs were seeking an in personam judgment against the executors, such that the damages sought were distinct from the res being administered by the probate court.[329]

It is thus clear that the Rhode Island Superior Court has the jurisdiction and capacity to entertain claims for tortious interference. By contrast, Rhode Island probate courts may exercise jurisdiction only to the limited extent conferred by statute and have very limited equitable powers.[330] Specifically, Rhode Island probate courts may only follow the course of equity as it concerns a trust created by will or a testamentary trust.[331] In essence, Rhode Island probate courts have the power to administer estates, not decide questions of law or impose

> the jurisdiction where the cause of action arose, as when the action's subject matter is a piece of real property.

Aquidneck Realty, Inc. v. G.P. Pier Retail, LLC, C.A. No. NC-2007-0625, 2008 R.I. Super. LEXIS 22, at *1 (R.I. Super. Ct. Feb. 5, 2008) (citing BLACK'S LAW DICTIONARY 34 (8th ed. 2004) (internal citation omitted) (internal quotations omitted)). The *Marshall* Court held that, "a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction." 547 U.S. at 314.

326. 8 R.I. GEN. LAWS § 8-9-9 (Westlaw through Ch. 542 of the Jan. 2016 sess.); C.A. No. PC/02-2243, 2006 R.I. Super. LEXIS 91, at *26 (R.I. Super. Ct. Jul. 26, 2006).

327. C.A. No. PC/02-2243, 2006 R.I. Super. LEXIS 91, at *9–10.

328. *Id.* at *24 (emphasis added) (quoting *Marshall*, 547 U.S. at 304) (internal quotation marks omitted).

329. *Id.* at *25–26.

330. *Id.* at *17 (("[P]robate courts in Rhode Island are courts of limited jurisdiction and can 'exercis[e] jurisdiction only in a manner and to the extent conferred by statute'" (alteration in original) (quoting Carr v. Prader, 715 A.2d 291, 293 (R.I. 1999)).

331. 8 R.I. GEN. LAWS § 8-2-13 (Westlaw through Ch. 542 of the Jan. 2016 sess.).

equitable remedies. Thus, a claim of tortious interference, which is of both an equitable and legal character, is incapable of adjudication by the probate court.[332] And because the elements comprising a claim of tortious interference cannot be adjudicated by the Rhode Island probate courts, adoption of the exhaustion requirement in Rhode Island would actually impede tort victims' ability to obtain redress for their damages.

Other nearby states seem to agree. Maine has a probate court system similar to that of Rhode Island, making its jurisprudence on the exhaustion requirement compelling.[333] Recognizing the limited jurisdiction of their probate courts and the unavailability of jury trials at the probate court level, Maine state courts have held that there is no requirement for victims of tortious interference to exhaust probate court remedies before bringing such a claim in superior court.[334]

As described in Part III, in *Plimpton v. Gerrard*, the plaintiff, son of the decedent, brought an action against defendant legatee of a will alleging tortious interference with his expectancy, both in connection with the inter vivos transfer of his parents' real estate, and in connection with the revision of his father's will.[335] The defendant moved to dismiss the plaintiff's claims, arguing that the plaintiff had an obligation "to exhaust his Probate Court

332. *See* Bosworth v. Bosworth, 167 A. 151, 152 (R.I. 1933) (fraud is "one of the principal grounds of equitable jurisdiction."); Champlin v. Slocum, 103 A. 706, 708 (R.I. 1918) (the court of probate, which has no equity jurisdiction, is not adapted to the investigation and determination of questions of fraud); Cyr v. Cote, 396 A.2d 1013, 1019 (Me. 1979) (undue influence is the means of the tortious interference); Paiva v. Paiva, PC 05-3039, 2008 R.I. Super. LEXIS 48, at *21–22 (R.I. Super. Ct. Apr. 10, 2008) (undue influence is constructive fraud); *accord* Gee v. Bullock, C.A. No. 96-2223, 1996 WL 937009, at *2 (R.I. Super. Ct. Nov. 16, 1996) ("Allegations of misrepresentation are one of the principal grounds for obtaining equitable jurisdiction in Superior Court."); *see generally* Burt v. Rhode Island Hosp. Tr., C.A. No. PC/02-2243, 2006 R.I. Super. LEXIS 91, at *18 n.9 (R.I. Super. Ct. Jul. 26, 2006) (claims of breaches of fiduciary duty, like fraud, are not appropriate for resolution by the probate court).

