# Recognizing a Tort That Allows a Fraud Claim To Survive The Death of The Defrauded.

Christopher E. Sanspree
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.
P.O. Box 4160
272 Commerce Street
Montgomery, AL. 36103-4160

In March of 1997, Ms. C was 89 years old, extremely sick, and in very poor mental condition. In fact, at her worse, Ms. C could barely speak and was unable to recognize her four children when they would come to visit. Over time, it became obvious to her children that Ms. C would not live much longer, suffering as she was. In view of that, the four children agreed to read their mother's Last Will and Testament together to see how their mother wanted her property devised.

According to the provisions of her Will, upon Ms. C's death, each one of her four children would receive an equal one-quarter share of their mother's estate, the majority of which was made up of assets held in a revocable Trust being managed by The Bank. Although Ms. C had mentioned to her children many times over the years that her property was to be divided equally among them, this was the first time they were informed of their inheritances in writing. Within days of reading their mother's Will, Ms. C's condition took a turn for the worse, rendering her completely incompetent.

Realizing their mother needed a caretaker; the children began discussing the possibility of letting Ms. C move in with one of them. Sister, being the oldest, volunteered, and shortly thereafter, Ms. C moved in with her in Mobile. Almost immediately, Sister convinced Ms. C to grant her power of attorney, and she began handling all of Ms. C's financial affairs. Sister, realizing the size of her mother's Trust, was no longer satisfied with inheriting only twenty-five percent of the estate. In short, Sister wanted it all for herself, and began trying to design a plan that would allow her to get her hands on all of her mother's money.

However, what Sister needed was some good advice, so she contacted her insurance agent, Mr. Agent. Sister and Mr. Agent had grown close over the years, and Sister knew she could count on Mr. Agent to help her accomplish her objective. Sister told Mr. Agent of her mother's money being held in Trust, told him what each child was to inherit under her mother's Will, and told him of her desire to keep all of her mother's money for herself. Together, they came up with a plan that would not only allow Sister to keep all of her mother's money, but would also provide Mr. Agent with the largest commission of his life.

The plan was simple, and carrying it out was easy. Sister and Mr. Agent merely forged the signature of a notary public on a Trust revocation letter that they coerced Ms. C to sign. Mr. Agent then drove to Birmingham and personally delivered the Trust revocation letter to The Bank that managed the Trust. Believing the revocation letter to be legit, The Bank promptly revoked the Trust. After the Trust was revoked, Sister and Mr. Agent used over $800,000.00 from the Trust to purchase an annuity in Mrs. C's name, naming Sister as the sole beneficiary. Not surprisingly, Mr. Agent ended up making the largest commission of his life off of the sale of the annuity.

Later that month, Ms. C passed away in her sleep. Three months went by before the brothers learned that they would not be receiving their expected inheritances because of Mr. Agent and Sister's fraudulent conduct. Under Alabama law, outside of any possible probate remedies, can Sister's brothers recover from Mr. Agent and Sister for their fraudulent activities that deprived the brothers of their expected inheritances? Not in Alabama, yet.

**Standing**

It is undeniable that transactions of the above described nature not only harm the deceased testator by depriving him/her of their right to dispose of their property at death without improper interference, but also harm the beneficiaries of the testator's estate. However, under the existing laws of Alabama, Ms. C is the only party with standing to sue for the harm suffered from Mr. Agent and Sister's fraudulent conduct, and, unfortunately, an un-filed fraud claim does not survive the death of the person with the claim.[1] As a consequence, under current Alabama law, Mr. Agent and Sister escape liability. However, this would change if Alabama decided to adopt the cause of action of tortuous interference with an inheritance/expectancy.

**Justification for the Tort**

Tortious interference with an inheritance is an unusual tort because the beneficiary is authorized to sue to recover damages primarily to protect the testator's intent rather than the disappointed beneficiary's expectations. The fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is. Thus, the common law court has created this cause of action not primarily to protect the beneficiary's inchoate rights, but to protect the deceased testator's former right to dispose of property freely and without improper interference.[2]

## The Tort

The Restatement (Second) of Torts includes tortious interference with an expected inheritance or gift as a valid cause of action.[3] This cause of action is not a probate challenge, nor does it challenge the validity of a will, but is a claim brought against a third party seeking to recover damages from that third party for tortious interference. [4] This cause of action typically includes situations where a third party induces an inter vivos transfer that affects an expected inheritance.[5]

