

Litigating Inheritance Interference

by THEODORE I. WALLACE JR.

The addition of a common law tort to our law is a stellar event almost as rare as the return of Halley's comet. Our court of appeal, after weighing competing policy considerations, officially recognized the tort of "intentional interference with expected inheritance" (IIEI) in *Beckwith v. Dahl*, 205 Cal. App. 4th 1039 (2012). The purpose of adopting the IIEI tort is to provide a civil remedy for a plaintiff when a will contest or a trust contest in the probate court would not restore to the plaintiff the benefit lost because of a defendant's tortious interference.

In embracing the tort, the court noted that twenty-five of the forty-two other states that have considered the tort have validated it. *Beckwith*, 205 Cal. App. 4th at 1050. The court explained that the IIEI tort advances two important principles of California law: (1) for every wrong, there is a remedy, and (2) every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights. *Id.* at 1052. If the decision withstands the scrutiny of the California Supreme Court, will this new tort lead to a sweeping expansion of trust and estate litigation in California, or only marginally augment currently available procedures? The answer will depend on how generously the courts welcome this newcomer.

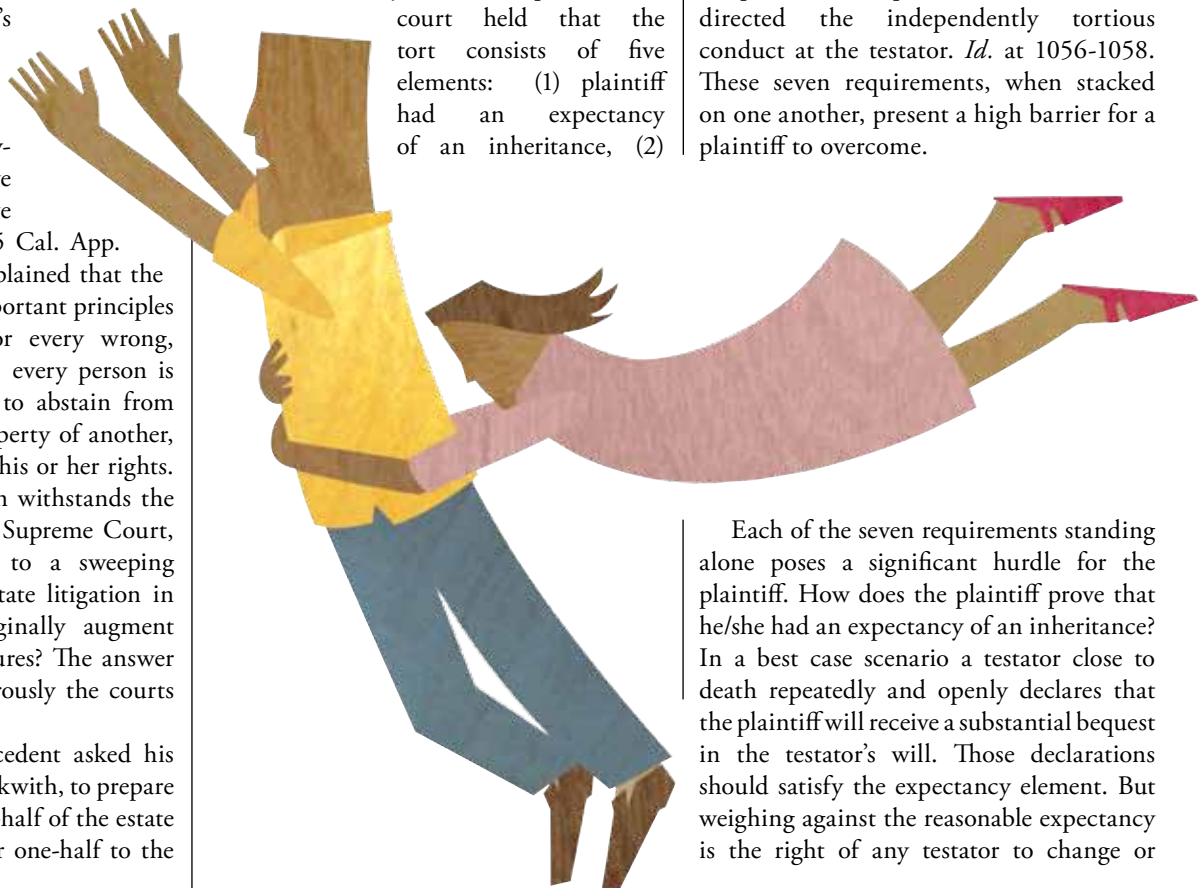
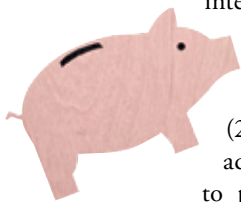
In *Beckwith*, the ill decedent asked his long-term partner, Mr. Beckwith, to prepare a will for him, leaving one-half of the estate to Beckwith and the other one-half to the

decedent's sister. When the sister got wind of this, she represented to Beckwith that she would have an attorney prepare a trust which would accomplish the same purpose while avoiding taxes and probate. Beckwith relied on the sister, but no trust was created. The decedent died intestate with the sister as his sole heir at law. Beckwith filed a civil action against the sister claiming intentional interference with expected inheritance. The trial court sustained a demurrer to the complaint without leave to amend. The court of appeal reversed, adopting the IIEI tort for the first time in California.