333. *See* Voisine v. Tomlinson, 955 A.2d 748, 751 (Me. 2008). Moreover, Maine has a significant body of law on the tort. "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." Klein, *supra* note 13, at 252.

334. *Cyr*, 396 A.2d at 1017; Plimpton v. Gerrard, 668 A.2d 882, 887 (Me. 1995).

335. *Plimpton*, 668 A.2d at 884.

remedies," both in connection with the inter vivos transfer challenge and the plaintiff's claim relating to the inheritance of his father's estate in probate court.[336] The Supreme Judicial Court of Maine disagreed. Though the plaintiff "theoretically [had] an adequate remedy in the Probate Court" for his inter vivos transfer challenge and inheritance claim, it did "not compel [him] to go there to pursue his tortious interference claim."[337] The court reasoned that the superior court and the probate court had concurrent jurisdiction for a claim of undue influence. "The very concept of concurrent jurisdiction is inconsistent with a preference for one jurisdiction over another."[338] Moreover, and importantly, "[i]n civil cases in which damages are sought, a plaintiff has the right to a jury trial."[339]

Connecticut, similarly, limits the jurisdiction of its probate courts. Connecticut General Statutes § 45a-98 defines the "[g]eneral powers" of the probate courts, contrasting them with the superior courts of "general jurisdiction."[340] Connecticut courts recognize that probate courts are limited.[341] Importantly, the Connecticut Appeals Court has held that counts for "tortious interference with the expectation of an inheritance," among other torts, were not within the jurisdiction of the probate court, stating that "[n]either § 45a-98 [which sets out the jurisdiction of the

336. *Id.* at 886–87.
337. *Id.* at 887.
338. *Id.*
339. *Id.*
340. CONN. GEN. STAT. § 45a-98 (Westlaw through the 2016 Sept. Spec. Sess.).
341. *See* Heussner v. Hayes, 961 A.2d 365, 369 (Conn. 2008) ("The Probate Court is a court of limited jurisdiction prescribed by statute, and it may exercise only such powers as are necessary to the performance of its duties."); Heiser v. Morgan Guar. Tr. Co., 192 A.2d 44, 45 (Conn. 1963) ("It is a familiar principle that a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . Our courts of probate have a limited jurisdiction and can exercise only such powers as are conferred on them by statute . . . .") (emphasis added); Geremia v. Geremia, 125 A.3d 549, 561 (Conn. App. 2015) ("Connecticut law long has demarcated the distinction between the jurisdiction of our probate and superior courts. Connecticut General Statutes § 51-164s provides in relevant part that '[t]he Superior Court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute. . . .'").;

probate court] nor any other provision of the General Statutes vests the Probate Court with jurisdiction, exclusive or otherwise, over those actions sounding in tort."[342]

Other states with probate courts jurisdictionally unable to entertain a claim for money damages arising for allegations of fraud hold that it is not necessary for a plaintiff to pursue remedies there prior to filing a suit in the trial courts.[343] In *Widdig v. Watkins*, the daughter of a decedent filed claims for civil fraud, undue influence, and tortious interference against her niece and nephew.[344] The trial court granted the niece and nephew's motion to dismiss for lack of subject matter jurisdiction, holding that the daughter had an obligation to exhaust her probate court remedies. Reversing, the appellate court explained that a threshold issue is "whether appellant had an appropriate procedure available in probate court to redress her claims . . . ."[345] Explaining that the probate court "is a court of limited and special jurisdiction," the court upheld the daughter's claims, brought in her individual capacity, as "generally speaking, the probate division has no jurisdiction over claims for money damages arising from allegations of fraud."[346] Thus, the daughter had no obligation to pursue probate court remedies before filing her claims in the trial court.[347]