To prove tortious interference with an inheritance, most jurisdictions adopt the elements enumerated in Section 744B of the Restatement (Second) of Torts, which are: (1) the existence of an expectancy, (2) that the defendant intentionally interfered with the expectancy, (3) that the interference involved tortious conduct in itself, (4) that the reasonable certainty existed that the plaintiff would have

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[1] *Brooks v. Hill*, 717 So.2d 759 (Ala. 1995).
[2] *Whalen v. Prosser*, 719 So. 2d 2, 6 (Fla. App. 1998).
[3] *See Graham v. Manche*, 974 S.W.2d 580, 582 (Mo. App. 1998) ("Missouri law supports a tortious interference with a gift or inheritance action. . . ."); *Labonte v. Giordano*, 687 N.E.2d 1253, 1255 (Mass. 1997) (stating that Massachusetts has "long recognized a cause of action for tortious interference with the expectancy of receiving a gift in certain limited conditions"); *DesMarais v. Desjardins*, 664 A.2d 840, 843 (Me. 1995) ("Maine recognizes the tort of wrongful interference with an expected legacy or gift under a will."); *Allen v. Leybourne*, 190 So.2d 825 (Fla. 1966) (recognizing a cause of action for tortious interference with inheritance where there is a strong probability that the testator's intention to make a bequest to the plaintiff would have been carried out but for the defendant's wrongful acts); *Mitchell v. Langley*, 85 S.E. 1050 (Ga. 1915) (recognizing claim of tortious interference with economic expectancy); Restatement (Second) of Torts § 744B (1979); *see also* Nita Ledford, Note, *Intentional Interference with Inheritance*, 30 Real Prop., Probate & Trust J. 325 (1995); Prosser & Keeton, *The Law of Torts, §* 130, p. 1007 (5th ed.).

[4] *See* Curtis E. Shirley, *Tortious Interference with an Expectancy*, 41 Res Gestae 16 (1997); Nita Ledford, Note, *Intentional Interference with Inheritance*, 30 Real Prop., Probate & Trust J. 325 (1995).

received the expectancy but for the defendant's interference, and (5) damages.[6] The existence of an expectancy and damages appear to be the easiest of the five elements to prove, while the intent to interfere with the expectancy, and interference through tortious means seem to be the two most difficult.

To prove intent, the plaintiff must present evidence that the defendant either actually intended to interfere or knew that the deprivation of the plaintiff's expectancy was substantially certain to occur as a consequence of the defendant's actions. [7] As stated above, the intentional interference must be by tortious means.[8] When addressing the tortious conduct element of tortious

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[5] *See* M. Read Moore, *At the Frontier of Probate Litigation: Intentional Interference with the Right to Inherit ,* 7 Probate & Prop. 6 (1993); Marilyn Marmai, Note, *Tortious Interference with Inheritance: Primary Remedy or Last Recourse*, 5 Conn. Probate L.J. 295 (1991).

[6] *See* Restatement (Second) of Torts § 744B (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."); *see also Whalen v. Prosser*, 719 So.2d 2 (Fla. App. 1998); *Labonte v. Giordano*, 687 N.E. 2d 1253 (Mass. 1997); *Allen v. Leybourne*, 190 So.2d 825, 829 (Fla. 1966) ("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. While it is true that such a cause of action is difficult to prove, that does not affect the existence of a ground of tort liability."); *Mitchell v. Langley*, 85 S.E.2d 1050, 1053 (Ga. 1915) ("Where 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").

[7] *See* M. Read Moore, *At the Frontier of Probate Litigation: Intentional Interference with the Right to Inherit*, 7 Probate & Prop. 6, 9 (1993) ("To prove intent, the plaintiff must present evidence that the defendant either actually intended to interfere or knew that the deprivation of the plaintiff's expectancy was substantially certain to occur as a consequence of the defendant's actions.")

[8] *See* Restatement (Second) of Torts § 744B cmt. c (1979) ("[T]he liability stated in this Section is limited to cases in which the actor has interfered with the inheritance or gift by means that are independently tortious in character."); *Holt v. First Nat'l Bank*, 418 So. 2d 77, 79 (Ala. 1982) (considering whether to recognize tortious interference with inheritance as a valid cause of action the court stated that "[f]or the action to lie, the defendant must have used independently tortious means to interfere with the testator's intent.") (citing *Peffer v. Bennett*, 523 F.2d 1323 (10th Cir. 1975); Prosser, *The Law of Torts,* § 130, p. 951 (4th ed. 1971)); *see also* Dennis S. Reaves, *Tortious Interference with an Expected Gift or Inheritance*, 47 J. Mo. Bar 563, 564 (1991) ("One who by legitimate means merely persuades a person to disinherit

interference with inheritance, most courts refer to conduct such as fraud, duress, and undue influence. However, because undue influence is not a tort, it may be more helpful to refer to this requirement as interference through independently wrongful conduct.[9] Other types of conduct may qualify as a type of tortious conduct sufficient to satisfy this element as well.[10]

## Other Jurisdictions

So far, at least eleven states have expressly adopted the tort of intentional interference with an inheritance.[11] Five states have implicitly adopted the tort, or expressly adopted a version of the tort.[12] In most remaining states, courts have not

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plaintiff or eliminate the means of plaintiff's expectancy and leave the interest to the persuader is not liable to plaintiff. The conduct must be independently tortious such as by fraud, duress or undue influence.").