In a carefully crafted opinion, the court held that the tort consists of five elements: (1) plaintiff had an expectancy of an inheritance, (2)

proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the testator's death if there had been no interference, (3) the defendant had knowledge of plaintiff's expectancy of inheritance and took deliberate action to interfere with it, (4) the interference was conducted by independently tortious means, and (5) damages resulted from the interference. Proof of just those five elements alone, however, will not carry the day. *Id.* at 1057. To these five elements, the court added two requirements: (1) the plaintiff must demonstrate that no adequate probate remedy exists, and (2) the plaintiff must prove that the defendant directed the independently tortious conduct at the testator. *Id.* at 1056-1058. These seven requirements, when stacked on one another, present a high barrier for a plaintiff to overcome.

Each of the seven requirements standing alone poses a significant hurdle for the plaintiff. How does the plaintiff prove that he/she had an expectancy of an inheritance? In a best case scenario a testator close to death repeatedly and openly declares that the plaintiff will receive a substantial bequest in the testator's will. Those declarations should satisfy the expectancy element. But weighing against the reasonable expectancy is the right of any testator to change or



revoke his/her will at any time or to die intestate. Absent some enforceable contract to make a will, the testator always retains the power to defeat an expected inheritance without warning or explanation.

Proving causation may be no simple task. The plaintiff must submit proof amounting to “a reasonable degree of certainty” that the bequest or devise would have been in effect at the time of the testator’s death if there had been no interference. *Id.* at 1057. The court did not spell out what quantum of proof satisfies the “reasonable degree of certainty” criterion. Is a preponderance of the evidence enough or is the higher burden of clear and convincing proof the standard, or are we somewhere in between preponderance of the evidence and clear and convincing proof? Because a testator can change or revoke his will at any time for any reason or for no reason at all, building the causation bridge from the defendant’s tortious conduct to the testator’s failure to make the expected bequest or devise is especially challenging.

Even if the plaintiff can prove that the defendant knew of the plaintiff’s expectancy of an inheritance, proof of deliberate action by the defendant to interfere with the inheritance could be elusive. A defendant is unlikely to broadcast his wrongful acts of interference, preferring instead to commit the tortious acts in one-on-one private sessions with the testator.

Proof of separate tortious conduct such as fraud, undue influence, threats, or duress inevitably will require some line-drawing. When does a defendant’s pressure or entreaties directed at the decedent reach the point of tortious conduct?

Proof of damages raises further problems. Unless the testator quantifies the intended bequest or devise by identifying a specific piece of property, a specific amount of money, or a specific portion of the estate, proof of damages resulting from the interference seems speculative at best.

Next is the requirement that the defendant’s tortious conduct must be practiced directly on the testator. *Id.* at 1057-1058. In *Beckwith*, the complaint alleged that the defendant had made false representations to the plaintiff, but the complaint did not contain any allegation of wrongful conduct addressed directly to the testator. Not sufficient, the court said. And because the defendant is unlikely to inflict a tortious act on the testator with other witnesses present, the plaintiff may find this requirement difficult to satisfy.

Finally, what constitutes an adequate probate remedy? Simply put, an adequate probate remedy is a will contest which, if successful, provides the plaintiff with the full benefits of the expected inheritance. See *Munn v. Briggs*, 185 Cal. App. 4th 578, 591-592 (2010). A will contest was not a remedy available to Mr. Beckwith because the decedent died intestate. Moreover, because Mr. Beckwith was not an heir at law, he had no standing in the probate court to object to the distribution of the decedent’s estate to the decedent’s sole heir at law, the sister whom Mr. Beckwith charged with the interference of his expected inheritance.

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Procedural problems can arise, as well. As the *Beckwith* court noted, the plaintiff must file a separate civil action to pursue the tort claim to obtain the IIEI remedy. *Beckwith*, 205 Cal. App. 4th at 1058. While the civil suit is making its way through the civil court, what happens to the probate case that the defendant is pursuing? Does the probate court stay the probate case pending the outcome of the civil action? Can the two cases be consolidated? What is the statute of limitations for this new tort: three years under California Code of Civil Procedure Section 338(c)(1) or four years under Section 343? If a will is admitted to probate, could a defendant persuasively argue that the civil action for IIEI must be brought within the 120-day period allowed for filing a will contest under California Probate Code Section 8270(a)? What if the probate court has already ordered distribution of the probate estate even before the civil action is filed? These questions remain to be answered.

Despite the obstacles to a successful prosecution of the IIEI tort, the plaintiff has compelling incentives to pursue the

claim. In the ordinary will contest, when the contestant succeeds, the court simply denies or revokes probate of the challenged will. Cal. Prob. Code §§ 8254, 8272 (West 2012). The contestant receives whatever benefits a prior valid will confers, or an intestate share of the estate if the will contest leaves the decedent intestate. But a tort case allows compensatory and punitive damages payable out of the defendant’s pocket. *Briggs*, 185 Cal. App. 4th at 586.

The plaintiff may also enjoy procedural benefits in the civil case. In a will contest, the contestant must verify the contest pleading. Cal. Prob. Code § 1021 (West 2012). But in the ordinary civil action the plaintiff need not verify the complaint. Cal. Civ. Proc. Code § 446 (West 2012). Moreover, in a will contest, the contestant is not entitled to a jury trial. Cal. Prob. Code, §§ 825; 8252(b) (West 2012). But the plaintiff in an IIEI tort case which seeks money damages should be entitled to a trial by jury. Cal. Civ. Proc. Code § 592 (West 2012); See also 3 Weil & Brown, *Cal. Practice Guide*, Civil Procedure Before Trial (The Rutter Group 2010) § 12.288.

The *Beckwith* court addressed only wills and probate proceedings. But the policy consideration (for every wrong, there is a remedy) underlying the IIEI tort should be applicable to intentional interference with non-probate transfers such as transfers by trust, joint tenancy, pay on death accounts, or life insurance.

Now that the long-awaited IIEI tort has arrived in California, experience will determine whether it can flourish in the climate of our courts.



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