Though New Hampshire has not yet recognized tortious interference, its case law indicates that if it did, probate exhaustion would not be a prerequisite to maintaining a suit in

342. *Geremia*, 125 A.3d at 561.

343. *See, e.g.*, Widdig v. Watkins, No. 13-CA-3531, 2013 Ohio App. LEXIS 4015, at *1 (Ohio Ct. App. Aug. 22, 2013).

344. *Id.* at *1–2.

345. *Id.* at *5.

346. *Id.* at *8.

347. *Id.*; *see also* Huffey v. Lea, 491 N.W.2d 518, 522 (Iowa 1991) ("[W]e do not believe the same evidence supports the will contest and the action for intentional interference with a bequest. Further, we agree with plaintiffs that a complete remedy could not be provided in the will contest because of the additional costs involved in the appeals process."); Allen v. Hall, 974 P.2d 199, 204 (Or. 1999) ("A tort claim does not become a will contest simply because it arises out of facts relating to the making or unmaking of a will."); Butcher v. McClain, 260 P.2d 611, 616 (Or. Ct. App. 2011) (citing *Allen* and concluding plaintiff was not required to bring claim in probate court to pursue tort); Barone v. Barone, 294 S.E. 260, 264 (W. Va. 1982) ("We find tortious interference with a testamentary bequest to be a tort in West Virginia. This tort is not within probate court jurisdiction . . . .").

the superior court. Similar to Rhode Island, the New Hampshire probate courts are "not [ ] court[s] of general jurisdiction. [Their] powers are limited to those conferred upon [them] by statute."[348] In *In re CIGNA Healthcare, Inc.*, the Supreme Court of New Hampshire stated that, in enacting the Omnibus Justice Act, the legislature "did not intend to force a party entitled to a jury trial in superior court to first subject itself to a trial before a probate court judge and then to appeal an adverse decision to the superior court for jury trial."[349] Specifically, the "statutory provision that the superior court will take 'cognizance' of matters in the probate court for which there is a right to trial by jury did not deprive litigants of the right to apply for relief in superior court without first applying for the same relief in the probate court."[350]

States that *have* adopted the exhaustion requirement, on the other hand, have probate court systems that are much better suited to adjudication of a tort such as tortious interference. For instance, Massachusetts, which espouses the exhaustion requirement, has probate "courts of general equity jurisdiction," which sit full-time.[351] Furthermore, Massachusetts General Laws chapter 215, § 2, provides that Massachusetts probate courts are courts of "superior and general jurisdiction."[352] Thus, it is possible for the Massachusetts probate courts to adjudicate claims of tortious interference, making circumvention of the probate court procedures a legitimate concern.

As is clear, Rhode Island probate courts are ill equipped, and more importantly lack the necessary jurisdiction, to adjudicate a claim for tortious interference. However, there is another compelling rationale for rejection of an exhaustion requirement: the practical limitations of the Rhode Island probate court system itself. There are thirty-nine probate courts in Rhode Island—one for each town or city.[353] Probate judges sit part-time and often