[9] *Fell v. Rambo*, 2000 WL 546260, *10 (Tenn. Ct. App. 2000)

[10] *See* Nita Ledford, Note, *Intentional Interference with Inheritance*, 30 Real Prop., Probate & Trust J. 325, 334 (1995) ("The interference must take the form of conduct that is tortious in itself. Types of tortious conduct include fraud, duress, undue influence, defamation, abuse of fiduciary duty, and forgery, alteration or suppression of a will."); *see also* Restatement (Second) of Torts § 744B cmt. c (1979).

[11] *Davison v. Feuerherd*, 391 So.2d 799, 799 (Fla. Dist. Ct. App. 1980); *Allen v. Leybourne*, 190 So.2d 825, 828-29 (Fla. Dist. Ct. App. 1966); *In re Estate of Roeseler*, 679 N.E.2d 393, 406 (Ill. App. Ct. 1997); *Nemeth v. Banhalmi*, 425 N.E.2d at 1190-1191; *Minton v. Sackett*, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996); *Huffey v. Lea*, 491 N.W.2d 518, 520 (Iowa 1992); *Frohwein v. Haesemeyer*, 264 N.W.2d 792, 795 (Iowa 1978); *Morrill v. Morrill*, 712 A.2d at 1041-42; *Cyr v. Cote*, 396 A.2d 1013, 1018 (Me. 1979); *Graham v. Manche*, 974 S.W.2d 580, 583 (Mo. Ct. App. 1998); *Hammons v. Eisert*, 745 S.W.2d253, 257-258 (Mo. Ct. App. 1988); *Doughty v. Morris*, 871 P.2d 383; *Firestone v. Galbreath*, 616 N.E.2d 202, 203 (Ohio 1993); *Brandes v. Rice Trust, Inc*., 966 S.W.2d 144, 146 (Tex. App. 1998); *King v. Acker*, 725 S.W.2d 750, 754 (Tex App. 1987); *Kessel v. Leavitt*, 511 S.E.2d 720, 763 (W.Va. 1998); *Barone v. Barone,* 294 S.E.2d 260, 264 (W.Va. 1982); *Harris v. Kritzik*, 480 N.W.2d at 517.

[12] See *Mitchell v. Langley*, 85 S.E. 1050, 1051 (Ga. 1915)(holding that a cause of action existed when a defendant fraudulently induced the deceased during his lifetime to remove plaintiffs as beneficiaries of a benefit certificate payable at death) cited in *Morgan v. Morgan*, 347 S.E.2d 595, 596 (Ga. 1986); *Labonte v. Giordano*, 687 N.E.2d 1253, 154-56 (Mass. 1997)(holding that an action for tortuous interference with an expectancy of receiving a legacy cannot be maintained until after the death of the testatrix but, because testatrix had died during appeal, remanding to permit plaintiff to amend complaint)*; Monach V. Koslowski*, 78 N.E.2d 4, 6 (Mass. 1948)(recognizing that prior Massachusetts case law implies that a tort action exists for wrongful interference with a devise, legacy or gift); *Griffin v. Baucom*, 328 S.E.2d 38, 41-42 (N.C. Ct. App. 1985)(holding that although only the statutory remedy of a will contest is available when a will is submitted to probate, if no will is submitted, an action for tortuous interference with an expectancy is permitted. *Allen v. Hall*, 974 P.2d 199, 202 (Or. 1999)(refusing to reach the question of whether Oregon recognizes the tort of intentional interference with an inheritance because, under Oregon law, such



 

decided to adopt the tort either because the issue has not yet arisen, the facts presented did not support the cause of action, or existing law already provided a remedy for the plaintiff.[13] What's more, different States place different limitations on the availability of this cause of action.[14] For example, Kansas and Missouri courts require that the action be brought only after the exhaustion of all probate remedies.[15]

## The Tort in Alabama

Although Alabama has not yet officially recognized the tort of tortious interference with an expectancy, the Supreme Court of Alabama addressed the

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interference may be actionable under a reasonable extension of the well-established tort known as intentional interference with economic relations).

