

# Tortious Interference with an Expectation of an Inheritance

## A Survey Since *Galbreath*

BY DANIEL A. MCGOWAN

The tort of intentional interference with an expectation of an inheritance (IIEI) is one way of remedying wrongdoing by unscrupulous persons who prey upon vulnerable, sick and weak people with wealth. The tort is recognized to advance a public policy for the protection of the testator's interest in freely disposing of his or her property. In contrast to a garden-variety will contest based on undue influence, where the contestant must establish that the free will of the testator was overborne, a tortious interference claim does not require such a proof. Rather, the focus is on the defendant's intention: whether the defendant intended to interfere with an inheritance and acted on that intention.

### What are the differences between a typical will contest and IIEI?

There are significant legal differences between an equitable will contest and the tort. The tort is an action at law and allows for compensatory and punitive damages. See, RESTATEMENT (SECOND) OF TORTS §774B. Unlike a will contest, in many jurisdictions the elements of damage for the tort include past and future mental or emotional distress resulting from the interference. Also, if the tortfeasor-defendant is found liable, the judgment is paid from its personal assets, not those of the estate.

The tort has been exalted for supplying would-be beneficiaries with powerful substantive and procedural tools for obtaining bequests and for punishing wrongdoers. On the other hand, however, IIEI has been denounced by one prominent Harvard scholar as “a shapeless perversion of equity to provide compensation for, or deterrence of, harmful antisocial conduct.”

### The Deterrent Factor

Perhaps, the deterrent factor of the tort is its most attractive characteristic when viewed

as a vehicle to achieve the ideal of justice. Advocates of the tort point to the fact that equitable remedies such as a constructive trust and restitution based on trust instruments procured by fraud, offer no deterrent at all to the tortious conduct described in many of the IIEI complaints filed in Ohio courts. The idea of deterrence is not so much that an individual, having been held liable for a tort, would thereafter conduct himself better, it is rather the idea that all persons, recognizing potential tort liability, would tend to avoid conduct that could lead to tort liability. Many legal commentators have observed that to allow a defendant to avoid a tort liability because there is an alternative equitable remedy available would be to allow many defendants to potentially commit “the perfect crime.” Many practitioners have observed that the need for application of tort liability is especially critical when the available equitable remedies offer no deterrent at all to the tortious conduct (i.e., where the tortfeasor, after judgment, is simply returned to the same place he was prior to his tortious conduct). For example, assume a testator-parent wishes to divide the estate equally between a son and a daughter, but the son tortiously induces the parent to make a will much more favorable to him. Perhaps this will also names the son as executor. Should his sister bring a will contest, the estate will pay the costs of defending the will, and we can assume the son will defend the will vigorously. Should the sister succeed in her contest, and have the will struck down, the tortfeasor will still collect his one-half share by intestacy or a prior will—the same inheritance he would have received had he never committed the tort.

### *Firestone v. Galbreath*

This tort was first recognized in Ohio in the 1993 Supreme Court decision *Firestone v. Galbreath*, 616 N.E.2d 202, where our state's high Court was requested to answer two

questions from the Sixth Circuit: (1) Is IIEI a cognizable claim in Ohio?; (2) If so, who has standing to commence such an action?

The Court answered YES to both questions and defined the elements of the tort as follows: (1) an existence of an expectancy of inheritance in the plaintiff; (2) an intentional interference by a defendant with that expectancy; (3) conduct by the defendant involving the interference which is tortious in nature; (4) a reasonable certainty that the expectancy would have been realized, but for the defendant's interference and (5) damages.

The dissenting judges in *Firestone* believed the majority's response of “yes” was too broad because “the claim of these plaintiffs is a mere expectancy or future, contingent interest.” This attenuated nature of the property interest in IIEI cases was explored recently in the case of *Brown v. Ralston*, 2016-Ohio-4916, an inheritance dispute involving a granddaughter who sued to recover money damages as a result of another family member's abuse of a power of attorney. Simply stated, the family member used the grandfather's trust as a vehicle to transfer property rights during his life away from the granddaughter (the intended beneficiary) and to the tortfeasor-family member. At the trial level, the family member defended claiming, just as the dissenting judges had opined in *Firestone*, that she could not interfere with the granddaughter's expectancy of inheritance because the granddaughter's expectancy was too attenuated — she had no present interest in the assets at the time the tortious conduct occurred. The Seventh District disagreed, holding that a claim for intentional interference with the expectancy of inheritance does not require a present interest in the property.

### Is a Will Contest a Necessary Precondition to Commencing the Tort Action?

Another critical question remaining after *Firestone* was answered in *Roll v. Edwards*,

156 Ohio.App.3d 227. *Roll* involved a dispute involving the decedent's husband and son in the Probate Court challenging the validity of the decedent's will based on undue influence and lack of testamentary capacity. They also included with their will contest a claim of intentional interference with expectancy of inheritance against the alleged undue influencer--the decedent's daughter. In the probate action they requested that the probate court invalidate the will admitted to probate as well as enter a money judgment against the daughter. The Court held that although it makes common sense for a will contest

and a claim for intentional interference with expectancy of inheritance to travel through the probate court process together, the court probate court doesn't have jurisdiction to do so. The court reasoned that the probate court can fully adjudicate the will contest without determining the essential elements of the tort action because the tort claim requires proof of elements that are not the same as the elements necessary for a prima facie will contest claim. The court feared that if both actions were allowed to proceed, plaintiffs could pursue both at the same time and potentially receive a double recovery.

The issue of adequate probate relief explored in *Firestone* was further developed in *Grimes v. Grimes*, 879 N.E.2d 247 which involved an action filed by the executor of an estate challenging the validity of the decedent's inter vivos deed transfers to his son when the father was incompetent. The complaint, filed in the general division, alleged that the defendant procured the transfers by undue influence at a time when the decedent had a deteriorated mental condition, was dependent upon the defendant for advice, was in poor health, was physically incapacitated, was susceptible to undue influence, and was of advanced

age; that the defendant took advantage of the decedent's conditions and preyed upon his incompetence in obtaining the transfer of the real estate; and that the deeds were recorded after the decedent's death and that the defendant had intentionally interfered with his expected inheritance. The defendant argued that under the reasoning of *Roll v. Edwards*, the general division should dismiss the intentional interference claim for lack of ripeness because there was a pending unresolved probate case. The executor then filed the equivalent action in the probate division and the defendant also sought dismissal of the probate case.

After both cases were dismissed, the executor appealed since he was evidently left with no remedy. The *Grimes* court reversed and articulated the procedure for determining when an IIEI is ripe as a justiciable controversy. Simply stated, holding that until the executor resolved the probate action it was not certain whether he suffered damages as a result of the alleged tortious interference and thus, the individual claim for intentional interference with expectancy of inheritance was not yet ripe for judicial review. The court reasoned, as had the *Roll* court, that to hold otherwise would create a risk of double recovery in the intentional interference plaintiff.

The development of IIEI law in Ohio since *Firestone* continues to affirm the availability of a valuable weapon against elder abuse and exploitation. Further, IIEI has proven to be another option to supplement the typical probate will contest, which is frequently criticized as providing an insufficient remedy against interference with freedom of testation.



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