348. *In re* Estate of O'Dwyer, 605, A.2d 216, 217 (N.H. 1992).
349. 177 A.2d 884, 890 (N.H. 2001).
350. *Id.*
351. MASS. GEN. LAWS ch. 215, § 6 (Westlaw through Ch.1 of the 2017 1st Annual Sess.).
352. *Id.* § 2.
353. *See Probate Courts: State Links,* NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org/Topics/Special-Jurisdiction/Probate-Courts/State-Links.aspx#Rhode Island (last visited Mar. 17, 2017). Many of these courts meet only once per month. *See Rhode Island Probate Court Update*,

maintain private law practices. Moreover, while the Rhode Island Rules of Civil Procedure are self-executing in superior court, in the probate courts parties must petition, pursuant to Rhode Island General Laws §§ 8-9-17 and 9-18-12, for the use of specific discovery to obtain information from the opposing party.[354] A probate court may then exercise its discretion and "limit the scope of discovery to what is relevant to the contested issue before it and may shorten or enlarge deadlines for compliance as circumstances warrant."[355] With respect to hearings, probate courts may choose whether to apply the Rhode Island Rules of Civil Procedure, and the parties can decide jointly whether to apply the Rhode Island Rules of Evidence.[356] Decisions are always rendered by a probate court judge, never a jury, and parties advancing in age do not have the benefit of acceleration of civil actions in cases where a "plaintiff or defendant has attained the age of sixty-five (65) years."[357]

A claim of tortious interference involves allegations of undue influence, fraud or duress, and oftentimes is proven by circumstantial evidence, as "the perpetrator of such covert coercion generally applies the forbidden pressure in secret."[358] Discovering such indirect evidence would be an awkward and clumsy task in probate court, where use of discovery devices is not automatic, and petitioning for discovery may involve waiting a month until the court next meets. Moreover, whether one has been unduly influenced or defrauded is frequently a fact-intensive inquiry that is more appropriate for resolution by a jury, rather than a judge. Because the circumstantial evidence likely involves out of court statements, it is imperative that the rules of evidence apply. For these and other reasons, the Rhode Island probate court system is an inappropriate forum to bring a claim of tortious

PROVIDENCERI.COM, http://www.providenceri.com/efile/620 (last visited Mar. 4, 2017).

354. 8 R.I. GEN. LAWS § 8-9-17 (Westlaw through Ch. 542 of the Jan. 2016 sess.); 9 R.I. GEN. LAWS § 9-18-12 (Westlaw through Ch. 542 of the Jan. 2016 sess.).

355. 33 R.I. GEN, LAWS, § 33-22-19.2(c) (Westlaw through ch. 542 of the Jan. 2016 sess.).

356. *Id.*

357. 9 R.I. GEN. LAWS § 9-2-18 (Westlaw through Ch. 542 of the Jan. 2016 sess.)

358. Caranci v. Howard, 708 A.2d 1321, 1324 (R.I. 1998).

interference.

An understanding of the limited jurisdiction and functionality of the probate court system in Rhode Island demonstrates that concerns about circumvention of the probate court statutes are not implicated by rejection of the exhaustion requirement. Indeed, there is no real ability to litigate a claim of tortious interference in the Rhode Island probate courts, rendering an exhaustion requirement meaningless and, potentially, fatal to a tort victim's ability to obtain constitutionally guaranteed relief. Thus, whatever the force of arguments in favor of exhaustion as necessary prior step to bringing a claim of tortious interference, the practical effects of such a requirement in Rhode Island must be carefully weighed, considered, and given context. These authors believe that the potential benefits of such a requirement in Rhode Island are far outweighed by the risk of closing the courthouse doors to victims of the tort.

CONCLUSION

Decades of case law illustrate that courts recognize the need to fill the vacuum left by the inadequacy of probate court procedures by extending the common-law claim for tortious interference with a business relation or contract to the context of inheritance law. The Rhode Island Superior Court's decision in *Americans United for Life v. Legion of Christ of North America, Inc.* aligns Rhode Island with several states, including nearby Maine, Massachusetts, and Connecticut, and, by threatening to penalize wrongdoing, promises to deter those who would attempt to tortiously interfere with a testator's intentions. *Americans United*, therefore, represents a significant victory for the Rhode Island population vulnerable to undue influence and fraud and for third parties who have been thereby deprived of their inheritance.