[13] *Dunham v. Dunham*, 528 A.2d 1123, 1130-31 (Conn. 1987)(affirming trial court decision to recast claims for breach of fiduciary duty and tortuous interference with an inheritance as a legal malpractice claim); *Troy v. Folger*, No. CV 970161947s, 1998 WL 252355, at *2 (Conn. Super. Ct. May 8, 1998)(refusing to reach the issue of interference with prospective advantage in inheritance context because it was not adequately briefed); *Casternovia v. Casternovia*, 197 A.2d 406, 409 (N.J. Super. Ct. App. Div. 1964)(holding that an action for interference with an expectancy could not be maintained because the potential donor was alive and competent); *Douglas ex rel. Louthian v. Boyce*, 519 S.E.2d 802, 807 (S.C. Ct. App. 1999)(noting that South Carolina has never recognized claims for interference with inheritance rights and, on the facts presented, such a claim could not succeed in any event); *Axe v. Wilson*, 96 P.2d 880, 885-88 (Kan. 1939)(in an action for malicious interference with a right of inheritance through fraud and undue influence that did not seek damages beyond what the plaintiff would receive in a successful will contest, held plaintiff's remedy lay in the then pending action to contest the will); *Geuduldig v. Posner*, 743 A.2d at 257 (declining to recognize tortuous interference with an inheritance where it was duplicative of the independent claims based on fraud and undue influence, except for the damage claim [emotional distress, harm to reputation, and punitive damages] that would constitute an expansion of existing law); *Hauk v. Seright*, 964 P.2d 749, 753 (Mont. 1998)(refusing to address whether Montana recognizes tortuous interference with an inheritance as a cause of action because the evidence did not support such a claim in one instance and, in the others, the plaintiff failed to show how the new tort would produce a different result than existing law on undue influence).

[14] *See* Marilyn Marmai, Note, *Tortious Interference with Inheritance: Primary Remedy or Last Recourse*, 5 Conn. Probate L.J. 295, 299 (1991).

[15] *See, e.g., Graham v. Manche*, 974 S.W.2d 580, 584 (Mo. App. 1998) ("It is generally accepted that the claim will survive only when the plaintiff attempts to seek relief in probate court or has no adequate remedy in the probate court."); *Axe v. Wilson*, 96 P.2d 880, 885-88 (Kan. 1939)(in an action for malicious interference with a right of inheritance through fraud and undue influence that did not seek damages beyond what the plaintiff would receive in a successful will contest, held plaintiff's remedy lay in the then pending action to contest the will).

issue in 1982 and indicated that it would adopt the cause of action under the right circumstances. *See Holt v. First Nat'l Bank*, 418 So.2d 77 (Ala. 1982).[16] In *Holt*, the deceased testator, before his death, verbally expressed to his daughters his intent to leave his property to them. However, the Defendant, the daughters' stepmother, later unduly influenced the testator to leave his property to her at a time when he was mentally incompetent. As a result, the daughters were disinherited and sued the stepmother alleging tortious interference with their expectancy. Unfortunately, the daughters failed to provide the Court with any written evidence of their father's intent to devise his property to them. Although the Court affirmed the trial court's dismissal of their tortuous interference with an expectancy claim, it indicated that it would have recognized the cause of action if the daughters had provided written evidence of their father's intent to devise his property to them.[17]

## Recognizing the Tort

Recognizing the tort of tortuous interference with an expectancy/inheritance would not only provide beneficiaries with standing to recover for the wrongful interference with their expectancies, but would also provide beneficiaries with standing to protect the testator's former right to dispose of his/her property freely. In other words, recognizing tortuous interference with an expectancy as a cause of action would allow a beneficiary, after the testator dies, to recover for the fraudulent conduct perpetrated upon the testator before his or her death.

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[16] Holt v. First Nat'l Bank, 418 So.2d 77 (Ala. 1982)

[17] Holt v. First Nat'l Bank, 418 So.2d 77 (Ala. 1982)

As mentioned above, although Alabama has not expressly adopted the tort, the Court clearly indicated in the *Holt* decision that it would adopt the cause of action under the right circumstances. This is obviously a recognition by the Court of the need for the cause of action in Alabama, so why shouldn't the tort be recognized if all of the required elements have been met. A case with a factual scenario similar to the one used to open this article would provide the Court with the perfect opportunity to satisfy this "need" in Alabama, and provide protection for not only beneficiaries, but also for deceased testators.



 